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# Procedure and Evidence -- 1956 Tennessee Survey

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# PROCEDURE AND EVIDENCE—1956 TENNESSEE SURVEY

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## PLEADING

*Generally:* To one who has not inherited the Tennessee system of procedure and has not yet "first endured, then pitied, then embraced" it, it presents some startling contrasts. There is an astounding intermingling of the modern, which seeks to make procedure the servant of substance, with the ancient, that has in most jurisdictions been relegated to the legal attic or to a museum of procedural antiques. In an action instituted by warrant in the Court of General Sessions of Shelby County and tried de novo on appeal in the circuit court, the warrant is a summons and cannot serve as a pleading although it must allege a cause of action. The pleadings are oral; and the recital in the warrant of the contents of a note with profert of the note, and the physical insertion of the note in the record do not, in the absence of a bill of exceptions, enable the court of appeals to "consider" the note. To make it a part of the formal record, the process of oyer is necessary. The consequence of applying this outmoded doctrine of common-law pleading in conjunction with the accepted rules governing bills of exceptions was that the court was unable to deal with the real issue, and had to indulge in presumptions as to unrecorded amendments and unspecified evidence to sustain the decision of the circuit court.[1]

The common-law rule that pleadings are to be construed most strongly against the pleader has been abrogated. Now every reasonable intendment is to be made in favor of the pleading. Thus, a complaint in intervention which alleges in one count facts which support the intervenor insurance company's right, both under the Workmen's Compensation Act and under its policy, to be reimbursed for sums paid out by it for compensation and for medical and hospital aid, is sufficient to authorize recovery for sums paid for such aid in excess of the amount stipulated in the act.[2] But we have been instructed that when a plaintiff has been injured by conduct of a defendant which constitutes both common-law negligence and a violation of a statute, he should state his claim based on the former in one count

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1. Van Pelt v. P. and L. Federal Credit Union, 282 S.W.2d 794 (Tenn. App. W.S. 1955).
2. United States Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693 (Tenn. 1955).

and that based on the latter in a separate count. This is particularly true where the statute is the so-called Statutory Precautions Act, which modifies the common-law obligations concerning precautions to be taken at grade crossings at which warning signs are posted. It is frequently said that a person injured at such a crossing has two distinct causes of action.[3] What is meant is that he has distinct grounds of recovery for the same infringement of his right to be free from harm to his person wrongfully inflicted. Doubtless clarity is increased by stating the common-law and statutory grounds in separate paragraphs, for the extent of defendant's obligations and the availability of defenses in justification or excuse under the statute are different from those under the common law. But it is suggested that no good purpose can be served by treating a separate ground of recovery as a separate cause of action. This common-law practice grew out of the common-law rule which permitted the plaintiff in one declaration to join as many causes of action in the same form of action as he had against the same defendant. When the courts began to insist that plaintiff should state only such facts as constituted a single ground of recovery and must support that statement by proof, pleaders sought to take advantage of the established practice permitting the plaintiff to join in a single action all claims which he had against the defendant that were remediable in the same form of action. The pleader pretended, and so alleged, that each statement of a ground of recovery was a statement of a completely different cause.[4] The English courts tolerated this pretense until 1834, when it was forbidden by the Hilary Rules. It would be unfortunate to have such a fiction not only encouraged but made mandatory in Tennessee more than a century after it was abolished in the jurisdiction of its origin.

*Demurrer—Pleading Conditions:* The well settled rule that a complaint which fails to allege compliance with conditions precedent to the creation of plaintiff's right to recover was applied in two interesting cases. Plaintiffs, seeking a mandatory injunction to compel a telephone company to extend its services to a designated community and to recover a penalty for thus discriminating against them as members of the community, failed to allege in their complaint application to and adverse action by the Railroad and Public Utilities Commission. It was held insufficient on demurrer. The general rule was applied which requires exhaustion of remedies before a properly constituted administrative tribunal as a condition precedent to the right of judicial

3. Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954).

4. See MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION, C. I (1956).

relief.[5] In *Langford v. Vanderbilt University*[6] plaintiff was suing for punitive damages for a libel without having given the defendant the statutory five days notice affording it an opportunity to avoid the imposition of punitive damages; defendant demurred for failure to allege performance of the statutory requirement. The trial court refused to include in the record plaintiff's exceptions concerning the constitutionality of the statute. The supreme court ruled that no bill of exceptions was necessary to preserve this problem for review because the demurrer raised the question of constitutionality of the statute.

In *Denny v. Wilson County*[7] the extent to which a defense disclosed in a complaint and not met by an anticipatory reply will make it demurrable was not discussed, but a recital of facts therein showing estoppel by deed was held fatal. The court thought it worthwhile to point out that such an estoppel was not required to be specially pleaded in an action at law as distinguished from an action in chancery.[8]

*Theory of Pleading—Variance:* The decision in *Teague v. Pritchard*[9] can be explained on two grounds. In a pleading, which if accurately reported is remarkable for alleging not the existence of facts, but that "plaintiff would show" the facts alleged, plaintiff averred (1) negligence of defendant and his servants in leaving defendant's automobile with its doors unlocked and its ignition key in place, parked on a public street in a neighborhood where and at a time when it was likely to be stolen, and (2) injury to plaintiff resulting from negligent driving of the automobile by a person who did steal it. To avoid the direction of a verdict upon proof of these facts, plaintiff could not rely upon the statutory presumption based on proof of registration and ownership of the automobile by defendant, that it was being operated by defendant or by his servant in the course of his employment. Obviously this would involve a shift in the theory of his pleading as well as a complete variance from his theory of trial. Furthermore, his own evidence rebutted the presumption.

*Plea in Abatement:* The few cases dealing with the pleading of dilatory matters hardly deserve mention. A plea in abatement should be promptly filed, but a chancellor may properly permit it to be filed late or may consider a late plea though filed without previous leave.[10] A plea in abatement is necessary to attack an indictment, fair on its face, for the alleged reason that the private acts pursuant to which the grand jurors were selected are invalid. It must allege all the

5. Breeden v. Southern Bell Tel. & Tel. Co., 285 S.W.2d 346 (Tenn. 1955).
6. 287 S.W.2d 32 (Tenn. 1956).
7. 281 S.W.2d 671 (Tenn. 1955).
8. *Id.* at 675.
9. 279 S.W.2d 706 (Tenn. App. W.S. 1954).
10. Alexander v. Alexander, 286 S.W.2d 104 (Tenn. App. M.S. 1955).

pertinent facts. A motion to quash the indictment is inappropriate.[11]

*Pleas in Bar:* In view of the provisions for concurrent jurisdiction of the chancery and the courts of law in so many subjects, it is somewhat strange that there is no statute or ruling authorizing equitable defenses in legal actions. Ejectment is a strictly legal action in which no purely equitable defense may be pleaded.[12] Other decisions as to pleas are orthodox. For example, the defense that a breach of warranty of an article was waived by the plaintiff purchaser's further use of the warranted article must be pleaded specially.[13]

*Amendments:* Tennessee applies the accepted rule that the trial judge's ruling on a motion to amend a pleading will be reversed only for abuse of discretion. Generally, amendments are freely allowed and technical objections brushed aside. Thus, where on petition filed in a county court, a will contest was removed to the appropriate circuit court, an amendment to the petition was properly permitted in the latter. It would have been a useless ceremony, involving needless expense and waste of time, to send the matter back to the county court.[14] And it was entirely proper to add, by amendment to the parties to a bill of review, a person who was not a party to the original suit in which a decree *pro confesso* was entered.[15] On the other hand, there is a great reluctance to grant the right to add what the judge considers an unconscionable defense, and unless the motion to amend is made promptly, it will ordinarily be denied. Hence, when defendant moved to amend by alleging expiration of the statutory period of limitations, (1) his failure to plead this when earlier ordered to set out his defenses specially, and (2) his delay in making the motion until after his motion for a directed verdict had been denied and plaintiff had been compelled to elect between two counts made denial of the motion eminently proper.[16] And where the proposed amendment would serve no beneficial purpose, it is properly rejected. Such was the situation where in a quo warranto proceeding to determine the validity of the appointment of two members of a school board, the proposed amendment questioned the eligibility of the two to hold over after the expiration of the term for which they were properly appointed, since no party to the record was seeking the office held by either or appeared to be rightfully entitled to it.[17]

Where the amendment introduces no new cause of action, it relates back to the time of the original pleading, even though the statutory

11. Price v. State, 287 S.W.2d 14 (Tenn. 1956).
12. Harris v. Buchignani, 285 S.W.2d 108 (Tenn. 1955).
13. Huddleston v. Lee, 284 S.W.2d 705 (Tenn. App. M.S. 1955).
14. Needham v. Doyle, 286 S.W.2d 601 (Tenn. App. W.S. 1955).
15. White v. Henry, 285 S.W.2d 353, 356 (Tenn. 1955).
16. Caccamisi v. Thurmond, 282 S.W.2d 633 (Tenn. App. W.S. 1954)
17. State *ex rel.*, etc. v. Simpson, 281 S.W.2d 679 (Tenn. 1955)

period of limitations applicable to the cause stated has expired. Thus, where plaintiff named the defendant as Southeastern Greyhound Lines and process was served upon a proper officer of the Greyhound Corporation, an amendment substituting the Greyhound Corporation as defendant, after it was shown that the Southeastern Greyhound Lines was not a legal entity but was merely the name of an operating division of Greyhound Corporation, did not bring in a new party or state a new cause of action, but merely corrected a misnomer. The trial judge committed reversible error in ruling that the amendment did not relate back.[18]

*Parties—Capacity:* A person who has been adjudged insane may sue and be sued in his own name if the adverse party fails to object; but by the majority rule such a person is incapable of maintaining an action for divorce, and a decree rendered therein is absolutely void. The reasons given are that such a person is incapable of the requisite personal volition and has no capacity to take the prescribed oath. These reasons have no applicability in some circumstances and the Supreme Court of Tennessee, therefore, overruled former decisions and adopted the minority view, which makes the decree merely voidable. Hence, where the decree is valid on its face, it is not subject to collateral attack.[19]

In deciding that a foreign corporation doing a purely interstate business in Tennessee has capacity to sue and defend in Tennessee courts, though it is not licensed to do business within the state, the supreme court applied a well-settled rule.[20]

*Same—Necessary:* Where plaintiff took a nonsuit as to two of three joint tortfeasor defendants, they were no longer parties to the action, and the trial court had no power to determine their rights as against the remaining defendant.[21]

### REMEDIES

*Generally:* Where a statute imposes a new duty or creates a new right and provides the penalty or remedy for its violation or infringement, the court has no power to award additional remedies. Thus, the statutory requirement, that the operator and owner of a motor vehicle involved in an accident causing damage show financial responsibility in order to avoid forfeiture of license and number plates, is exclusive. A court has no authority to enjoin the owner or operator from conveying or encumbering his property until he has paid a judgment secured against him for injuries caused by the accident.[22] And where no penalty or remedy is provided for violation by

18. Link v. Southeastern Greyhound Lines, 279 S.W.2d 259 (Tenn. 1955).
19. Turner v. Bell, 279 S.W.2d 71 (Tenn. 1955).
20. Seagram Distillers Co. v. Corenswet, 281 S.W.2d 657 (Tenn. 1955).
21. Mink v. Majors, 279 S.W.2d 714 (Tenn. App. W.S. 1954).
22. Turner v. Harris, 281 S.W.2d 661 (Tenn. 1955).

a member of the Beer Committee of Knox County of a resolution of the county court governing applications for license, the sole remedy lies in action by the court, and protesting citizens have no right to present or cross-examine witnesses or to be otherwise heard by the Board concerning the granting of such an application.[23]

*Attachment:* In a divorce action, which is a "chancery suit," the court has jurisdiction to grant an attachment upon grounds other than those specified in the code that are applicable both at law and in chancery. But the grant must be made upon allegation and prayer, and an attachment granted upon non-statutory grounds without such allegation and prayer must be dissolved.[24]

*Habeas Corpus:* The court has had three occasions to consider the scope of inquiry suitable in a petition by one held for extradition. In the second, the petitioner was to be delivered to the authorities of the State of Florida because of alleged violation of his parole. He alleged that his conviction in Florida was in violation of the 14th Amendment for failure to appoint counsel for him as an indigent defendant. Chief Justice Neil, speaking for the court, said: "The determinative issue in this case involves the jurisdiction of the courts of Tennessee to decide the constitutionality of a statute of the State of Florida under which the relator was tried and convicted." Conceding that the refusal to appoint counsel was a violation of due process and that a void judgment is subject to collateral attack, he denied relator's right to question its validity, or to contend that the Florida court would not grant him the same relief which he was asking of the Tennessee court. He concluded: "Moreover, we think it would be a dangerous precedent to permit one who is a fugitive from justice to invoke the jurisdiction of the courts of this State to review and declare unconstitutional a statute of a demanding state under which he stands convicted. It would be disrespectful to the honor and dignity of a sovereign state. The demanding state must be the judge of its own laws as well as the proceedings for their enforcement, and the jurisdiction of its courts are exclusive in determining if a person is being deprived of his liberty without due process of law."[25] This result does not indicate a lack of judicial power but a determination of judicial policy.

The court had previously held that it would not consider alleged defects in the indictment of the demanding state so long as it substantially charged an offense,[26] and it later ruled that an indictment which charged that "the offense was committed in the fall of 1949" was not on that account open to attack. It conceded that the relator

23. Manuel v. Eckel, 285 S.W.2d 360 (Tenn. 1955).
24. Humphreys v. Humphreys, 281 S.W.2d 270 (Tenn. App. W.S. 1954).
25. State *ex rel.* Johnson v. Llewelyn, 286 S.W.2d 590 (Tenn. 1955).
26. State *ex rel.* Sandford v. Cate, 285 S.W.2d 343 (Tenn. 1955).

might show that he was not subject to extradition because not in the demanding state at the time the offense was committed; but he must show it beyond reasonable doubt. Hence, if he was ordered discharged solely because the alleged defect in the indictment prevented or made very difficult such a showing, the order must be reversed on appeal by the sheriff.[27]

*Mandamus:* Mandamus to compel restoration to a position or office in the classified civil service of the City of Nashville by relator who was laid off by the Director of Personnel will not issue unless relator has exhausted his administrative remedies or shows that request to the proper administrative authorities for relief would have been futile. The relator failed to make this showing by offering to prove that there was no lawfully appointed person in his department entitled to give relator notice of layoff and that the Director of Personnel had no such authority. He should have appealed to the Commission and made a record there. This is a condition precedent of the right of a civil service employee to maintain in a court of record any proceeding in the nature of an appeal from a decision of a city official involving his civil service status.[28]

*Scire Facias:* Under Tennessee practice scire facias to revive a judgment of the court of appeals is a judicial writ to enforce the judgment and is a continuation of the original action. As such, the court has jurisdiction to determine all questions of law and fact raised by extensive pleadings in the scire facias proceeding and is not confined to issues made by the writ and the plea or answer thereto.[29]

*Declaratory Judgment:* In an interesting case involving the jurisdiction of the State Board of Claims, the supreme court declared that the Tennessee Declaratory Judgment Act does not give the courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought. Actions for injuries to person or property cannot be maintained against the state except where the state has consented. The State Board of Claims is given exclusive jurisdiction to entertain and allow claims for injuries and damage caused by negligence of state officials or employees in certain specified situations and no other. The Board dismissed a claim of complainant for damages for wrongful death caused by negligent conduct of a convict who was negligently permitted to drive a state owned truck outside the prison grounds. Complainant sought a declaratory judgment that the Board had jurisdiction to hear and determine and award compensation to complainant. The chancellor

27. Reeves v. State *ex rel.* Thompson, 288 S.W.2d 451 (Tenn. 1956).
28. State *ex rel.* Jones v. Nashville, 279 S.W.2d 267 (Tenn. 1955); TENN. CODE ANN. § 27-914 (1956).
29. Craddock v. Calcutt, 285 S.W.2d 528 (Tenn. App. W.S. 1955).

sustained a demurrer to the bill of complaint and the supreme court affirmed. Obviously the court below, whether chancery or circuit, would have had no jurisdiction of an action for wrongful death against the state. But does it follow that it would have no jurisdiction to determine whether the Board had jurisdiction? Or is the decision to be justified on the ground that the act does not give the court jurisdiction to construe statutes, or that the courts will, in the exercise of their discretion, refuse to determine the jurisdiction of boards, commissions or inferior courts? The opinion seems to rely upon all three grounds.[30]

*Election of Remedies:* Where a complainant brought a bill to review a decree pro confesso on the ground that the order for the decree was obtained by fraud and judgment was entered against him, the complainant was not barred from maintaining another bill on the ground of errors on the face of the record. The two bills were not inconsistent and complainant had not, by bringing the first bill, made an irrevocable election of remedies.[31]

### Presumptions and Burden of Proof

*Generally:* An examination of current English, Canadian and American law reports makes it abundantly clear that the courts, including those of Tennessee, frequently, if not generally, use the term burden of proof indiscriminately to denote (a) the burden of producing sufficient evidence to justify a finding and (b) the burden of persuading the trier of fact to make the finding. As Wigmore has pointed out, the former is more accurately described as the risk of non-production of the evidence and the latter as the risk of non-persuasion of the trier, for the source of the production or persuasion is immaterial. The evidence may be introduced by the burden-bearer or by his opponent or by the judge. The persuading factor may be found in the evidence, or in the argument of either counsel, or in the charge of the judge. A presumption, as distinguished from an inference, is an assumption of fact which is required when a specified fact or group of facts is established in an action. This fact or group of facts may conveniently be called the basic fact and the fact assumed may be called the presumed fact.

*Basic Fact of Presumption:* Two recent cases demonstrate the importance of accurate definition of the basic fact. It is well settled in Tennessee that in a will contest the contestant has the burden of persuasion on the issue of undue influence, and that the existence of a confidential relationship between the testator and the chief beneficiary is relevant. But the existence of that relationship alone is

30. Hill v. Beeler, 286 S.W.2d 868 (Tenn. 1956).
31. White v. Henry, 285 S.W.2d 353 (Tenn. 1955).

not sufficient to create a presumption of undue influence in the absence of any activity of the beneficiary in the preparation or execution of the will.[32] In some jurisdictions this presumption fixes not only the burden of producing evidence but also the burden of persuasion. And the opinion in this case seems to assume that such is its effect in Tennessee. In *Wilson v. St. Louis Terminal Dist. Co.*[33] the court speaks in terms of inference, presumption and prima facie case. If there is a presumption that an employee found dead at his post of duty met his death from an injury or accident arising out of and in the course of his employment, the basic fact must include physical exertion by him. The mere fact that he was found dead at his place of employment during working hours is not enough. In this case, the result would be the same whether the court was dealing with a presumption or an inference; and it seems reasonably clear that its decision was merely that there was no evidence from which the trier could find the required fact, that the injury arose in the course of his employment.

In *Reynolds v. State*[34] a similar uncertainty appears. The court, dealing with the fact that deceased was found dead in Wilson County from a broken neck, said: "We think that there must be a presumption that the crime was committed here, rebuttable in character, that the crime was committed where the body was found, when there is no showing to the contrary." It then states other circumstances supporting the presumption and concludes that the jury was warranted in finding that the victim was murdered in Wilson County.

*Statutory Presumption:* By Tennessee Code section 59-1038, ownership and registration of an automobile in defendant's name creates a "presumption and prima facie case" that its operator on a particular occasion was defendant or defendant's agent operating it for his use. This is not so far overcome as to call for a directed verdict by the introduction of evidence to the contrary of such a character that the jury might properly reject or disbelieve it.[35] But it is overcome by plaintiff's own evidence that the operator of the car was a thief or other unauthorized person who took it when parked with the ignition key in place.[36]

*Conflicting Presumptions:* The presumption that separation of jurors in a criminal case is prejudicial and vitiates their verdict conflicts with the presumption that the officer in charge of the separated juror during the separation observed his oath and did not communicate with the juror concerning the case or allow others to do so. The latter pre-

32. Halle v. Summerfield, 287 S.W.2d 57 (Tenn. 1956).
33. 278 S.W.2d 681 (Tenn. 1955).
34. 287 S.W.2d 15 (Tenn. 1956).
35. McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955).
36. Teague v. Pritchard, 279 S.W.2d 706 (Tenn. App. W.S. 1954).

sumption is of greater strength and prevails. This pronouncement was unnecessary in the case at bar for the juror was the only woman member and Chapter 71 of the Public Acts of 1951 specifically provides that segregation of women from men jurors outside the court room is not unlawful.[37]

*Burden of Proof—Shifting:* In *Anderson v. Nichols*,[38] an action to avoid a deed of decedent on the ground of fraud, the chancellor held that evidence of matters which "constitute a badge of fraud" and casts suspicion upon the bona fides of the grantee defendant puts upon him the burden of proving bona fides. As the court said, the burden of proving bona fides of the transaction was shifted to the defendant. It is difficult, if not impossible, to determine whether the court was speaking of the burden of producing evidence or the burden of persuasion.

*Burden of Proof—Measure of Persuasion:* In a criminal prosecution the rule that the state must prove its case beyond reasonable doubt has no application to the issue of venue, which is a jurisdictional matter. The measure of persuasion is that applicable to an ordinary civil action, usually expressed as proof by a preponderance of the evidence.[39] And the same is true upon the issue of revocation of a suspension of sentence. It is said that the judge may determine that defendant's conduct justifies revocation of sentence even though the evidence be weak.[40]

*Same—On Criminal Appeal:* In Tennessee the usual rule, which cannot be said to be usual in other jurisdictions, that the accused on appeal has the burden of persuading the court that the evidence preponderates against the verdict, assumes that in a homicide case the state has introduced evidence from which the jury could reasonably find that defendant's conduct was the cause of the death alleged in the indictment. Otherwise the accused has no such burden.[41]

## Evidence

*Relevance—Customary Conduct:* Relevant evidence is evidence having any tendency in reason to prove any fact in issue. The immediate fact which it tends to prove may be merely the basis for an inference or series of inferences to the ultimate fact in issue. The customary conduct of persons engaged in a particular business or activity may not coincide with the standard of conduct which the law requires; that is, it may not constitute due care. For this reason, some courts have held that evidence of such customary conduct is inadmissible to

37. Steadman v. State, 282 S.W.2d 777 (Tenn. 1955).
38. 286 S.W.2d 96 (Tenn. App. M.S. 1955).
39. Reynolds v. State, 287 S.W.2d 15 (Tenn. 1956).
40. Thompson v. State, 279 S.W.2d 261 (Tenn. 1955).
41. Seagroves v. State, 281 S.W.2d 644 (Tenn. 1955).

rebut an adverse party's claim of negligence. This disregards the fact that what men customarily do in a particular occupation or calling is very likely to be what the ordinarily prudent person would do in the same circumstances, and is therefore relevant as tending to prove due care, though it does not necessarily constitute due care. Thus, in a recent case where a subcontractor had removed guards erected by others to protect the public from excavations, in order that he might gain access for his work, the court of appeals held that evidence of the custom in that activity for the subcontractor to replace the guards or to construct new ones was admissible as tending to prove the conduct of reasonable men in the same circumstances.[42]

*Same—Other Crimes:* The usual statement concerning admissibility of evidence of other crimes or civil wrongs as tending to prove the commission of the crime or wrong in issue calls for its exclusion except in specified circumstances. It is believed that both the American Law Institute Model Code, rule 311, and the Uniform Rules of Evidence, rule 55, make the proper analysis. Evidence of a person's character as tending to prove his conduct on a particular occasion is generally rejected because of its slight weight and unduly prejudicial effect; so when the crime or wrong is relevant only as a basis for an inference to disposition and thence to conduct in accord therewith, the evidence of the crime or wrong is necessarily excluded. But where relevant as tending to prove any other material fact, the evidence is admissible. The specific instances are merely examples and not all inclusive. Uniform rule 55 so declares, enumerating "absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity." The Tennessee courts have used the ordinary generalization, but a recent case would have been much more easily explained by the doctrine of rule 55. The defendant was on trial for stealing and for receiving stolen goods, a suit of clothes belonging to Levy Brothers in Nashville. The suit was found in an automobile for which he had the parking check, with other new suits including four stolen from a Mr. Daniels in Memphis. Evidence that the suits, among which the Levy Brothers suit was found, had been stolen from Mr. Daniels was held admissible. The court discussed the authorities which stated and applied the so-called exceptions but did not specify the one applicable in this situation.[43]

*Photographs:* The first requisite of admissibility of a photograph is that what it purports to picture be relevant; the second that it be verified as a substantially accurate representation of the relevant place, thing or person so pictured. Ordinarily the physical characteristics of the place where a relevant event occurred are of importance,

42. De Ark v. Nashville Stone Setting Corp., 279 S.W.2d 518 (Tenn. App. M.S. 1955).

43. Liakas v. State, 286 S.W.2d 856 (Tenn. 1956).

and a properly verified photograph of the place is admissible, provided that there has been no substantial change in those characteristics which have a material bearing upon the issue, or where the change, if any, can be so explained as to make the photograph helpful rather than misleading. It is generally a function of the trial judge to make this determination. Thus, in a recent case a photograph of a railway crossing introduced by plaintiff pictured it with the shrubbery grown as at the time of year when the accident occurred, and a photograph introduced by the defendant pictured it in the winter time without shrubbery; the court of appeals held that the reception of the latter did not constitute error.[44] And where the physical condition of the defendant at the time he made a confession was deemed relevant, the trial judge committed no error in admitting a photograph of him taken on the same day.[45]

*Same—Hearsay:* See discussion *infra, re* hearsay admitted without objection.

*Irregularly Secured:* Evidence obtained irregularly but not in violation of a statute is not on that account inadmissible. Thus, where a trial judge ordered the exhumation of the body of the man for whose homicide defendant was on trial, without any notice to defendant, by an informal order not noted on the minutes, testimony as to the result of the examination of the body highly unfavorable to defendant was properly admitted.[46]

*Hearsay—Relevance and Weight:* Is hearsay evidence which does not fall within any recognized exception deemed irrelevant or deemed of such slight weight that it must be disregarded when admitted without objection? The great weight of modern authority declares that such evidence is to be given its inherent probative value. This seems to be the view sanctioned by the majority of the court in *Sturgis v. State,*[47] but in most instances the court is at pains to point out other reasons which prevent objection, such as the establishment of the fact in question by other evidence.[48] In the *Sturgis* case, Mr. Justice Burnett, speaking for the majority, relates a number of statements previously made by the defendant and says: "Since they were made by him and not objected to they are competent and must be given their natural probative effect as if in law they were admissible."[49] (It is difficult to imagine any ground on which the defendant could have objected, for nothing is better settled than that admissions by a party are receivable in evidence against him for the truth of the

44. Little v. Nashville, C. & St.L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954).
45. Kirkendoll v. State, 281 S.W.2d 243 (Tenn. 1955).
46. Dennis v. State, 279 S.W.2d 512 (Tenn. 1955).
47. 288 S.W.2d 434 (Tenn. 1956).
48. Hale v. State, 281 S.W.2d 51 (Tenn. 1955).
49. 288 S.W.2d at 437.

matter stated.) The learned justice then considers other evidence, obviously objectionable as hearsay, corroborative of testimony of the complainant: "In addition to the above enumerated acts of corroboration are the statements made by the detective who testifies without objection as to how the young lady related this transaction to him—as to how these things happened on these different occasions. Such statements of the detective are admissible as corroborative of her testimony."[50] Chief Justice Neil, speaking for himself and Mr. Justice Tomlinson, could find no corroboration: "The testimony of the police officers as to statements made to them by her regarding her alleged relations with the defendant, not made in the presence of the accused are not corroborative of the girl. It is not insisted that the statements made by her to these officers were part of the *res gestae*. In fact, they were not."[51]

*Hearsay Rule—Applicability in Contempt Proceeding:* A proceeding to punish defendant for contempt of court in conspiring with his wife to obtain fraudulently a divorce by falsely alleging residence in Memphis is "neither a civil action nor a criminal prosecution as ordinarily understood nor a criminal prosecution within the sixth amendment of the United States Constitution."[52] Affidavits are usually admissible. After making these pronouncements, the court said that defendant must be given the freest opportunity to present his defense, and that if inadmissible evidence is received, the appellate court will reject it and decide the case as if it were not in the record. The chancellor at the hearing had received the transcript of testimony of the wife given at a previous time when neither the defendant nor his attorney was present. She did not testify at the hearing but was present, and the chancellor then and there gave defendant leave to examine her under oath if he so desired.

The supreme court declared (a) that the chancellor was fully justified in considering the former testimony "as a basis for the show cause order," (b) that the record, excluding this testimony, sustained the chancellor's finding, (c) that the chancellor's offer to put the witness on the stand and permit defendant to cross-examine her satisfied the requirement of confrontation, and (d) that there was "no doubt under the proof" of the conspiracy.[53] The result is clear, but just what does the case stand for upon the applicability of the exclusionary rules of evidence at a hearing upon an order to show cause why a defendant should not be punished for criminal contempt? Does it hold anything more than that if non-admissible evidence is received, the appellate court on review will disregard it even though

50. *Ibid.*
51. 288 S.W.2d at 438.
52. Bowdon v. Bowdon, 278 S.W.2d 670 (Tenn. 1955).
53. 278 S.W.2d at 672.

the chancellor gave it the same consideration as if it had been admissible?

*Same—Non-hearsay Distinguished:* When evidence of a relevant statement is offered for a purpose other than as tending to prove the truth of the matter stated, it is not objectionable as hearsay. Thus, when defendant is charged with negligently exposing plaintiff's cattle to poisonous substance by spraying upon vegetation upon its right of way a substance designed to kill the vegetation, a report of a reliable chemical company and the labels attached to the containers as to the toxicity and composition of the substance, upon which defendant relied, are admissible as tending to prove defendant's due care. They are not offered for the truth of the matter stated in them. As to the labels required by law to be attached to the containers, defendant had a right to rely upon the data set forth in them.[54] This is a clear case typical of situations where the evidence is offered to prove the state of mind or knowledge of a person by showing what information was transmitted to him.

The application of the rule to evidence offered to prove a state of mind of the declarant or actor is not so clear, particularly in a situation such as that in *Anderson v. Nichols*.[55] The action was brought by a decedent's successor in interest to set aside a deed, recorded after decedent's death, on the ground of fraud. The deed consisted of more than one page and there was some evidence tending to show that a new page had been substituted for the original first page or that the original had been changed. Plaintiff's theory was that the document when executed by decedent was intended to be, and was in fact, an option and not a deed. Evidence of declarations by decedent that he had given defendant an option was received over his objection. The opinion of the court of appeals does not disclose the form of the objection or the terms of the chancellor's ruling, but discusses the problem as if the evidence had been received not to prove the truth of the statement but to prove that decedent's intention at the time the instrument in question (here assumed to be the recorded deed) was manually transferred, was to deliver an option, and not a deed of conveyance. It accepts as "the correct rule" that set forth in *Kelly v. Bank of America*[56] by the intermediate appellate court of California: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases

54. Tennessee Valley Electric Cooperative v. Harmon, 286 S.W.2d 593 (Tenn. App. W.S. 1955).
55. 286 S.W.2d 96, 103 (Tenn. App. M.S. 1955).
56. 112 Cal. App. 388, 246 P.2d 92, 34 A.L.R. 2d 578 (1952).

involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them."[57]

It is true that if the statement was not offered to prove that decedent had given defendant an option, it was not offered to prove its truth. If received only to show the declarant's state of mind, it must be on the assumption that declarant at the time of the statement believed that he had given an option, this includes the belief that he had not given a deed; and this belief serves as a basis for an inference that at the earlier time when he handed the instrument to defendant, he believed he was not delivering a deed and did not intend to deliver it as a deed. Since intention is an essential of delivery, there was no delivery even though the instrument was in form a deed. By this line of reasoning we reach a result that comes perilously close to hearsay in this particular case. It will be noted that the California court designates the rule as an exception to the hearsay rule. It does, indeed, involve the hearsay dangers affecting the sincerity and memory of the declarant; but it is clearly distinguishable from the hearsay exception covering a declaration of presently existing state of mind, which has no application to a declaration of a past state of mind. And certainly the Tennessee court was not treating the evidence as a declaration that the instrument at the time of delivery was in the form of an option.

*Same—Admissions:* A judicial admission falls without the realm of evidence. It is conclusive that for the purposes of the litigation the admitted fact exists. Thus, an admission in a defendant's answer in chancery is conclusive against him, not withstanding testimony by him to the contrary at the trial or hearing.[58]

There is no longer any doubt that an extra-judicial statement by a party is admissible against him as tending to prove the truth of the matter stated. It is not a substitute for evidence, and if the making and tenor of the admission is established, it is not conclusive. It may or may not be also a prior contradictory impeaching statement if the party as a witness has given testimony in conflict with it. In a recent workmen's compensation case[59] defendant alleged that plaintiff was an independent contractor; it appeared without dispute that plaintiff was employed to haul logs at a specified rate per thousand, furnishing his own truck, and that he was injured while unloading logs at defendant's mill. Plaintiff proved that he was paid by check which required his signature as endorser to a printed statement on

57. 246 P.2d at 96, 34 A.L.R. 2d at 585.
58. Hewgley v. General Motors Acceptance Corp., 286 S.W.2d 355 (Tenn. App. M.S. 1955).
59. Bond Brothers, Inc. v. O. C. Spence, 279 S.W.2d 509 (Tenn. 1955).

the back thereof that it was accepted in full payment of the services and that the endorser warranted that the rendering of the services was "in compliance with the requirements of the Fair Labor Standards Act of 1938, as amended." Since the act dealt only with the relationship between management and employee, to require the plaintiff to sign this endorsement was to assert that plaintiff was an employee, and constituted an admission of that relationship by defendant.

*Adopted Admission:* A common misunderstanding of the theory of adopted or adoptive admissions is illustrated in *Voss v. State.*[60] When the confession of a codefendant was offered, the only objection interposed was that it was made out of the presence of defendant; and that was the only question considered. The rule in truth is that where an accusatory statement is made in such circumstances that defendant hears and understands it and is free to deny it but fails to do so, it is admissible in evidence against him. That it is made in his presence is not of itself enough. The statement is obviously unadulterated hearsay, the accused's conduct—his reaction to the statement—is relevant and constitutes an admission. The theory is that his failure to deny is evidence of his belief in its truth. The New York Court of Appeals appears to hold it admissible only where his conduct is the equivalent of an express affirmation of the truth of the statement.[61] Uniform rule 63(8) makes it receivable if accused with knowledge of its content has "by words or other conduct manifested his adoption or his belief in its truth." There is much conflict in the cases as to the effect of accused's being under arrest and of his making an equivocal statement instead of a flat denial. The uniform rule is in harmony with the generally accepted principle of our adversary theory that any relevant conduct of a party to an action is admissible as evidence against him.

*Confession of Codefendant:* A confession of one defendant which implicates his codefendant is, of course, hearsay and inadmissible against the codefendant. But it is well settled that it may be read in evidence to the jury provided that the judge's instruction makes it clear that the confession can be considered only against the defendant who made it.[62] This is but one of the many instances in which the courts attribute extraordinary capacity for intellectual and emotional control to jurors who are supposed, under normal conditions, to be unable to evaluate ordinary hearsay evidence.

*Spontaneous Statements:* Before Wigmore wrote on the subject, evidence of declarations explaining or describing an event substantially contemporaneous with the event was said to be admissible as a part of the res gestae. Thayer condemned the use of such a

60. 278 S.W.2d 667 (Tenn. 1955).
61. People v. Allen, 300 N.Y. 222, 90 N.E.2d 48 (1949).
62. Kirkendoll v. State, 281 S.W.2d 243 (Tenn. 1955).

phrase as practically meaningless in such a situation, but justified the reception of the evidence as an exception to the hearsay rule on the ground that the trier would not have to rely solely on the credit of a declarant not subject to cross-examination. If the witness was the declarant, he could be examined under oath concerning not only the content of his statement, but also the event, and if his auditor was the witness, he could likewise be questioned as to what he saw and heard which would throw any light upon the accuracy of declarant's utterance. Wigmore re-examined the precedents and evolved the theory that the indicium of verity which makes the utterance admissible is spontaneity. The utterance is admissible only if made by declarant while laboring under the stress of a nervous excitement or shock caused by the startling occurrence to which the utterance relates so that it is spontaneous and unreflective. The condition precedent to admissibility is the startling occurrence. Must this be proved by evidence extrinsic to the utterance? This problem is presented where the declarant was alone at the time of the alleged occurrence and is dead at the time of trial. The comparatively few decisions are in conflict;[63] in some of the cases the problem is ignored or slurred, in some it may be inferred that the physical facts at the place of the alleged occurrence and the observable condition and conduct of declarant are persuasive circumstantial evidence of the occurrence, in still others the declarant's condition is strong evidence that something unusual enough has happened to put him in a state of mind negativing reflective falsehood, but nothing to indicate what it was. The tendency to liberality in admitting the evidence is noticeable in workmen's compensation cases. This liberality is illustrated in the brief opinion in *Lee v. King Brothers Shoe Co.*[64] where the evidence of the occurrence was circumstantial and the court avoided the term, res gestae.

*Declarations of Intent:* In *Thornton v. Thornton*[65] the issue was whether or not a grant of land to defendant, grantor's son, was an advancement. This depended upon the intent with which it was made. The chancellor received evidence of declarations of the grantor to the effect that the grant was not an advancement but, on the contrary, an attempt to equalize benefits between defendant and complainant because of money theretofore spent by grantor on behalf of complainant. Some of the declarations were made of intent to convey before the conveyance, some at the time of execution and delivery of the deed, and some after that time. The case, therefore, presented questions of admissibility of (a) evidence of declarations of a presently existing state of mind as the basis for an inference to

63. See MORGAN, BASIC PROBLEMS OF EVIDENCE 298, n. 35 (1954).
64. 281 S.W.2d 49 (Tenn. 1955).
65. 282 S.W.2d 361 (Tenn. App. W.S. 1955).

the same state of mind at a later date, (b) evidence of declarations of a presently existing state of mind accompanying an act the legal significance of which depended upon that state of mind and (c) evidence of declarations of a past state of mind. It also presented an opportunity for a rational consideration and a cleancut decision of each question. But because complainant had framed his contention in terms of res gestae, the court rejected the opportunity, made no distinction between the three classes of evidence, and held them all properly received "under the circumstances" of the case.[66]

*Parol Evidence Rule—Collateral Consistent Oral Agreement:* In Tennessee, where the Statute of Frauds does not require a writing for the creation of a trust in realty, evidence is admissible to prove that the grantee in a deed absolute on its face agreed to hold in trust the property therein conveyed.[67] This is the generally accepted view, and various explanations for this exception to the parol evidence rule have been offered,[68] but none of them can blink the fact that the agreement modifies the express terms of the deed, and that the apparently complete writing is treated as only a partial integration of the transaction.

*Same—Warranties:* In *Huddleston v. Lee*,[69] an action for recission by the buyer, the bill of sale of a freezer contained a printed "warranty" that the seller would service and replace all defective parts that developed within one year, "and the correction of such defects by the seller shall constitute a fulfillment of its obligations to the purchaser hereunder." The evidence showed, and the chancellor found, that the buyer fully disclosed to the seller the purpose for which he desired the freezer, that it did not perform and was incapable of performing that purpose, and that the implied warranty of fitness for the purpose was not inconsistent with the printed express warranty. This seems in accord with the *Restatement of Contracts* for the express warranty is not of like kind with the implied warranty and parties do not ordinarily make express provision that the article is fit for the purpose for which it was, to the knowledge of the seller, purchased. But the court of appeals upheld the chancellor's decision on another ground, namely, that the express representation of the seller that the freezer would do the work for which it was purchased was the inducing cause of the purchase, and was no part of the contract of sale. Though there was no fraud on the seller's part, the misrepresentation relied upon by the buyer, justified his demand for recission of the contract of sale. This may bring the case within the reason of section 238 of the *Restatement* which makes receivable

66. 282 S.W.2d at 366.
67. Brantley v. Brantley, 281 S.W.2d 668 (Tenn. 1955).
68. 9 WIGMORE, EVIDENCE § 2437 (3d ed. 1940).
69. 284 S.W.2d 705 (Tenn. App. M.S. 1955).

parol evidence "to prove facts in a suit for rescission or reformation of the written agreement showing such mistake as affords ground for the desired remedy." And it is generally held that the rule does not prevent a party from proving facts which make the agreement void or voidable.

*Same—Interpretation:* In interpreting a particular provision of a will, the court looks to the entire document to ascertain the manner in which the testator uses the applicable language, and receives evidence of all the circumstances in which the will was executed. Consequently, the court considers the language in which testator provided for devises in case the devisee predeceased or survived him in interpreting a provision making a devise dependent upon survivorship of one or the other of two named persons, and holds admissible evidence of the physical condition of the testator at the time of the execution of the will.[70]

*Same—Strangers to Agreement:* It is generally said that the parol evidence rule has no application in an action between one of the parties to the writing and a stranger, for the stranger cannot be said to have agreed that the writing was the final and complete expression of the agreement. Williston, Corbin and Wigmore contend that where the issue depends upon the legal relations between the parties created by the writing, the rule should be applicable in full force. And such was the effect of the ruling of the trial court in *Swift v. Beaty.*[71] The court of appeals held this ruling erroneous, but not ground for reversal, since the legal effect of the writing and that of the situation disclosed by the parol evidence were the same.

### WITNESSES

*Examination—Form of Objection to Testimony:* The rule applied in most jurisdictions is that the trial judge's ruling on a general objection will not be reviewed. The objector must state the specific ground of his objection. This is for the protection of the judge and of the adverse party. This rule was applied in *McParland v. Pruitt*[72] where the objection was overruled. Where the objection is sustained, it is generally held that the proponent is entitled to be informed of the reason in order that he may eliminate the ground for the objection, if possible, by reframing the question or laying a proper foundation for it.

*Same—Form of Question:* Ordinarily a party may not lead his own witness, for the court wants to hear what the witness has to say rather than a mere affirmation by him of suggested statements by

70. Johnson v. Speer, 279 S.W.2d 711 (Tenn. App. W.S. 1954).
71. 282 S.W.2d 655 (Tenn. App. W.S. 1954).
72. 284 S.W.2d 299 (Tenn. App. W.S. 1955).

counsel. But even in a criminal case the court may in its discretion permit a leading question by the prosecution, except where the leading appears to have prejudiced the defendant.[73] And this is particularly true where the question merely directs the attention of the witness to the desired subject without suggesting the desired answer.

*Competency:* In an action against two defendants as partners for breach of contract, one defendant is competent to testify to the relationship of partners between him and the other defendant. Early Tennessee cases to the contrary were applying the common law rule which made interested persons incompetent as witnesses. This rule was changed in Tennessee in 1867.[74] It may be a curious commentary upon the "guile or gall" of the profession that the court in 1955 felt it necessary to point out (a) the distinction between the hearsay prior statement of this witness that he and the other defendant were partners and his testimony upon the stand, and (b) the present inapplicability of these ancient precedents cited in defendant's brief.[75]

*Privilege—Identity of Informer:* Where defendant was arrested without a warrant, it may be shown in support of the issue of probable cause that the arresting officer acted upon information received from a person from whom on other occasions he had received similar accurate information without disclosing the identity of the informer.[76]

*Expert Opinion:* In most situations the opinion of an expert is not conclusive as against lay testimony. For example, the trier of fact may accept the testimony of an injured workman that he continually suffered pain in determining the extent of his disability notwithstanding the testimony of a qualified expert of lack of physiological conditions that would cause the alleged pain.[77]

*Impeachment—One's Own Witness:* The rule which forbids a party to impeach his own witness does not prevent him from introducing evidence contrary to that given by the witness.[78] The proponent may be regarded as vouching for the character of his witness for veracity, but he cannot be held to guarantee the accuracy of his perception or memory or of his capacity to express himself by the accurate use of language.

*Same—By Demonstration on Cross-examination:* Defendant on trial for murder of her husband, testified on direct examination that she

73. Hale v. State, 281 S.W.2d 51 (Tenn. 1955), a case which has been much criticised on other grounds and in which Chief Justice Neil and Mr. Justice Burnett wrote powerful dissents for different reasons.
74. Wyatt v. Brown, 281 S.W.2d 64 (Tenn. App. E.S. 1955).
75. 281 S.W.2d at 67.
76. Simmons v. State, 281 S.W.2d 487 (Tenn. 1955).
77. Block Coal & Coke Co. v. Gibson, 285 S.W.2d 112 (Tenn. 1955).
78. Hewgley v. General Motors Acceptance Corp., 286 S.W.2d 355 (Tenn. App. M.S. 1955).

was a taxi driver and that for her protection as such she carried the pistol which she drew from her bosom when she was attacked and knocked down by her husband. On cross-examination she was required to place the pistol in her bosom or brassiere to illustrate how she carried it. Held, this was proper as affecting the credibility of her direct testimony.[79] This seems a clear example of demonstrative evidence to test the validity of oral testimony.

*Same—By Evidence of Prior Disgraceful Conduct:* In a thoroughly considered opinion[80] Mr. Justice Prewitt reviewed the prior decisions of the court holding admissible on cross-examination of a witness questions as to prior disgraceful conduct and as to prior indictments, arrests and charges of offenses. Speaking for the court, he declared that the earlier decisions allowing questions as to accusations, charges or indictments should no longer be followed. The inquiries should be confined to conviction of offenses involving moral turpitude. The case at bar involved cross-examination of the accused but the cited precedents included cross-examination of other witnesses as well. The conclusion to be drawn from the discussion is that hereafter in Tennessee a witness, subject to his claim of privilege against self-incrimination, may be asked to reveal any prior conduct involving moral turpitude and that his answer may not be contradicted by independent evidence—the cross-examiner must take the answer of the witness. The witness may not be questioned concerning prior accusations, charges or indictments even for offenses involving moral turpitude. Mr. Chief Justice Neil in his concurring opinion[81] asserts that the usual rule which excludes evidence of the commission of other similar crimes by defendant should be applied even where the questions are asked only to affect credibility. This seems a distinct limitation upon the main opinion except in so far as the privilege against self-incrimination is involved, as it would be in most pertinent situations.

*Effect of Impeachment:* The maxim, *falsus in uno falsus in omnibus,* when carefully stated, means that if the trier finds that a witness makes a false statement which he knows to be false upon a material matter, the trier may reject his entire testimony except where it is corroborated by other credible evidence; and a charge to this effect is justified. It is, no doubt, true that a jury may refuse to credit all the testimony of a witness which it has reason to disbelieve, so that the *falsus in uno* doctrine is probably useless, if not misleading. In *McParland v. Pruitt*[82] the testimony of each of the two defendants was contradicted concerning a fact within their personal knowledge,

79. Dennis v. State, 279 S.W.2d 512 (Tenn. 1955).
80. Posley v. State, 288 S.W.2d 455 (Tenn. 1956).
81. 288 S.W.2d at 458.
82. 284 S.W.2d 299, 303 (Tenn. App. M.S. 1955).

which was material and, if false, was knowingly false. In these circumstances the court, without enumerating these details, declared the maxim applicable.

### Judicial Notice

The current Tennessee cases on judicial notice cover (1) notice of the act of Congress providing for federal credit unions and permitting them to charge specified rates of interest,[83] (2) notice of matters of common knowledge and notoriety, for example, the use of the usual abbreviations for dates such as 3-7-54 to indicate March 7, 1954,[84] and the facts that the temperature inside a steel river barge is on warm days higher than that outside and a person may have a so-called stomach upset caused by some internal condition rather than by an external condition.[85] In *Howard v. Haven*[86] the court conceded that where a principal is sought to be held liable for the wrong of his agent on the doctrine of respondeat superior a finding for the servant is inconsistent with a finding against the principal, but held that where plaintiff sought recovery both under that doctrine and on the theory that the principal was a joint tort-feasor with the agent, the finding for the agent did not prevent a valid finding against the principal. In its discussion the court said that it took judicial cognizance that the duties of the agent, here the "business agent" of the local trade union, "related to the making of contracts under which only members of his organization would have the right of employment . . . . We think it can be said without serious dispute that it was the business of the Union to make war upon every contractor who refused to employ its members; and they were so acting in the instant case." Does this mean that the duties of a union's business agent generally are judicially noticeable, or that the duties of one business agent of this local union are within the realm of temporary local judicial notice, or is the court merely saying that the conduct in question was within the scope of this agent's authority under the circumstances appearing in the evidence? To what extent is this subject a matter of common knowledge or notoriety?

### Jurisdiction and Venue

The current decisions dealing with jurisdiction and venue present no problems of major importance in general. They are concerned principally with statutory interpretation. Consequently this section is little, if anything, more than a digest.

83. Van Pelt v. P. and L. Federal Credit Union, 282 S.W.2d 794 (Tenn. App. W.S. 1955).
84. Grace v. State, 281 S.W.2d 641 (Tenn. 1955).
85. Nashville Bridge Co. v. Todd, 286 S.W.2d 861 (Tenn. 1956).
86. 281 S.W.2d 480, 485 (Tenn. 1955).

*Process—Original Attachment:* When an original attachment by garnishment has been made by service of the garnishment summons and the credit has been thereby impounded, the court may in its discretion order the summons to be amended as to the date at which the garnishee is required to appear.[87]

*Service of Summons—Time for:* The statute which authorizes service of summons upon the Secretary of State in an action against a non-resident motorist limits the authority of the Secretary to accept service as agent of the motorist to one year after the accident or injury in question. It is not a statute of limitation and is not affected by the statute authorizing a new action to be brought within one year after a judgment against the plaintiff in an action timely brought upon a ground not concluding his right of action, as on a plea in abatement for wrong venue. Service of summons upon the Secretary more than a year after the accident is ineffective.[88]

*Jurisdiction Over Person:* Under Chapter 188 of the Public Acts of 1953, proceedings may be begun in this state for the purpose of having action taken in a sister state against a person therein who has abandoned his dependents in this state. But a court of this state has no jurisdiction to enter a personal judgment against a defendant without service of process upon him within the state.[89]

*Jurisdiction Over Subject Matter—Court of General Sessions:* Though the court's jurisdiction is limited to misdemeanors and it may not impose a fine exceeding fifty dollars, it has power to accept a plea of guilty to a misdemeanor on account of conduct which amounts to an offense beyond the jurisdiction of the court, if the accused waives indictment or presentment and trial by jury. A judgment of conviction entered upon such a plea and waiver is a bar to further prosecution for that offense.[90] But such a court has no power to suspend sentence under the small offense law if its jurisdiction is limited to that of a justice of the peace in civil and criminal cases.[91]

*Same—Chancery:* Chancery has exclusive jurisdiction to set up a will that has been lost, destroyed or suppressed. In circuit court a husband, who in case of intestacy would take no part of his deceased wife's estate which consisted solely of realty, sought to contest her will on the ground of testamentary incapacity, alleging that he was the sole beneficiary of an earlier will which, if not in existence, was destroyed without her knowledge. The court held that this was in effect an action to set up an earlier lost or destroyed will, or to

87. Newport v. Semones, 286 S.W.2d 876 (Tenn. App. M.S. 1955).
88. Oliver v. Altsheler, 278 S.W.2d 675 (Tenn. 1955).
89. State v. Perry, 280 S.W.2d 919 (Tenn. 1955).
90. State v. Simmons, 287 S.W.2d 71 (Tenn. 1956).
91. Cates v. State, 279 S.W.2d 262 (Tenn. 1955).

probate an earlier will, and that he had no standing as a contestant in the pending action without first taking proper proceedings in another court.[92]

Chancery has no jurisdiction to interfere with the circuit court in performance of its duties nor can it act as a court of review to correct errors of the circuit court, but where a decree of a circuit court in a divorce action is void, chancery does have power to enjoin a party from prosecuting a petition for contempt for refusal of the adverse party to obey the decree.[93]

While chancery has jurisdiction to set aside or cancel a written instrument on the ground that it was obtained by fraud and to grant incidental legal relief in an equitable proceeding, it has no jurisdiction to entertain an action to recover unliquidated damages for personal injury merely because plaintiff seeks to have set aside for fraud a release which he expects defendant to set up as a defense. The gist of the action is legal. The plaintiff may plead and prove the fraud as an avoidance of the defense in the law action.[94] It seems obvious that if chancery were to take jurisdiction, it would be under its inherent power as a court of equity and not under the statute giving it jurisdiction over specified subject matter. The court does not consider the question whether fraud in the inducement in a simple contract action is a legal defense, and if so whether that doctrine applies to the issue when raised in a replication. In assumpsit, under the common law decisions beginning in the latter part of the eighteenth century, fraud in the inducement was a legal defense, and an equitable bill to cancel a simple contract obligation on that ground would not be entertained because of the adequate remedy at law. This doctrine was not extended to instruments under seal until a much later period. The discussion in the instant case is concerned principally with determining whether the gist of the action is equitable with legal relief as incidental or vice versa; and the result seems thoroughly sensible whether or not the release was under seal.

Chancery has no jurisdiction of an original petition to compel a telephone company to extend its services to a community or to impose a penalty for refusing to serve individuals in that community. The Railroad and Public Utilities Commission has exclusive original jurisdiction of a petition for the extension of service, and exhaustion of remedies before the Commission is a condition precedent to the exercise of jurisdiction by the court.[95] Nor does chancery have jurisdiction to order the Board of Claims to entertain a claim for wrongful death against the state.[96]

92. Warmath v. Smith, 279 S.W.2d 257 (Tenn. 1955).
93. Brown v. Brown, 281 S.W.2d 492 (Tenn. 1955).
94. Tucker v. Simmons, 287 S.W.2d 19 (Tenn. 1956).
95. Breeden v. Southern Bell Tel. & Tel. Co., 285 S.W.2d 346 (Tenn. 1955).
96. Hill v. Beeler, 286 S.W.2d 868 (Tenn. 1956).

*Same—Circuit Court:* A circuit court has no power to award alimony to a wife where divorce is granted to the husband. A decree awarding alimony in such a situation is void, and an order to show cause in a contempt proceeding for refusal to obey the decree is void. The wife may be enjoined from further prosecution of that proceeding.[97]

*Venue:* In an action against sureties on the bond of the Commissioner of Finance for damages for a tort committed by him, the venue is not determined by the place where the tort was committed notwithstanding the statute which authorizes an action against a tortfeasor to be brought in the county where the tort occurred. The action must be brought in the county of the official residence of the Commissioner, namely, Davidson County.[98]

The venue of an action for wrongful death, which is not a local action, is to be determined on the theory that the statutory beneficiaries are not parties to the action brought by the administrator. Hence, although the beneficiaries of plaintiff administrator and the administrator defendant reside in the same county, the plaintiff administrator who resides in another county may bring and maintain the action in the county where the defendant administrator was at the time the action was instituted.[99]

TRIAL

*Right to Jury:* In an inquisition of lunacy in the county court there is no right of trial by jury unless demanded by the guardian ad litem of the party or the party himself. That is to say, the court has no duty to provide a jury of its own motion.[100] A person who is charged with an offense may, in a court of general sessions, expressly waive a jury and plead guilty to a misdemeanor after expressly waiving indictment or presentment, although the act charged constitutes an offense beyond the jurisdiction of the court.[101]

*Composition of Jury—Mixed Race:* In a prosecution for murder against a Negro and a white man as codefendants, of 18 Negro jurymen, eight were excused by the court on the *voir dire,* seven were challenged peremptorily by the State, one by the Negro defendant, and two who had been accepted by the state and the Negro were peremptorily challenged by the white defendant. Thereupon the Negro defendant moved orally to quash the panel, which motion the court properly denied. Obviously there was no discrimination against

97. Brown v. Brown, 281 S.W.2d 492 (Tenn. 1955). See textual material supported by note 93 *supra.*
98. Keefe v. Atkins, 285 S.W.2d 338 (Tenn. 1955).
99. Denny v. Webb, 281 S.W.2d 698 (Tenn. 1955).
100. Craddock v. Calcutt, 285 S.W.2d 528, 537 (Tenn. App. W.S. 1955).
101. State v. Simmons, 287 S.W.2d 71 (Tenn. 1956). See textual material supported by note 90, *supra.*

defendant in selecting the jury, and the white defendant had a right to exercise his peremptory challenges for any reason or without reason.[102]

A person who is unable to read or write is not incompetent to serve as a juror even in a prosecution for murder, in which the instructions to the jury must be in writing.[103]

*Challenge to Array or Panel:* A challenge to the array or panel must be made in writing. There is no reversible error in overruling an oral challenge.[104] A motion to quash the panel because a codefendant had removed all remaining Negroes on the panel by peremptory challenge,[105] or a motion that the entire list be disqualified for cause made after the state had accepted the list, is treated as a challenge to the panel or array.[106]

*Challenge to Poll—Trial by Judge:* In a case where two jurors were challenged on the ground of actual bias in having stated that the defendants were guilty and ought to be killed, the evidence, heard by the trial judge, was in some conflict. He found the challenges untrue and held the jurors competent. The court applied the generally accepted rule that the decision of the trial judge, like the verdict of a jury in a civil action, will not be reversed if supported by evidence. The credibility of the witnesses is for the judge.[107] At common law the sufficiency of a challenge was determined by triers selected for that purpose, and their decision was final and not subject to review, but today in most jurisdictions, the trial is by the judge in both civil and criminal cases.

*Effect of Erroneous Ruling:* During defendant's examination of the jurors on *voir dire,* he exhausted all challenges before juror number twelve was called. He had challenged five jurors for cause and after the trial judge overruled each challenge, defendant did not peremptorily challenge any one of the five. He was denied the right to challenge number twelve peremptorily. The supreme court refused to consider the ruling as to any one of the five challenged for cause on the ground that the defendant should have exercised one of his peremptories on each and held it no reversible error to refuse the challenge to juror number twelve.[108] This must mean that when a defendant is presented with a juror, he must exercise all available challenges and use a peremptory even upon a disqualified juror when the trial judge refuses to disqualify. This compels him to take chances

102. Kirkendoll v. State, 281 S.W.2d 243, 253 (Tenn. 1955).
103. *Id.* at 255.
104. *Id.* at 253.
105. *Ibid.*
106. Hale v. State, 281 S.W.2d 51, 56 (Tenn. 1955).
107. Kirkendoll v. State, 281 S.W.2d 243, 249 (Tenn. 1955).
108. Hale v. State, 281 S.W.2d 51, 56-57 (Tenn. 1955). See also Kirkendoll v. State, 281 S.W.2d 243, 248 (Tenn. 1955) as to peremptory challenge.

upon the qualities of the jurors still to be drawn. In this case it deprived him of the right to remove a qualified juror, number twelve, by peremptory challenge. The result of this procedure in a case, in which the right to peremptory challenge in the circumstances was of special importance, was that defendant may have been compelled to accept five biased jurors and one competent juror to whom he objected for undisclosed reasons. It may be true that there is no denial of due process in abolishing the common law right of an accused to peremptory challenges even in a capital case and in substituting therefor regulation by statute, and that it is not reversible error to furnish him a jury of which a disqualified juror is a member so long as he has an unused peremptory at the time the jury is completed. It may be true also that the right to challenge is the right to reject, not the right to select, and that an accused is entitled only to a trial by twelve qualified jurors. But it seems extremely harsh in fact to destroy the value of defendant's privilege to use his quota of peremptories by assuming, first, that he waived his right to exclude incompetent jurors and, second, that the five challenged jurors were competent, and then declaring that even an erroneous denial of the right to use a peremptory is harmless so long as all of the twelve jurors were competent.

*Discretionary Control by Judge:* The order of proof is determined by the trial judge in the exercise of his sound discretion. He may permit a party to introduce in rebuttal evidence which should have been introduced as a part of his main case.[109] And it is well settled in Tennessee that the judge may put questions to a witness necessary to elicit facts overlooked by counsel which tend to protect the rights of the parties.[110]

*Motions During Trial—Motion to Dismiss the Panel for Misconduct of Counsel:* In a criminal case in which the death penalty was authorized, the prosecutor asked each juror whether if he found the defendant guilty, he would vote to impose the death penalty; each juror who was accepted by the state answered in the affirmative. The defendant's motion that the panel be disqualified on this account was denied. The court held this motion was a challenge to the array and need not be considered because not in writing.[111] This is obviously an extremely technical ruling, since the material facts all occurred in the presence of the court. The chief justice in a powerful dissent declared that he knew of "no case in the judicial history of this State where the prosecution was ever permitted to ask a juror on his voir dire if he will agree to fix a defendant's punishment at death." It is believed that the court might well have treated this

109. Newport v. Semones, 286 S.W.2d 876 (Tenn. App. M.S. 1955).
110. Bond Brothers, Inc. v. Spence, 279 S.W.2d 509 (Tenn. 1955).
111. Hale v. State, 281 S.W.2d 51, 56 (Tenn. 1955).

motion not as a challenge to the array but as a motion to dismiss the jurors for misconduct of the prosecuting attorney or as a challenge to each of the selected jurors because he had made a statement under oath which the chief justice said made it "extremely difficult" for him "to enter upon a consideration of the case with an open mind as to the guilt or innocence of the accused and what penalty should be imposed."[112] Generally the supreme court is slow to give a restricted meaning to the language of a motion which will prevent a fair consideration of the actual problem thereby intended to be presented.

*Same—Motion for Directed Verdict:* Defendant may make a motion for a directed verdict at the close of plaintiff's case or at the close of all the evidence, or at both times. If his motion made at the close of plaintiff's case is erroneously denied and he then introduces evidence, he waives the error; and if he makes a like motion at the close of the evidence, only the latter motion will be considered on appeal.[113] This is the universally accepted view except where an abortive statute provides otherwise; but in some jurisdictions the trial judge may not at the close of plaintiff's case entertain a motion for a directed verdict as distinguished from a dismissal or nonsuit.

*Same—Motion to Dismiss in Chancery:* In equity practice a motion to dismiss at the close of the plaintiff's case is not to be entertained; it should, if entertained, be treated as a submission of the case to the chancellor on plaintiff's evidence alone. It is improper practice to deny the motion and then proceed to hear defendant's evidence. Even at the close of the case, the proper time for a motion to dismiss is after the court has made findings of fact.[114]

*Charge to Jury—Requests to Charge:* In a criminal case the trial judge must give instructions upon all fundamental matters including reasonable doubt, the weight to be given to a dying declaration, and, where the evidence of guilt is solely circumstantial, the rule governing that kind of evidence. As to non-fundamental matters, a request is required under Code section 40-2517.[115] A request to charge which is inapplicable to an issue made by the evidence is properly denied. The court's duty is to charge upon the law applicable to the facts of the case as presented by the evidence. These rules were applied in a condemnation case where defendant requested an instruction as to value of the condemned land.[116]

*Same—Coercing Agreement:* An instruction to the jury after it has announced that it is unable to agree is not objectionable as coercing the minority jurors which tells the jurors that it is their duty

112. *Id.* at 61.
113. McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955).
114. Humphreys v. Humphreys, 281 S.W.2d 271 (Tenn. App. W.S. 1954).
115. Bishop v. State, 287 S.W.2d 49 (Tenn. 1956).
116. Stroud v. State, 279 S.W.2d 82 (Tenn. App. E.S. 1955).

to decide the case if they can conscientiously do so and to listen to each other's arguments with a disposition to be convinced; that if a majority are against him, a minority juror should consider whether his doubts are reasonable; that jurors should not go contrary to their convictions, but they should give heed to the opinions of their fellows and "by reasonable concessions" reach a conclusion "to which all can scrupulously adhere."[117]

*Misconduct of Jury—Separation:* The general rule at common law is that separation of jurors in a criminal case vitiates their later verdict unless it is shown that there was no communication with them by outsiders. This rule is not applicable to the separation of the single female member of the jury from the others when an officer had charge of her during the period of separation and another officer or other officers had charge of the other eleven. Chapter 71 of the Public Acts of 1951 specifically provides that it shall not be unlawful for women members to be segregated from the male members when outside the court room so long as each member is in the custody of an officer or officers duly sworn for that purpose.[118]

*Verdict—Excessive Punitive Damages:* The court of appeals has ruled that punitive damages are always allowable in an action for seduction, but in an opinion in which the facts concerning the plaintiff are set out in sordid detail and a verdict for $5,000 compensatory damages was upheld, it ordered a new trial unless plaintiff should remit $2,500 of an award of $5,000 punitive damages.[119]

*Same—Inconsistent Verdicts:* Where plaintiff sues master and servant jointly for an injury for which under the evidence the master could be found responsible for his personal breach of duty to plaintiff and vicariously responsible for his servant's breach of duty, or both, a verdict against the master is not inconsistent with a verdict in favor of the servant.[120] But where a wife sues a defendant for personal injuries and her husband sues for damages caused by loss of her services due to those injuries, and the actions are consolidated for trial, a verdict in favor of the wife in her action is inconsistent with a verdict in favor of the defendant in the husband's action, and both verdicts must be set aside.[121] In the former situation the verdict may be based on a finding that the master was personally at fault and the servant blameless. In the latter, no similar explanation is possible. The jurors either totally misunderstood the judge's instructions or they deliberately disregarded them.

*Judgment—Res Adjudicata:* A decision of a county court denying

117. Simmons v. State, 281 S.W.2d 487, 490 (Tenn. 1955).
118. Steadman v. State, 282 S.W.2d 777 (Tenn. 1955).
119. Caccamisi v. Thurmond, 282 S.W.2d 633 (Tenn. App. W.S. 1954).
120. Howard v. Haven, 281 S.W.2d 480 (Tenn. 1955).
121. Berry v. Foster, 287 S.W.2d 16 (Tenn. 1956).

a petition for adoption on the grounds that petitioners were not fit persons and that the child's welfare would not be promoted thereby, affirmed on appeal, is a bar to a subsequent similar petition by the same parties. The principle of res adjudicata is applicable to a decision regarding an adoption in the absence of a showing of change in relevant conditions.[122] And a decree of divorce in an action by the wife against the husband in which the court had jurisdiction of both the subject matter and the parties is res adjudicata and a bar to an action by the husband to set aside the decree on the ground that he was never married to the wife because previously married to another woman from whom he had never been divorced.[123] His remedy, if any, was by appeal from the earlier decree.

### Appeal and Error

*What is Reviewable:* No appeal lies from a judgment of acquittal upon a charge of contempt of court for violation of an injunction issued in a divorce proceeding.[124]

Normally an appeal or writ of error lies only from a final judgment. Thus, where there were four parties defendant in an action for personal injuries and demurrers interposed by three of them were sustained but the action remained undecided as to the fourth, the appeal by plaintiff was dismissed. The provision for a discretionary appeal applies only in equity.[125] And a judgment committing an accused to a hospital for the criminal insane for observation and treatment entered on a verdict finding him presently insane, so as not to be presently triable for the offense charged, is not appealable.[126]

A discretionary appeal will lie from an order of the chancellor denying a new trial after an order confirming or approving the report of the master, and the court of appeals will, in suitable circumstances, dispose of the entire case,[127] for after an appeal is perfected the lower court loses jurisdiction until after remand.

*By What Court:* Where the chancellor dismissed the intervenor's petition after a hearing on the merits, appeal or writ of error lies only to the court of appeals, and if taken to the supreme court will be transferred to the court of appeals for consideration and decision.[128]

*Prerequisites:* The statutory time for filing the bond necessary to perfect an appeal may be extended by order of the court, but if

122. Whitley v. Reeves, 281 S.W.2d 411 (Tenn. App. M.S. 1955).
123. Rutledge v. Rutledge, 281 S.W.2d 666 (Tenn. 1955).
124. Schwalb v. Schwalb, 282 S.W.2d 661 (Tenn. App. W.S. 1955).
125. Potter v. Sanderson, 286 S.W.2d 873 (Tenn. 1956).
126. Cogburn v. State, 281 S.W.2d 38 (Tenn. 1955).
127. Huntington v. Lumpkin, 281 S.W.2d 403 (Tenn. App. W.S. 1954).
128. Goins v. Yowell, 285 S.W.2d 135 (Tenn. 1955).

the bond is not filed within the time set in the order, the appeal must be dismissed.[129]

*Scope of Review:* The circuit court on appeal from decision of the beer board revoking a beer license considers only whether there was sufficient evidence to support the decision, not whether the evidence preponderates in favor of it.[130] But where the chancellor is called upon to review a decision of the Railroad and Public Utilities Commission on the ground that the rates prescribed are confiscatory, the chancellor must review the entire record and exercise his independent judgment on the facts as well as on the law, and if he has proceeded on the theory that he is to determine only whether the commission's decision is supported by credible evidence, the case will be referred back to him for further consideration.[131]

*Same—Criminal Case:* Where the accused on appeal complains that the verdict is not sustained by the evidence, the supreme court inquires only whether the evidence preponderates against the verdict, and where accused's own testimony conflicts with that of other witnesses, the court accepts the determination of the jury as to which is to be credited.[132]

*Same—Chancery:* when the court of appeals reviews a decree in equity, it examines the facts de novo and is not bound by the finding of the trial judge. A divorce action is for this purpose treated as an action in equity even when tried by the circuit court.[133] The court of appeals exercises the same power of review on an appeal in an injunction action as to an issue not submitted to a jury, which is deemed to have been reserved for decision by the chancellor.[134] But a finding of fact by the chancellor affirmed by the court of appeals is conclusive on later review by the supreme court.[135] And the chancellor's ruling in dissolving a temporary injunction is reviewable only for abuse of discretion.[136]

*Record on Appeal—Correction and Disregard of Technical Defects:* By diminution of the record and by applying Code section 27-110, the record may be corrected to show authentication by the trial judge, and it will be presumed that the signature to the bill of exceptions was made prior to the filing thereof. Hence, the court may consider a

129. Scott v. St. Louis-San Francisco Ry., 286 S.W.2d 347 (Tenn. App. W.S. 1954).

130. Presson v. Benton County Beer Board, 281 S.W.2d 63 (Tenn. 1955).

131. Southern Continental Tel. Co. v. Railroad and Public Utilities Comm'n., 285 S.W.2d 115 (Tenn. 1955).

132. Smith v. State, 280 S.W.2d 922 (Tenn. 1955).

133. Humphreys v. Humphreys, 281 S.W.2d 270 (Tenn. App. W.S. 1954).

134. Murrell v. Bentley, 286 S.W.2d 359 (Tenn. App. W.S. 1954).

135. Howard v. Haven, 281 S.W.2d 480 (Tenn. 1955); Miller v. Hubbs, 285 S.W.2d 527 (Tenn. 1955).

136. Alexander v. Alexander, 286 S.W.2d 104 (Tenn. App. M.S. 1955).

bill of exceptions contained in a transcript of the record notwithstanding defects which are thus curable.[137]

*Same—Bill of Exceptions:* Where the bill of exceptions on appeal from a judgment on a verdict directed for defendant does not recite that it contains all the evidence, the court will examine the bill to determine whether it contains evidence which would justify a finding in favor of plaintiff; if not, the judgment will be affirmed.[138] But if material in the transcript filed with the court is not included in the bill of exceptions, it cannot be considered as a ground of error. This rule is applied even in a criminal case in which the material in question was a transcript of the prosecutor's speech claimed to constitute reversible misconduct.[139] This does not apply to the pleadings or other parts of the formal record. If they show without dispute the materials that present the pertinent issue on appeal, no bill of exceptions is necessary.[140] Still, where there is proffer of a written instrument and no demand for oyer, the instrument does not become a part of the formal record, and a certified copy of it included in the record on appeal in which there was no bill of exceptions cannot be considered by the court of appeals.[141]

*Same—Sufficiency of Basis for Review of Exception—Ruling on Evidence:* Ordinarily when an exception is sustained to a question put to a witness, the questioner must make an offer of proof or otherwise get on the record the expected answer so that the court can determine whether it would constitute relevant, competent evidence. But this is not true where the court erroneously holds that the defense which the evidence tends to sustain cannot be proved in the action.[142] To call all witnesses and put to each pertinent questions would be a mere waste of time. Likewise, when the trial judge informed counsel that he would rule improper any argument for a specified finding by the jury and would sustain any objection thereto made by the adverse party, it was totally unnecessary for counsel to attempt to make the argument and require an objection by the adverse party and a ruling thereon.[143]

*Assignment of Error:* On certiorari to the supreme court from the court of appeals the court will not consider any alleged error of the court of appeals which is not set forth in the assignment accompanying the petition for certiorari.[144]

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137. Simmons v. State, 281 S.W.2d 487 (Tenn. 1955).
138. Russel v. Chattanooga, 279 S.W.2d 270 (Tenn. App. W.S. 1954).
139. Hargrove v. State, 281 S.W.2d 692 (Tenn. 1955).
140. State *ex rel.*, etc. v. Simpson, 281 S.W.2d 679 (Tenn. 1955).
141. Van Pelt v. P. and L. Federal Credit Union, 282 S.W.2d 794 (Tenn. App. W.S. 1955).
142. Nashville v. Drake, 281 S.W.2d 681 (Tenn. 1955).
143. Burkett v. Johnston, 282 S.W.2d 647 (Tenn. App. W.S. 1955).
144. Berry v. Foster, 287 S.W.2d 16 (Tenn. 1955).

*Rehearing:* The purpose to be served by a rehearing is to bring to the attention of the court matters overlooked in the original decision, not to reargue matters duly considered and determined. Consequently, the court will deny a petition which alleges that it had not considered and rendered an opinion upon specified assignments of error when the original opinion and decision dealt specifically with the subject matter of these assignments,[145] or a petition which asks the court to reconsider and overrule a precedent that the court deliberately followed in preference to decisions in other states to the contrary, though the latter represent the weight of authority.[146]

*United States District Courts*

The following decisions by United States District Courts in Tennessee deal with procedural questions of interest and importance to Tennessee lawyers.

*Removability from State Courts:* The Fair Labor Standards Act provides that an action may be maintained in any court of competent jurisdiction and it is settled that the plaintiff may maintain his action in either the state or the federal court where jurisdiction over the defendant's person is secured. Prior to the revision of 1948 the cases were in conflict as to whether such an action for less than $3000 brought in a state court was subject to removal. Section 1441(a) of the present Code reads: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction may be removed by the defendant . . . ."[147] The excepting clause was not in the former provision, and the Revisers' Note states that they intended to clear up previous ambiguities. In 1953 Judge Goddard in the southern district of New York held that since the Fair Labor Standards Act did not forbid removal, an action brought thereunder was removable.[148] Judge Robert Taylor reached the same conclusion,[149] and cited the *Asher* case in support of his decision.

*Parties:* The administrator of a decedent appointed in Kentucky brought action in Tennessee to recover for the wrongful death of the decedent under the Kentucky statute which provided that the recovery should be "for the benefit and go to" specified kindred of decedent. The defendant insisted that plaintiff had no capacity to maintain the action. Judge William E. Miller, in applying federal rule 17(b), declared that there was no controlling Tennessee decision, and held that since the great weight of authority elsewhere was con-

145. Harris v. Buchignani, 285 S.W.2d 108 (Tenn. 1955).
146. Evans v. Mayberry, 279 S.W.2d 705 (Tenn. 1955).
147. 28 U.S.C.A. § 1441(a) (1952).
148. Asher v. William L. Crow Constr. Co., 118 F. Supp. 495 (S.D. N.Y. 1953).
149. Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (E.D. Tenn. 1955).

trary to the defendant's contention, the Kentucky administrator was the proper and competent party plaintiff.[150]

*Same—Class Action:* Several Negroes brought action for themselves and all other Negroes similarly situated for a declaratory judgment and an injunction against racial discrimination in the public high schools in Anderson County. Judge Robert Taylor held that the action was properly brought as a class action, and that it did not become moot when the named plaintiffs ceased to be members of the class. The action stands for trial for the benefit of members of the class.[151]

*Remedies—Habeas Corpus:* The Tennessee Habitual Criminal Act, as interpreted by the Tennessee Supreme Court and as applied in the instant case, does not require the accused to be notified that he is being charged as an habitual criminal and subject to additional penalties if convicted. This the district court held to be violative of the fourteenth amendment. The accused had been convicted and allowed an appeal. His attorney neglected to perfect the appeal and to have a bill of exceptions prepared. After accused was in prison starting to serve the life sentence imposed, he sought habeas corpus in the state courts and was defeated. He was unable to appeal because he lacked means to furnish the required cost bond. Thereby he had exhausted his remedies in the state courts and was entitled to a writ of habeas corpus in the United States court; and on the merits he was entitled to prevail.[152]

*Jurisdiction—Foreign Corporation:* Any foreign corporation carrying on business in a substantial manner in Tennessee is subject to service of process under Chapter 13, Public Acts of Tennessee, 1929. If such a corporation fails to appoint an agent for service of process, service made upon the Secretary of State is valid. Whether the conduct of the corporation constitutes the prescribed measure of business is a question of fact for the court.[153]

*Judicial Notice:* The United States district court sitting in Tennessee will judicially notice the laws of Tennessee and of Missouri. Tennessee has adopted the uniform Judicial Notice Act. Hence the United States district court may act either under the general common law rule which makes all laws of the states and territories subject to its judicial notice or under rule 43(a) which makes the liberal state rule applicable.[154]

150. Citizens Fidelity Bank and Trust Co. v. Baese, 136 F. Supp. 683 (M.D. Tenn. 1955).
151. McSwain v. County Board of Education, 138 F. Supp. 570 (E.D. Tenn. 1956).
152. Rhea v. Edwards, 136 F. Supp. 671 (M.D. Tenn. 1955).
153. Radford v. Minnesota Mining & Mfg. Co., 128 F. Supp. 775 (E.D. Tenn. 1955).
154. Insurance Research Serv. v. Associates Finance Corp., 134 F. Supp. 54 (M.D. Tenn. 1955).

*United States Court of Appeals Sixth Circuit*

The procedural decisions of the Sixth Circuit Court of Appeals represent applications of generally accepted rules. A brief digest of them may be of some value to the profession.

PROCEDURE AND EVIDENCE

*Pleading:* At common law and under a typical code a party may plead a document by alleging its legal effect or setting forth its content verbatim in the pleading or by both. Under the code he may also incorporate the document in his pleading by reference—a verbatim copy attached thereto as an exhibit. By alleging its legal effect he is obviously pleading a conclusion of law, and if there is an inconsistency between his conclusion and the proper legal interpretation of the document, his conclusion is of no effect at whatever stage of the proceeding the inconsistency is made to appear, whether in the pleading or in the evidence. This rule is not changed by the Federal Rules of Civil Procedure.[155]

*Motion before Trial—For Removal to United States District Court—Time for:* A motion to remove an action to the United States district court was timely when made within twenty days after receipt by defendant of the declaration, although the summons had been served upon the Secretary of State four months earlier in purported compliance with statute. After removal the case stood subject to all defenses, including lack of jurisdiction over the person, available in the state court at the time of removal.[156]

*Evidence—Presumptions and Burden of Proof:* Section 810 of the National Life Insurance Act provides that where an individual is shown to have been absent without explanation "for seven years his death as of the date of the expiration such period may . . . be considered as sufficiently proved."[157] The cases frequently talk of presumptions in this connection, but it is almost too obvious for comment that this provision merely authorizes an inference that the death occurred on the last day of the period, the day which as a matter of logical reasoning from experience is most unlikely. Consequently, as was held in *Peak v. United States,*[158] death at an earlier date may be proved by circumstantial evidence. This would, of course, be true had the statute created a presumption.

*Same—Illegally obtained:* In *Flanders v. United States*[159] the

155. Mengel Co. v. Nashville Paper Products & Specialty Workers Union, 221 F.2d 644 (6th Cir. 1955).
156. Munsey v. Testworthy Laboratories, Inc., 227 F.2d 902 (6th Cir. 1955).
157. 54 STAT. 1013 (1940), 38 U.S.C.A. § 810 (1946).
158. 229 F.2d 503 (6th Cir. 1956).
159. 222 F.2d 163 (6th Cir. 1955).

court considered all previous cases dealing with the question whether using an extension telephone with the consent of the receiver of the message is an illegal interception forbidden by the Communications Act. It found the opinion of Judge Learned Hand of the Second Circuit in *United States v. Polakoff* unacceptable, and held admissible evidence of the message as heard on the extension telephone. Notwithstanding the generally recognized eminence of Judge Hand, it is difficult to follow his reasoning in the *Polakoff* case, regardless of one's views of the ethics of receiver's conduct.

*Same—Parol Evidence Rule:* Where the parties enter into an oral agreement and proceed with its performance, and thereafter one of them signs a later created writing purporting to embody the agreement, the parol evidence rule is not applicable to prevent him from showing the terms of the oral agreement. And this is particularly true where he signed the writing under circumstances indicating duress.[160] It seems clear that the objectives of the rule, to assure stability of commercial transactions, and prevent sharp dealing by the party to whom the contract has proved disadvantageous, would be frustrated rather than furthered by its application in such a situation.

*Same—Opinion:* The reception of an opinion of a witness, assumed to be qualified as an expert, is reversible error when the opinion is based on an assumption of fact contrary to the undisputed evidence.[161] This result is so unquestionable that one has to speculate as to why the trial judge should have admitted the evidence.

### Witnesses

*Competency—Mental Capacity:* Where a witness appeared normal and defendant's counsel merely requested that the court examine him so as to determine his sanity but made no offer of evidence, the court committed no error in permitting the witness to testify.[162] When the competency of a witness is challenged, it is usually the function of the judge to conduct the examination or to be present while counsel examines. This statement is dictum, and its application must depend on the circumstances of the case. It is certainly the function of counsel to make the challenge and to support it by evidence when the appearance or conduct, or both, of the witness do not make the incompetence obvious.

*Same—Cross-examination:* In a condemnation proceeding where the hearing is before a commission the adversary is entitled to cross-examine witnesses who have testified to the amount of compensation to be awarded; and it is serious error for the commission to prevent

160. John A. Johnson & Sons, Inc. v. United States, 229 F.2d 713 (6th Cir. 1955).
161. Louisville & N.R.R. v. Farmer, 220 F.2d 90 (6th Cir. 1955).
162. Henderson v. United States, 218 F.2d 14 (6th Cir. 1955).

cross-examination as to the particular items involved in that amount. Where such an error occurs and the award is confirmed by the district judge, a reversal is required.[163] While the trial tribunal has a large discretion in regulating the scope of cross-examination, its discretion does not cover denial of all cross-examination on so important an issue.

TRIAL

*Motions during Trial—Dismissal without Prejudice:* The Tennessee state practice permits a plaintiff to dismiss without prejudice at any time before the jury retires. This does not obtain in the United States district court, where rule 41(a)(2) governs. A district court judge may make an order dismissing without prejudice conditioned upon plaintiff's payment of expenses incurred to date and upon his compliance with an already served notice to take his deposition. On his failure to comply the judge may properly order and have entered a judgment of dismissal with prejudice.[164]

*Jurors—Competency—Challenge:* A person is not incompetent to sit upon a jury trying accused on a charge of having received stolen goods, merely because he had been a member of the jury which tried accused's co-indictee for stealing, where it appears that there was no evidence at the prior trial of the receipt by another of the goods which had been stolen by the co-indictee. Furthermore, accused had interposed no challenge to the juror, and it is immaterial that accused's counsel was under the erroneous impression that the trial judge, after some preliminary questioning of the juror, had ruled him competent.[165] Counsel cannot, it seems, be too often warned of the necessity of having the record show what he understands to have been the ruling of the court.

*Charge to Jury:* The court has been called upon to reaffirm the generally accepted rules governing objections to the accuracy or sufficiency of the judge's instructions to the jury. A correctly phrased request to charge is properly denied if the matter is adequately covered in the general charge, which must be considered as a whole and not in isolated parts. A request which is not strictly accurate is properly disregarded.[166] But instructions which are inconsistent on a material point, or which in a criminal case ignore a defense supported by evidence, or which assume as proved a fact not established by the evidence, constitute reversible error.[167]

*Same—Exceptions to Charge:* Under rule 51 exceptions to the charge

163. United States v. 12.3 Acres of Land, 229 F.2d 587 (6th Cir. 1956).
164. Stern v. Inter-Mountain Telephone Co. 226 F.2d 409 (6th Cir. 1955).
165. Winer v. United States, 228 F.2d 944 (6th Cir. 1956).
166. Louisville & N.R.R. v. Farmer, 220 F.2d 90 (6th Cir. 1955); Lazarov v. United States, 225 F.2d 319 (6th Cir. 1955); Southern Ry. v. Jones, 228 F.2d 203 (6th Cir. 1955).
167. Smith v. United States, 230 F.2d 935 (6th Cir. 1956).

not taken before the jury retires are ineffective and will be disregarded.[168] But the rule is satisfied if by argument of counsel and colloquy with the judge, the objections are made clear,[169] or if the court has informed counsel that no additional objection need be interposed because proper notation had already been made.[170]

*Verdict—Sufficiency:* The United States courts apply to cases tried in Tennessee the settled Tennessee rule concerning a general verdict for the plaintiff where the declaration contains several counts. If one count is good and the evidence justifies a verdict for plaintiff upon that count, a general verdict for plaintiff is good and judgment is properly entered thereon.[171]

NEW TRIAL

*Grounds for—Misconduct of Counsel:* In *Henderson v. United States*[172] the majority of the court, speaking in general terms as to permissible partisanship and vigor in the prosecutor's address to the jury, refused to characterize his conduct as reversible misconduct. Judge McAlister, dissenting, quoted portions of counsel's speech in which he emphasized his own firm belief in the guilt of accused and asserted his unwillingness ever to prosecute unless he was convinced of defendant's guilt. Unless the usual assertions concerning the obligation of counsel to refrain from injecting his personal opinion upon vital issues are mere pious exhortations, it is difficult to disagree with Judge McAlister's dissent.

*Same—Prejudicial Publicity:* In *Briggs v. United States*[173] the trial judge during the trial issued bench warrants charging several witnesses with perjury who had given testimony contrary to statements previously made to F.B.I. agents. This was given much publicity in local newspapers access to which the jurors had, for they were permitted to separate during each recess. When defendant's counsel moved for a mistrial, the judge suggested that counsel question the jurors as to whether they had read, and been influenced by reading, the published accounts; counsel rejected the suggestion. On appeal, after denial of a motion for a new trial, the court held that the judge, rather than counsel, should have taken steps to ascertain what effect the publication had, and reversed the judgment of conviction.

*Same—Prejudicial Conduct of Judge:* At the opening of the trial the accused requested that counsel, who had been appointed by the judge, be withdrawn. The judge in the presence of the panel from which the petty jurors were to be drawn stated that the appointee was

168. Southern Ry. v. Jones, 228 F.2d 203 (6th Cir. 1955).
169. Louisville & N.R.R. v. Farmer, 220 F.2d 90 (6th Cir. 1955).
170. Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955).
171. *Ibid.*
172. 218 F.2d 14 (6th Cir. 1955).
173. 221 F.2d 636 (6th Cir. 1955).

one of the best, a former United States attorney, that he would represent accused in every honorable way, and would refuse to represent him in a dishonorable way, if accused wanted such representation; and that the appointee knew much more about a lawsuit than accused, though the accused may have had some experience. The court, on appeal after conviction, held that the statement was highly prejudicial, carrying an implication that accused had previously been a defendant, and that, since the case was a close one on the evidence, the judgment must be reversed.[174]

*Same—Receipt of Perjured Testimony:* A witness gave highly prejudicial testimony against accused. On recall he recanted and confessed that it was entirely false. Thereupon the judge ordered the original testimony stricken but did not grant a mistrial. The court on appeal held that it was impossible to eradicate the prejudicial effect of the false testimony by striking it, and ordered a new trial.[175]

### APPEAL AND ERROR

*What is Appealable—Order Granting New Trial:* At common law an order granting or refusing a new trial in a civil action was not appealable and was not even subject to review on writ of error from the judgment entered after disposition of the motion. The motion and ruling were not part of the common law record nor could they be embodied in a bill of exceptions. An order granting a new trial makes no final disposition of the litigation and is almost universally said not to be appealable in the absence of statutory authorization. Nevertheless, in *Turner v. United States*,[176] the court seems to have entertained a motion for a new trial and to have been content with treating the rule as to appealability as identical with the rule as to reviewability, namely, that the judge's ruling will be reversed only for abuse of discretion.

*Same—Order Refusing to Vacate Sentence:* An order refusing to vacate sentence on the ground that the acts charged in the indictment do not constitute a violation of the specified statute is not appealable. This point could and should have been raised on appeal from the judgment of conviction.[177]

174. Chalupiak v. United States, 223 F.2d 522 (6th Cir. 1955).
175. Snipes v. United States, 230 F.2d 165 (6th Cir. 1956).
176. 229 F.2d 944 (6th Cir. 1956).
177. Fooshee v. United States, 223 F.2d 261 (6th Cir. 1955).