Vanderbilt Law Review

Volume 8
Issue 5 *Issue 5 - August 1955*

Article 13

8-1955

Procedure and Evidence -- 1955 Tennessee Survey

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PROCEDURE AND EVIDENCE— 1955 TENNESSEE SURVEY

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PLEADING

Demurrer: Demurrers are not favored in Tennessee. The pleading to which a demurrer is interposed is construed most favorably to the pleader. For the purpose of determining the sufficiency of a pleading all properly pleaded allegations are upon demurrer taken to be true; in the usual phrasing, they are said to be admitted. Although Tennessee courts, like all others, declare that a demurrer does not admit a conclusion of law, they sometimes let it come perilously close to doing so. Thus, in an action by a bailee against his bailor for failure to return chattels in the condition in which they were bailed, an allegation that the failure was "the direct and proximate result of defendant's breach of duty" was a sufficient allegation of negligence.[1] Perhaps the result is due to the circumstance that the facts were within the peculiar knowledge of the bailee. But where the plaintiff sets out the facts of cohabitation with a man, now deceased, as man and wife and recognition of them as such by their friends and the public at large, the allegation that plaintiff is the widow of the deceased and "entitled to all the rights in his estate allowed widows of decedents by Tennessee Law" is a bare conclusion of law and is not admitted by demurrer.[2]

Where a party relies upon a written instrument as the basis of his claim or defense, he must make profert thereof as at common law, but the phrase, "here to the court shown," constitutes profert, although the instrument is not produced or tendered.[3] And when oyer is demanded and the instrument is filed, the situation is exactly the same as at common law. Hence, where a plaintiff in a divorce action sets down for argument as to its sufficiency a plea in which profert and oyer of a writing were made, the procedural effect is the same as if the instrument had been set forth at length in the plea and a demurrer had been interposed to the plea.[4]

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1. Jones v. Allied Am. Mut. Fire Ins. Co., 274 S.W.2d 525 (Tenn. App. E.S. 1954).
2. Crawford v. Crawford, 277 S.W.2d 389 (Tenn. 1955).
3. Jones v. Allied Am. Mut. Fire Ins. Co., 274 S.W.2d 525 (Tenn. App. E.S. 1954).
4. Moore v. Moore, 273 S.W.2d 148 (Tenn. 1954).

Theory of Pleading: In some code states the doctrine of theory of pleading operates somewhat like the writ under the common-law formulary system. Each count must be construed as having a single theory upon which the plaintiff must base his cause; and the sufficiency of the pleading and the scope of the evidence admissible and requisite for recovery are determined upon that theory. Current Tennessee decisions illustrate the application of an analogous concept. Where the plaintiff's declaration alleges facts showing a breach of contract with consequential injuries to plaintiff's person, the action is one for personal injuries and if the declaration discloses that the one-year period of the applicable statute of limitations has expired, the declaration is demurrable.[5] Of course this rationale is explainable as involving only interpretation of a statute which on its face is ambiguous.

If the theory of plaintiff's declaration is held to be that of an accounting for the profits of a dissolved partnership or joint venture, cognizable only in chancery, rather than an action at law for money due, and the action is brought in the circuit court, defendant's remedy is by demurrer for lack of jurisdiction. If he fails to demur, the circuit judge may try the cause according to the rules of chancery.[6]

If a plaintiff alleges that defendant was negligent in a specified particular in a situation in which the doctrine, res ipsa loquitur, is applicable, he is not thereby deprived of the advantages of that doctrine but the allegation is treated as surplusage.[7]

Where plaintiffs' declaration and evidence in support of it proceed on the theory that the occupants were passengers in the automobile in which they were injured, the fact that defendant's defense and evidence were to the effect that they were guests did not destroy the plaintiffs' theory or compel them to elect. Where the court under those circumstances and without objection submits the case to the jury on both theories in instructions to which the defendant does not object, defendant cannot complain of error.[8] Apparently the Court assumed that the evidence was such that the jury might find such conduct on the part of defendant as would justify a finding of such negligence as would warrant a recovery by guests. Query, was defendant's claim that plaintiffs were guests a mere argumentative denial that they were passengers, and his evidence mere affirmative evidence to support his denial? If so and he had objected to the instruction which would have permitted recovery on the guest theory, would the result have been different?

Plea in Abatement: In a criminal case objection that only one

5. Bland v. Smith, 277 S.W.2d 377 (Tenn. 1955).
6. Powell v. Bundy, 272 S.W.2d 490 (Tenn. App. M.S. 1954).
7. McCloud v. City of La Follette, 276 S.W.2d 763 (Tenn. App. E.S. 1954) (The opinion contains a thorough exposition of the doctrine and the conflict among the authorities concerning its procedural effect.).
8. McMahan v. McMahan, 276 S.W.2d 738 (Tenn. App. E.S. 1954).

witness appeared before the grand jury, if valid and sufficient, should be interposed by a plea in abatement; and such a plea comes too late after a plea of not guilty.[9]

The entering of a plea in abatement alleging facts which show lack of jurisdiction over the subject matter does not constitute a general appearance which gives the court jurisdiction over defendant's person,[10] nor does a general appearance as to one count in the complaint give the court jurisdiction over the person of defendant as to two other counts to which he has interposed pleas in abatement attacking the court's jurisdiction over the subject matter.[11] Although there are many cases in other jurisdictions holding that a demurrer for lack of jurisdiction of the subject matter confers jurisdiction over the defendant's person, they should have no pertinence in a state where a plea to the merits and a plea in abatement may be pleaded and tried together.

General Issue and Special Defense: An answer which sets up a special defense such as the statute of limitations admits the truth of all other well-pleaded allegations which are not elsewhere denied in the answer.[12] The general issue has the same effect under the Tennessee code as at common law in the usual case, but, the law in Tennessee with reference to pleading the general issue and special defenses is in some confusion.[12a] It is entirely clear, however, that if a defendant who has pleaded the general issue is required to plead specially under section 8767, his plea of general issue becomes totally ineffective, and he must deny specifically each substantive allegation of the complaint upon which he desires to take issue.[13]

This requirement of special pleading does not change the settled rule that a defendant need not allege specially facts which constitute an argumentative denial. Thus, under a specific denial of the averment that water damaging plaintiff's premises came from defective pipes on premises occupied by defendant, defendant is entitled to prove that the water came from a broken pipe in the street adjacent to plaintiff's premises.[14] But, of course, an answer which sets up a specific affirmative defense will not permit reliance upon a distinctly different excuse or justification. For example, in a workmen's compensation case, a plea that defendant had offered to furnish plaintiff such further medical attention as he desired will not authorize reliance upon the defense that payments of compensation were sus-

9. Walker v. State, 273 S.W.2d 707 (Tenn. 1954).
10. Hobbs v. Lewis, 270 S.W.2d 352 (Tenn. 1954).
11. Forgey v. Wallin, 270 S.W.2d 342 (Tenn. 1954).
12. Alsup v. Travelers Ins. Co., 268 S.W.2d 90 (Tenn. 1954).
12a. Morgan, *Procedure and Evidence*, 7 VAND. L. REV. 895, 896 (1954).
13. East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591 (Tenn. App. E.S. 1954).
14. Gerwin v. American News Co., 270 S.W.2d 354 (Tenn. 1954).

pended because of plaintiff's refusal to accept the medical services required by statute to be furnished.[15]

Amendment: An amendment to a bill in chancery germane to the purposes of the original bill is properly allowed by the chancellor in the exercise of his discretion. His ruling will be reversed only for abuse of discretion. Thus, in an action by the state on the relation of preferred stockholders and others for the dissolution of a corporation and an accounting by its officers and directors, an amendment alleging that the defendant officers had wrongfully caused to be issued to themselves certificates of preferred stock was rightly permitted.[16]

On the other hand, a trial judge is not only authorized but is required to refuse an amendment which introduces a new cause of action, even where it arises out of the same transaction or subject as the original claim, if the new cause could not have been properly included in the original complaint.[17] But where the facts giving rise to the cause of action are the same in both the original and in the amended complaints and the amendment merely substitutes as parties plaintiff the persons substantively interested for a representative not legally authorized to appear for them, it is reversible error to refuse to allow the amendment even after the statutory period of limitations has expired upon the cause. Consequently, when in a wrongful death action a person appointed as administrator of decedent by a surrogate court of New York instituted the action within one year after the wrongful act causing the death, and the parents, who were the beneficiaries of the decedent under the statute, moved to amend the complaint by substituting themselves as plaintiffs, the trial judge was required to allow the amendment.[18]

Equity Pleading—Demurrer or Equivalent: On demurrer to a bill of review of a decree for plaintiff from which the then defendant, now petitioner, did not appeal or file a writ of error, the chancellor considers only errors apparent on the face of the record, but not errors based on disputed issues of fact which may appear in the record of the original proceeding.[19] When plaintiff sets down a case for argument on bill and answer, all properly pleaded allegations in the answer are treated as on a demurrer, and this includes matter disclosed on plaintiff's demand of oyer of writings of which profert is made in the answer. Thus where in a divorce action the proffered writings were the documents in the judgment roll in a divorce action in a sister state including the decree of divorce, plaintiff's attack upon the decree must be limited to matter appearing upon the

15. Jones v. Corder, 268 S.W.2d 359 (Tenn. 1954).
16. State v. Breedlove, 270 S.W.2d 582 (Tenn. App. E.S. 1954).
17. Forgey v. Wallin, 270 S.W.2d 342 (Tenn. 1954).
18. Gogan v. Jones, 273 S.W.2d 700 (Tenn. 1954).
19. Todd v. Baugh, 273 S.W.2d 2 (Tenn. 1954).

face of those documents.[20] This does not mean, however, that defendant's allegations are to be taken as true in so far as they are conclusions of law such as his deductions as to the meaning of words in a written contract or the legal effect thereof.[21]

Same—Effect of Decision on Demurrer: On demurrer to a bill or complaint which raised the decisive issue on the merits whether an instrument was a valid deed or an invalid will, the chancellor had given judgment for the demurrant on the ground that it was an invalid will; the Supreme Court in reversing for the reason that the instrument was a valid deed would not remand with leave to the defendant to interpose the defense that the grantor was physically and mentally incapable of executing the deed, thus shifting to an entirely different theory.[22]

Same—Answer—Special Defense: Under the rules of equity practice a defendant who has interposed one special defense may not at the trial rely upon another which he has not pleaded. This is true in workmen's compensation litigation.[23]

Same—Counterclaim: Since the chancellor has no jurisdiction over actions for unliquidated damages to person or property, he may not entertain a counterclaim or cross action for such damages. For example, where plaintiff is seeking an injunction prohibiting defendant's interference with plaintiff's building operations on premises conveyed to it by defendant and requiring defendant to vacate the premises, a counter-claim or cross-bill for damages for injury to defendant's health and business is subject to demurrer.[24]

Arrest of Judgment: The rules applicable in a civil action govern pleading in a proceeding under a warrant charging violation of a municipal ordinance. Judgment of conviction will therefore be arrested on motion where the warrant is void. On appeal from a judgment of conviction under such a warrant after denial of a motion in arrest, the judgment will be reversed.[25] But where a complaint imperfectly states a cause of action for the recovery of a share of money collected as commissions on sales of real property in that it is so lacking in precision and fullness that it might have been subject to demurrer, judgment upon a verdict for plaintiff will not be arrested. Such defects are cured by verdict.[26]

PARTIES

Proper or Indispensable: In an action for divorce in which de-

20. Moore v. Moore, 273 S.W.2d 148 (Tenn. 1954).
21. Petty v. Sloan, 277 S.W.2d 355 (Tenn. 1955).
22. Howell v. Davis, 268 S.W.2d 85 (Tenn. 1954).
23. Jones v. Corder, 268 S.W.2d 359 (Tenn. 1954).
24. Greenville Cabinet Co. v. Hauff, 273 S.W.2d 9 (Tenn. 1954).
25. Robinson v. Memphis, 277 S.W.2d 341 (Tenn. 1955).
26. Powell v. Bundy, 272 S.W.2d 490 (Tenn. App. M.S. 1954).

fendant's interest in a parcel of real estate was attached the court decreed that all the right, title and interest of defendant in the attached land be divested out of the defendant and vested in complainant for her natural life and after her death in her child. The legal title to the land was in a trustee and defendant's interest was equitable. In a later action for a declaratory judgment, objection was made that the trustee and the other beneficiaries of the trust were indispensable parties to the proceeding to dispose of the attached property in the divorce action; the court held that they would have been proper parties but were not indispensable.[27] This is in accord with practically all the judicial authorities and text-writers.

Misjoinder: A single published statement which libels two individuals creates two causes of action, one for each of them in which the other has no interest. If the two join as plaintiffs, a motion to dismiss for misjoinder of parties plaintiff is properly granted.[28] Obviously the better ground of motion is misjoinder of causes of action, and most of the court's opinion in the case cited deals with that defect. In many states misjoinder of parties is ground only for a motion to dismiss the misjoined party, but misjoinder of causes of action is ground for demurrer. In the instant case one of the defamed persons was misjoined as a plaintiff in the action by the other.

REMEDIES

Certiorari—Common-Law Writ: The Supreme Court in the *Hoover Motor Express Company* case[29] held that the common-law writ of certiorari could not be constitutionally enlarged so as to permit a Tennessee court to review as in an equity appeal any decision of a nonjudicial tribunal. Consequently, in reviewing a decision of the Railroad and Public Utilities Commission, the chancellor has no power to review the evidence except to determine whether the Commission has acted beyond its jurisdiction or has acted arbitrarily or fraudulently or illegally.[30] The same limitations apply to judicial review of decisions of a beer board.[31] The common-law writ will be granted to review a decision of an inferior judicial tribunal to determine whether there has been an absence or excess of jurisdiction or a failure to proceed according to the essential requirements of the law in the sense that the decision is fundamentally illegal rather than merely irregular. For this reason it was held that certiorari could not

27. Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954).
28. Smith v. Archer, 270 S.W.2d 375 (Tenn. 1954).
29. Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm'n, 195 Tenn. 593, 261 S.W.2d 233 (1953).
30. Louisville & N. R.R. v. Fowler, 271 S.W.2d 188 (Tenn. 1954); Gulf, M. & O. R.R. v. Railroad & Pub. Util. Comm'n, 271 S.W.2d 23 (Tenn. App. M.S. 1954).
31. Evers v. Hollman, 268 S.W.2d 97 (Tenn. 1954). *Cf.* Black v. Nashville, 276 S.W.2d 718 (Tenn. 1955).

properly be granted where the chancellor had ruled that a second mortgagee was not entitled to enjoin the foreclosure of a first mortgage and to require the first mortgagee to credit upon the first mortgage debt receipts from insurance for loss by fire of part of the mortgaged property, rather than upon unsecured obligations of the mortgagor, although he had dismissed the second mortgagee's action except in so far as it sought a personal judgment against the mortgagor.[32]

Injunction: An injunction is not available as a remedy to prevent an appeal from a decision of a circuit court which has reversed a decision of a beer board and nullified the board's revocation of a license.[33] It seems too obvious for argument that an inferior court cannot enjoin a litigant from exercising a statutory right to appeal.

Habeas Corpus: It is well settled that a person who is being held in prison upon a sentence imposed by a court having no jurisdiction to impose it is entitled to release on habeas corpus. In *Gosnell v. Edwards*[34] the problem of jurisdiction was presented in an unusual situation. The sentence was imposed under a statute which at that time was judicially interpreted as authorizing the court to impose it. By a later decision of the Supreme Court this interpretation was held to be erroneous. The accused sought habeas corpus on the ground that the statute must always have had the same meaning and that the later decision operated retroactively to deprive the court of its apparent jurisdiction. The Supreme Court held that the later interpretation did not affect the validity of sentences imposed under the earlier interpretation. It is suggested that such a decision furnishes food for thought for those theorists who insist that the courts do not make, but merely interpret, the law.

Interpleader: A decree that a party interplead does not dispose of his ultimate right to the property or obligation in issue. Consequently when such a decree is entered pro confesso and a party has lost his right to have it reviewed because of his failure to except and to appeal, he may in the further proceedings under the decree assert any claim that he may have under the terms of the decree.[35]

PRÉSUMPTIONS

The confusion reflected in the judicial opinions of the various courts in other jurisdictions concerning the meaning of the word and the procedural effect of a presumption, when and if defined, is illustrated in current Tennessee decisions.

"Conclusive Presumption": Notwithstanding exhortations by commentators and by many careful jurists, the term with or without

32. Wattenbarger v. Tullock, 271 S.W.2d 628 (Tenn. 1954).
33. Black v. Nashville, 276 S.W.2d 718 (Tenn. 1955).
34. 277 S.W.2d 444 (Tenn. 1955).
35. Gamble v. Waters, 274 S.W.2d 3 (Tenn. 1954).

qualifying adjectives continues to have no certain content. No doubt a so-called conclusive presumption denotes a rule of substantive law. And it is in this sense that the Court of Appeals used the term when it declared that as between conflicting judicial pronouncements it preferred to accept those which held that "the presumption of revocation" of a will of a married person "is conclusive upon the happening of two events; divorce and property settlement."[36]

"Res ipsa loquitur": Some commentators insist that wherever this doctrine is applicable, even when its effect is merely to make defendant's negligence a question for the jury, it should be held to create a presumption. Their theory is that while the happening of the accident would not ordinarily justify an inference of negligence, an artificial effect may be given to it by the jury because the defendant has peculiar knowledge of the facts and peculiar means of access to the pertinent evidence. Other commentators disagree on the ground that the facts which make the doctrine applicable are always such that any trier of fact would be justified in inferring negligence on the part of defendant. In *McCloud v. City of LaFollette*[37] Judge Hale, relying upon a previous opinion of Judge Felts, made a thorough exposition of the Tennessee view, pointing out that in the usual case the doctrine operates only to make the question of negligence one for the jury, but that in some situations it has the further effect of requiring defendant to come forward with evidence of due care, and in still others it may put on him the burden of persuading the jury that he exercised due care. In the instant case it was shown that a truck with a water tank trailer attached, which was owned and in the exclusive control of defendant, had run down "a pretty steep grade" on a city street and had crashed into plaintiff's building. The trial judge had charged that these facts "afforded reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Certainly this was sufficiently favorable to the defendant.

Procedural Effect—Generally: (1) In answering arguments that no relevant evidence upon an issue has been introduced, the court answers with the assertion of the existence of a presumption of regularity and compliance with the law in official action by public officers.[38] (2) The phrasing as to the requirement for dissipating the effect of a presumption varies. The presumption that an owner or occupant of premises on which whiskey is found owns or possesses the whiskey persists (a) in the absence of any evidence to the contrary,[39] (b) until credible

36. Rankin v. McDearmon, 270 S.W.2d 660 (Tenn. App. W.S. 1953).
37. McCloud v. City of La Follette, 276 S.W.2d 763 (Tenn. App. E.S. 1954).
38. McMahan v. McMahan, 276 S.W.2d 738 (Tenn. App. E.S. 1954) (traffic control signs). *Cf.* State *ex rel.* Cope v. Davidson County, 277 S.W.2d 396 (Tenn. 1955) (presumption that county trustee will do his duty).
39. Lampley v. State, 268 S.W.2d 572 (Tenn. 1954).

evidence is introduced to rebut it[40] or (c) until overcome by evidence.[41] The presumption that an assessment of taxes is valid, regular and correct endures until overcome by satisfactory evidence to the contrary.[42]

Same—Statutory Presumption: Chapter 202 of the Public Acts of 1953 creates a rebuttable presumption of an accused's intoxication if his blood is found to contain .15 per cent (by weight) of alcohol. In *Fortune v. State*,[43] the Supreme Court said: "We think that what the Legislature meant by this presumption was that when it was shown by this scientific test that the accused had more than the .15 per cent of alcohol in his blood that then there was a prima facie case against the accused established which the accused might rebut by introducing other evidence. Then when this is done the presumption created by the chemical or scientific test is to be considered by the jury and court along with other evidence introduced as to whether or not the accused is intoxicated." This seems to mean that if the basic fact that his blood contains more than .15 per cent alcohol is established, the accused has the burden of producing evidence to the contrary. Certainly the basic fact has logical value as tending to prove the presumed fact and thus satisfies the test of constitutionality laid down by Mr. Justice Roberts in the *Tot* case.[44] Furthermore, the presumption does not vanish when the contrary evidence is introduced; its compulsory effect is gone but the presumption itself, as distinguished from the basic fact, is to be considered with the other evidence. In this, the opinion is contrary to the great weight of authority but is in accord with prior Tennessee decisions, in which the court indicated that it was not impressed by arguments to the contrary, however technically correct their reasoning might be.[45]

In *Jones v. Agnew*[46] the Court of Appeals carefully distinguished between the effect of the evidence which had logical value as tending to prove the presumed fact and that of a presumption. The court stated that the former continued throughout the case; it was never to be eliminated from the consideration of court and jury, but that the "statutory presumptions of agency created by proof of registration [of an automobile] disappear when positive evidence of the ownership and operation of the automobile is introduced, and testimony may not be disregarded arbitrarily or capriciously, and the testimony of a witness, who is not discredited in any of the modes recognized by

40. Evans v. State, 270 S.W.2d 186 (Tenn. 1954).
41. Veal v. State, 268 S.W.2d 345 (Tenn. 1954).
42. Lee v. Harrison, 270 S.W.2d 173, 177 (Tenn. 1954).
43. 277 S.W.2d 381, 383 (Tenn. 1955).
44. Tot v. United States, United States v. Delia, 319 U.S. 463 (1943).
45. See 6 VAND. L. REV. 1142 (1953); Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 612-14, 130 S.W.2d 85 (1939), 16 TENN. L. REV. 245 (1940).
46. 274 S.W.2d 821 (Tenn. App. W.S. 1954).

law, must be accepted as true."[46a] It held that the evidence had dissipated the presumption but that sufficient evidence had been introduced to justify the jury in finding the requisite agency, and that the trial judge correctly denied a motion by defendant for a directed verdict. The Supreme Court in denying the defendant's petition for certiorari pointed out that the evidence was not only sufficient to justify a finding of the requisite agency but also that the testimony of lack of authority came from witnesses whose "testimony was contradicted as to some material matters."[47] This case, then, deals with a presumption the basic fact of which does not justify an inference of the presumed fact, and the decision is consistent in result with those cases in other jurisdictions which hold that the evidence to dissipate a presumption must be substantial,[48] as well as with the prior Tennessee decisions which give the presumption the force of evidence. But does the Court indicate that such evidence does not remove the compulsory effect of the presumption unless it is credited by the jury?[49]

BURDEN OF PROOF

Definition: The phrase, burden of proof, is frequently used to denote either the burden of producing, or the risk of not producing, sufficient evidence to avoid a directed verdict, or the burden of persuading, or the risk of not persuading, the jury to make the desired finding. The Tennessee courts rarely if ever use the phrasing of risk. They recognize so-called degrees of persuasion which in civil cases are described in terms of the kind or amount of evidence required. In the ordinary civil case the party bearing the burden or risk must prove or establish the truth of his proposition by a preponderance of the evidence and in the unusual case by clear and convincing evidence. But in a criminal prosecution the state must convince the jury of defendant's guilt beyond reasonable doubt. The kind or quality of evidence is not specified; it is the state of mind of the trier that is emphasized. Whether the jurors will or can understand what is meant by the usual phrasing in civil cases is open to serious doubt. Where the litigant's proposition is that event X occurred, must he convince the jury in the usual case that it is more probable than not that it did occur or that it did in fact occur? If the latter, how can the result be different than in the unusual situation where clear and convincing evidence is required? And in any case how can a juror be convinced

46a. *Id.* at 823.
47. Jones v. Agnew, 825, 827 (Tenn. 1954).
48. See, *e.g.*, Pariso v. Towse, 45 F.2d 962 (2d Cir. 1930) (applying the New York doctrine).
49. Note, 5 A.L.R.2d 198-249 (1948). This Note collects many cases dealing with evidence to overcome the presumption or inference of agency of the driver of a motor vehicle. It is useful as a collection of pertinent cases but of little or no value as an aid to intelligent analysis.

by evidence which is not convincing? The conflicts in the judicial opinions as to what state of mind of the jury these various phrasings require should amount to a demonstration of the necessity of employing other expressions or of accompanying the usual words with clarifying explanations. But this is rarely done.[50] Judge Felts in *Greene v. Greene*[51] explains that to "set up a resulting trust by parol requires a greater degree of proof than a mere preponderance of the evidence. The evidence must be clear and convincing."

It is often said in Tennessee opinions that a defendant who has been convicted of a criminal offense is presumed to be guilty when he is a plaintiff-in-error. What is meant is that he has the burden of convincing the Supreme Court (often said to be the burden of proving) that the verdict is contrary to the preponderance of the evidence, although at times this is inaccurately stated as the burden of showing his innocence by a preponderance of the evidence.[52]

Evidence

Illegally Obtained: It is settled law in Tennessee that evidence secured in violation of the privilege against unlawful search and seizure is inadmissible. Current litigation therefore concerns the necessity of obtaining a search warrant or the validity of the warrant used in the particular search. Thus evidence was held to have been secured by unlawful search where the warrant under which it was seized described the place to be searched as a specified building, which in fact contained 12 or more rooms, occupied by various persons, but did not designate the room which was searched or name the person who occupied the room.[53]

Same: Fingerprints: Fingerprints secured from defendant while detained under a void warrant without first taking him before a committing magistrate are admissible in evidence. There is no statute in Tennessee requiring that a person arrested by an officer be promptly taken before a committing magistrate, so that the doctrine of *McNabb v. United States*[53a] has no application. Thus the taking of the fingerprints and their reception in evidence did not violate defendant's privilege against self-incrimination.[54]

Evidence of Other Crimes: Where an indictment charges a defendant with a specific act of lewdness on a definite date and "on divers other

50. For example, *compare* Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N.W. 1077 (1906), *with* Sullivan v. Nesbit, 97 Conn. 474, 117 Atl. 502 (1922), and both *with* Sargent v. Massachusetts Acc. Co., 307 Mass. 246, 29 N.E.2d 825 (1940).

51. 272 S.W.2d 483, 488 (Tenn. App. M.S. 1954).

52. Lampley v. State, 268 S.W.2d 572 (Tenn. 1954). See Brewer v. State, 187 Tenn. 396, 399, 215 S.W.2d 798 (1948).

53. Worden v. State, 273 S.W.2d 139 (Tenn. 1954).

53a. 318 U.S. 332 (1943).

54. East v. State, 277 S.W.2d 361 (Tenn. 1955).

occasions," the state must elect the act on which it seeks conviction. The election need not be made until the evidence is closed. Evidence of the other acts is admissible as tending to prove the act charged.[55] The reception of this evidence seems to be contrary to Rule 311 of the Model Code of the American Law Institute and Rule 55 of the proposed Uniform Rules of Evidence. These provide that evidence that a person committed a crime on a specified occasion is inadmissible as tending to prove that he committed a crime on another occasion if it is relevant solely as tending to prove his disposition to commit such a crime. Of course, it could be argued in the instant case that if a sufficient number of instances were shown it would tend to prove a habit, or, if the circumstances were the same in all the incidents, a scheme or plan; but the court laid down no such conditions of admissibility. Allowing the prosecution to delay election until all its evidence was in made the procedure especially damaging and vulnerable to the reasons for the exclusionary rule. It must be said, however, that the rule of the Model Code is in some jurisdictions not accepted where the offense charged is abnormal sexual behavior.

Character Evidence: See the topic, Witnesses, *infra.*

Hearsay—Dying Declaration: The orthodox rule is accepted in Tennessee that the question whether the dying declarant realized that death was speedily impending is for decision by the judge. The statement of the declarant, urging immediate action, that he was going to die if they didn't do something for him, taken in connection with evidence of the appearance and serious character of the wound, justified the conclusion that he realized the imminence of death. The trial judge's ruling will not be reversed except for manifest error.[56]

Same—Confession: A confession made without improper inducement to an assistant prosecuting attorney is not rendered inadmissible because defendant was not warned that he need not make any statement. The statute requiring such a warning by a committing magistrate has no application to inquiries by an attorney general.[57]

Same—Declaration Against Penal Interest—Plea of Guilty Followed by Judgment of Conviction: In *Inter-City Trucking Company v. Mason & Dixon Lines,*[58] a servant of defendant testified that he had pleaded guilty and been convicted of stealing the goods in question. The court in dealing with this evidence thought it advisable to consider the admissibility of a plea of guilty when offered not against the person making the plea and the admissibility of the record of conviction when offered against the conviction in a civil action. It indicated that it agreed with the decisions holding such evidence in-

55. Cox v. State, 270 S.W.2d 182 (Tenn. 1954).
56. Crawford v. State, 273 S.W.2d 689 (Tenn. 1954).
57. Hickson v. State, 270 S.W.2d 313 (Tenn. 1954).
58. 276 S.W.2d 488 (Tenn. App. E.S. 1954).

admissible. Evidence of the plea of guilty, wherever relevant, is everywhere admissible when offered against the person who made it if he is a party to the action in which the evidence is offered. If offered against a third party, it is a declaration against penal interest and such a declaration is by the vast majority classed as inadmissible hearsay. Furthermore one of the requisites of admissibility of a declaration against interest is unavailability of the declarant. Here the declarant was available, competent and compellable as a witness with no privilege. As to the record of conviction, no court has ever suggested that it would be admissible against any person except the convict as evidence that he committed the crime of which he was convicted. Since the testimony of the witness was interpreted by the court as a statement that he was guilty and had pleaded guilty and had been convicted, any error in receiving the judgment record in the criminal case was obviously harmless.

Same—Declaration against Proprietary Interest: Statements by a declarant that he and his wife were joint owners of personal property in his possession or registered in his name and were operating the farm on which the property was used as a joint enterprise were admissible in an action by the wife against the declarant's administrator. The court did not specify upon what theory the evidence was properly admitted; but it is obvious that the statements were declarations against interest and vicarious admissions of a predecessor in interest.[59]

Same—Res Gestae: The courts continue to use the term, res gestae, to describe utterances made under stress of nervous excitement and substantially contemporaneously with the event or condition which they explain or describe. Distinguished judges have condemned its use. For example, Mr. Justice Holmes once admonished counsel: "The man that uses that phrase shows that he has lost temporarily all power of analyzing ideas." Judge Learned Hand in *United States v. Matot*[60] declared that "if it [res gestae] means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms." In *Noe v. Talley*[61] Judge McAmis held admissible as part of the res gestae statements of a woman fatally injured in a collision between her car and a truck, made while she "was still enmeshed in the wrecked vehicle and suffering such pain and anxiety as to meet the ultimate test of spontaneity and preclude premeditation or design." This indicates the adoption of Wigmore's test of spontaneity. These circumstances bring the utterances also within the Thayer theory which makes admissible statements made substantially contemporaneously with the event at the scene and while evidences of its occurrence are there present.

59. Oliphant v. McAmis, 273 S.W.2d 151 (Tenn. 1954).
60. 146 F.2d 197, 198 (2d Cir. 1944).
61. 274 S.W.2d 367 (Tenn. App. E.S. 1954).

Same—Testator's Statements: In *Nicely v. Nicely*[62] the issue was whether a will proved to have been written entirely in the hand of the testatrix, containing her name but not signed at the conclusion, was intended by her as her last will. The court held admissible evidence of declarations that she intended to make a will, that she was writing a will, that she had made a will and had put it where the named beneficiaries would find it. Post testamentary statements when offered for the sole purpose of proving the testator's state of mind, whether directly asserting a then existing state of mind or asserting the existence of facts which are a basis for an inference to that state of mind, are admissible by the overwhelming weight of authority, although inadmissible by the orthodox rule if offered to prove the execution or content of the will.

Authentication of Writings: A written report of an audit made by the witness assisted by a third person not called as a witness and verified as true and correct by the witness in his testimony is sufficiently authenticated to be admissible. Each of multiple copies made simultaneously by the use of carbons is an original and when verified as such is likewise sufficiently authenticated.[63]

Opinion—Tests for Alcoholic Content of Blood: The qualification of a witness to express an opinion as an expert is to be decided by the judge. The testing of body fluids or breath of a person to determine the percentage of alcohol in his blood is a process which requires special skill and training, and is consequently a proper subject for expert testimony. Considerations of practical police administration and the development of the instrumentalities and processes for such testing make it justifiable and reasonable to entrust to the trial judge the decision whether a police officer or technician has had the requisite training and experience in making such tests to qualify him to testify as to the taking of the samples and the results of the process in a particular case. The Supreme Court of Tennessee has indicated its recognition of this fact and its intention to rule accordingly. Thus, if the instrument known as a drunkometer used in taking samples of breath is shown to have been accurate and the process of testing and analyzing to have been accurately performed, testimony as to the result will be admissible; without such a showing, it is inadmissible.[64]

Same—Opinion re ultimate issue: The courts continue to assert that evidence of opinion, expert or lay, upon an ultimate issue is inadmissible because to receive it would be to invade the province of the jury or "to supplant the jury by the witness." Thus testimony of an expert that the defect in the dam in question was caused not by de-

62. 276 S.W.2d 497 (Tenn. App. E.S. 1954).
63. State v. Stockton, 270 S.W.2d 586 (Tenn. App. E.S. 1954).
64. Fortune v. State, 277 S.W.2d 381 (Tenn. 1955).

fendant's blasting but by faulty construction was properly excluded.[65] The fallacy of this reasoning has been exposed by numerous commentators and by some judges. The opinion is merely evidence for the consideration of the jury; it no more invades the province of the jury than does the assertion of the witness in an action for assault and battery that defendant struck plaintiff or in a homicide prosecution that defendant stabbed decedent. There may be an argument of policy to support the exclusion generally, namely, that otherwise a trial might degenerate into a battle of opinion between partisan experts. But such an argument is applicable to evidence of opinion that the ultimate fact "could have been" due to specified matters, or of opinion as what causes would have produced the ultimate result.[66] And opinion evidence in this form is everywhere received.[67]

At times the limitation as to ultimate issue evidence seems to be ignored, as, for example, in *Dunn v. Ralston Purina Company*[68] in which the issue was whether the cause of the death of a horse was its having eaten spoiled feed. It was disputed whether the horse died of colic and whether, if so, the spoiled feed caused the colic. Testimony of an expert that the death was caused by colic was received, as was similar testimony that the feed "was apt to give a horse colic, and likely did cause the death of this horse." Was the fact of death by colic an ultimate question for the jury? Certainly without an answer to this question, the jury could not find for plaintiff. Is the danger avoided by the testimony that the feed "likely did cause" instead of "did cause"? The problem of defining "ultimate fact" in the application of this rule is as puzzling as defining the same rule in pleading under a code which forbids pleading evidence on the one hand and a conclusion of law on the other, and requires pleading ultimate facts.

Same—Weight: The weight to be given expert opinion is for the jury. Where the opinion is in conflict with the testimony of percipient witnesses, the jury may ordinarily prefer one over the other. In some instances the opinion may be reduced to mere speculation.[69] On the other hand the expert testimony may be conclusive, as, for example, upon the issue of the existence of a particular disease.[70] The opinion of two veterinarians that the spoiled feed eaten by a horse likely did cause its death constituted substantial evidence of the

65. East Tennessee Nat. Gas Co. v. Peltz, 270 S.W.2d 591, 606 (Tenn. App. E.S. 1954).
66. Compare the opinions in Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942) and Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942).
67. See Armstrong Const. Co. v. Sams, 270 S.W.2d 561, 563 (Tenn. 1954).
68. 272 S.W.2d 479 (Tenn. App. M.S. 1954).
69. East Tennessee Nat. Gas Co. v. Peltz, 270 S.W.2d 591, 606 (Tenn. App. E.S. 1954).
70. See McAuliffe v. Metropolitan Life Ins. Co., 93 N.J.L. 189, 107 Atl. 258 (1919); Note, 93 A.L.R. 471, 482 (1934).

cause of death.[71]

Parol Evidence Rule—Mistakes in the Writing: The parol evidence rule has no application to a writing which purports to be a record of what actually happened, even an official record, where the evidence as to what did happen is offered to prove that the record is false in fact. Accordingly, the records of a town council which recite that an ordinance was read and passed on two prior occasions and was finally read and passed at a third session are not conclusive, and parol evidence is admissible that it was not read or passed on either of the two prior occasions.[72]

Same—Interpretation: In interpreting restrictive covenants in a series of deeds in each of which the same persons were grantors to determine whether the covenants were binding upon the grantors as well as upon the grantees, parol evidence is admissible of all the circumstances, including the fact that the restrictions were imposed in accordance with a general building improvement or development plan of the subdivision in which the property conveyed was located.[73]

Same—Writing Ambiguous and Incomplete: Where a bill of sale which recited as the consideration *a deposit* of part of the purchase price and the balance to be paid in cash *upon receipt of the goods and chattels* contained nothing as to the date of delivery, but had the usual language "does hereby grant, sell and transfer," it was incomplete and ambiguous. Consequently parol evidence was admissible to show that the chattels constituted the equipment of a restaurant which was being replaced by new equipment without closing the place during replacement, and that delivery was to be made as the pieces of equipment were replaced. In the light of this evidence the writing was interpreted as calling for delivery upon replacement, and the seller's prayer for reformation of the contract was denied as unnecessary, but under the prayer for general relief the buyer was enjoined from prosecuting a replevin action for the equipment.[74]

Same—Collateral Agreements: Contemporaneous oral agreements inconsistent with the integrated document cannot be proved by parol and if proved are without legal effect. Thus, an agreement by a prospective grantee to buy designated real property in his name and that of another, who furnishes no part of the purchase price, is ineffective to make him a trustee for the other of any interest in that property conveyed to him by a deed in which he is the sole grantee. And he does not become a constructive trustee by reason of such an agreement even though his promise is supported by adequate consideration, unless the other has furnished the purchase price or a portion of it.[75]

71. Dunn v. Ralston Purina Co. 272 S.W.2d 479, 482 (Tenn. App. M.S. 1954).
72. Brumley v. Town of Greenville, 274 S.W.2d 12 (Tenn. App. E.S. 1954).
73. Owenby v. Boring, 276 S.W.2d 757 (Tenn. App. E.S. 1954).
74. Sky Chefs v. Pryor, 276 S.W.2d 485 (Tenn. App. E.S. 1954).
75. Greene v. Greene, 272 S.W.2d 483 (Tenn. App. M.S. 1954).

Collateral agreements not inconsistent with the integrated document are in some situations admissible and operative. The Restatement of Contracts recognizes only two such situations, (1) where there is a separate consideration for the agreement, and (2) where it is such as might naturally be made by parties situated as were the parties to the document. This latter category has obviously uncertain or flexible boundaries, and may easily include the agreement in *East Tennessee Natural Gas Co. v. Peltz.*[76] There the grantors in a conveyance of a right-of-way for the construction and maintenance of a gas transmission line over two of three contiguous parcels of land owned a third adjoining tract upon which they had built a large dam at great expense. The consideration paid for the right-of-way was nominal, $16.17, the deed for which expressly negatived any statement or representation modifying, changing or adding to its provisions. The parol agreement and representation was that the operations under the deed would not injure the dam and the grantee would be responsible if any injury did result. The evidence was held to be admissible and to justify a verdict for damages for injury to the dam.

Petty v. Sloan[77] presents a parol evidence problem in an unusual manner. The issue was the meaning of a lease of a hospital owned by Smith County and paid for from the proceeds of the sale of bonds of the county. The county was the lessor and a group of doctors were the lessees. Lessees agreed "to cooperate with all reputable doctors of Smith County in the operation of said hospital and to make available the facilities of said hospital for treatment of their patients." The case came before the chancellor on bill and answer. This raised the same question as if there had been a demurrer to the answer, which alleged:

> " 'Lessees agree . . . to make available the facilities of said hospital for the treatment of their patients' (i.e., patients of other doctors), was by the contracting parties intended as excluding not including, surgical operations, and was by them employed to effectuate such intent, and that it does fairly import and manifest and express such meaning, intent and purpose."[77a]

The court held that the construction of the contract was for the court, that it did not contain any technical expressions and that in the circumstances the word "treatment" should be given its ordinary meaning, which includes surgical treatment. The court in finding the intention of the parties does not determine what their state of mind was but what was their expressed intention when the language as here is "plain, simple and unambiguous."

It goes without saying that the allegation in the answer that the

76. 270 S.W.2d 591 (Tenn. App. E.S. 1954).
77. 277 S.W.2d 355 (Tenn. 1955).
77a. *Id.* at 357.

language used, "does fairly import and manifest and express such meaning and intent and purpose," is an unadulterated conclusion of law, and entitled to no consideration by the court. This leaves the question as to the effect of the allegation that the parties intended, and used the word "treatment" to express the intention, to exclude surgical treatment. Assuming that the parties had expressly so agreed, would the agreement have had any legal effect in this situation where the issue is interpretation, not reformation, of this provision in the lease? Certainly not if Section 230 of the Restatement of Contracts is accepted. Section 230 provides that the standard of interpretation is the meaning which would be attached to the writing "by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration (i.e. the document) other than statements by the parties of what they intended it to mean." Query, had defendants filed a cross-bill to reform the lease, would they not have been met by the contention that the reformed lease would be void as contrary to public policy because giving the lessees the right to operate a public hospital as a private enterprise?

JUDICIAL NOTICE

The current decisions dealing with judicial notice are ordinary applications of the rule dealing with matters of common knowledge. The court judicially knows that damage done by termites occurs not suddenly but gradually, that a hollow timber when struck gives off a hollow sound and that a hollow piece will puncture more easily than a solid one.[78] And in a criminal case tried in 1953 there is no need for evidence that a 1952 Chrysler sedan was worth more than $60.00 even when the grade of offense committed by theft of the sedan depends on its value.[79] But the accuracy of a specified drunkometer or of the tests made by its use is within the field of evidence and not judicially noticeable.[80]

WITNESSES

Limitation of Number—Character Testimony: It is well settled that when character of a party to an action is not a fact in issue on the merits but is merely the basis for an inference to his conduct in a specified instance, the trial judge may exercise his discretion to limit the number of witnesses to be called by either side to give evidence as to character. The Tennessee Court applied this rule and upheld the ruling of the trial judge in a prosecution for a minor offense.[81] It

78. Glassman v. Martin, 269 S.W.2d 908 (Tenn. 1954).
79. Stooksbury v. State, 274 S.W.2d 10 (Tenn. 1954).
80. Fortune v. State, 277 S.W.2d 381 (Tenn. 1955).
81. Shields v. State, 270 S.W.2d 367 (Tenn. 1954).

did not indicate the reasons except to imply that the value of such evidence was comparatively slight. The leading opinion is that of the late Mr. Justice Jackson in the *Michelson* case.[82] After commenting on the peculiarity of the accepted doctrine that requires the witness to speak in terms of reputation, which on analysis is his opinion of the opinion of the community derived from anonymous hearsay, he said: "To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora's box of irresponsible gossip, innuendo and smear."[82a] For such evidence the firm exercise of judicial discretion is not only justifiable but imperative.

Impeachment—Of Accused on Cross-examination: Generally speaking, an accused who takes the stand may be cross-examined like any other witness and may be asked as to instances of prior disgraceful conduct on his part, but he cannot be required to answer as to rumors or charges of such conduct. By becoming a witness he does not assert that his reputation is good. Consequently where an accused was charged with passing worthless checks, it was reversible error to permit counsel to ask and to compel accused to answer whether he had not been previously "indicted before for passing bad checks and that all [the indictments] were nolle prossed"; and whether "he had not been arrested on numerous occasions and sometimes indicted for such crimes as public drunkenness, affray and other crimes and each time had managed to get out of or get loose from such charges." It passes understanding how any reputable counsel could have considered himself justified in putting such obviously improper questions or on what possible theory the judge should have ruled that defendant must answer. The Supreme Court held that the judge "should have excluded these questions and told the jury not to consider them for any purpose."[83]

Impeachment of Character Witness by Cross-examination: For the sole purpose of testing the basis and accuracy of the testimony of the witness who testifies to the good reputation of an accused, he may be asked questions about accused's conduct and about statements and rumors concerning it. It is therefore proper to ask him in a homicide case whether it was part of accused's reputation that he had cut a man less than a year ago and to inquire concerning particular acts or charges or rumors of misconduct on his part.[84] The possibility of abuse by putting questions which carry the implication that the cross-examiner has a basis in fact for each of such questions should cause

82. Michelson v. United States, 335 U.S. 469 (1948).
82a. *Id.* at 480.
83. Jones v. State, 277 S.W.2d 371, 374 (Tenn. 1955).
84. Crawford v. State, 273 S.W.2d 689 (Tenn. 1954); Walker v. State, 273 S.W.2d 707 (Tenn. 1954).

the trial judge in the exercise of his discretion to assure himself that it is asked in good faith, as was done by the judge and approved by the United States Supreme Court in the *Michelson* case.[85]

Rehabilitating Witness by Evidence of Good Character: When the plaintiff in a workmen's compensation case had testified concerning his disability and the employer "had suggested that he was a malingerer and was otherwise exaggerating his disability," it was proper to permit plaintiff to introduce evidence of his good character for truth.[86]

JURISDICTION

Trial Courts—Statutory—Justice of Peace, and General Sessions: The amendatory statute of 1953 which increased the jurisdictional amount in Justices of the Peace from $1,000 to $2,500 amended by implication Code Section 9304 and gave the Courts of General Sessions jurisdiction over actions of replevin in which the value of the replevied property does not exceed $2,500.[87]

Same—Circuit Court: Where an action brought in a circuit court lies within the exclusive jurisdiction of chancery, the circuit judge has jurisdiction to try and to dispose of the action according to chancery practice, unless the defendant interposes a demurrer for lack of jurisdiction.[88]

Same—Appellate Courts: Where the Director of Conservation decided that a shot gun was properly confiscated because used illegally by the owner in hunting and the circuit court on common-law certiorari reversed the decision on two grounds, one, that the owner had not been hunting, and the other, that the statute under which the Director acted was unconstitutional, an appeal lies only to the Court of Appeals, for by Chapter 9 of the Acts of 1951, the appeal is to that court in all civil cases except where a constitutional question as to a statute or city ordinance is the only question involved in the appeal. If the appeal is taken to the Supreme Court, the case will be transferred.[89] The Supreme Court has no power to modify a judgment of a court of appeals unless it first grants certiorari and where certiorari is granted the parties have a right to be heard.[89a]

Jurisdiction of Subject Matter: An action for money due and an accounting under a trust by a beneficiary of the trust, of which the trustees reside in the District of Columbia, where all of its properties are located, all of its moneys held and all of its business transacted, is an action concerning the administration of the trust and is beyond

85. Michelson v. United States, *supra* note 82.
86. Armstrong Const. Co. v. Sams, 270 S.W.2d 561, 563 (Tenn. 1954).
87. Pritchard v. Carter County Motor Co., 270 S.W.2d 642 (Tenn. 1954).
88. Powell v. Bundy, 272 S.W.2d 490 (Tenn. App. M.S. 1954).
89. Findlay v. Davis, 278 S.W.2d 87 (Tenn. 1955).
89a. Monday v. Millsaps, 271 S.W.2d 857 (Tenn. 1954).

the jurisdiction of the courts of Tennessee.[90]

Same—Action in Rem or Quasi-in-Rem: See *infra,* Distinction between Notice and Summons.

Same—Loss of Jurisdiction: Where under the currently accepted interpretation of a statute a court in a criminal case has jurisdiction to impose a specified sentence upon conviction but a later authoritative decision interprets the statute as denying such jurisdiction, a sentence imposed while the earlier interpretation was in force is valid, and the later interpretation does not operate retroactively to deprive the court of its earlier jurisdiction. The result is the same as if the statute had been amended by the legislature.[91]

Jurisdiction over Person—By Service of Process: Requisites of Summons: Jurisdiction over the person of a defendant is a prerequisite to the validity of a judgment against him. Due process requires that he be given notice and opportunity to defend, though in some circumstances actual notice is not essential and due process is satisfied by taking steps reasonably calculated to give him such notice and opportunity. The originating process is a summons at common law and a subpoena in equity. The content of process is frequently prescribed by statute or constitutional provision, and there has been much fruitless litigation to determine what variants from the statutory mandates are fatal and what merely irregular. The Supreme Court of Tennessee has recently held that a summons in an action under Code Section 8671, which allows summons to be served on a nonresident motorist by service upon the Secretary of State as his agent for service, need not "briefiy state the facts" authorizing such service. The function of the summons is to bring the defendant into court. He gets his information as to the cause of action and the charge against him in the declaration. Summons in the usual form is sufficient.[92]

Same—Privilege from Service: The Tennessee court has been liberal in granting the privilege of exemption from service of process to nonresidents attending court in Tennessee as litigants and has gone so far as to extend the privilege to a nonresident passing through the state in order to attend court as a litigant in another state. But, as the Supreme Court has recently decided, these cases have no application to a claim by a district attorney general, resident in one county, while attending court in his official capacity in another county. He is not a litigant. He is subject to service of process in a tort action under Chapter 34, Public Acts of 1953, like any other person. He has no statutory exemption, and there is no consideration of public policy which operates to create an exception in his favor to the provisions of Chapter 34 merely because he is present in order to

90. Hobbs v. Lewis, 270 S.W.2d 352 (Tenn. 1954).
91. Gosnell v. Edwards, 277 S.W.2d 444 (Tenn. 1955).
92. Gogan v. Jones, 273 S.W.2d 700 (Tenn. 1954).

perform his official duty.[93]

Same—Distinction Between Notice and Summons—Action in Rem or Quasi-in-Rem: A tax suit is a proceeding against the land begun by seizure of the land and is in rem. Tennessee has adopted the view that in order to dispose of whatever interest claimants may have, due process requires that reasonable means of bringing notice to them be taken. This may be done by personal service or by publication. But they are not thereby made parties to the action; they are made parties by the seizure of the land. Only their interest in the land is affected; no personal obligation is involved and no personal judgment is sought.[94]

In *Forgey v. Wallin*[95] the question of jurisdiction quasi-in-rem was raised in an unusual manner. Plaintiff began his action by filing a pauper's oath in lieu of a bond. Defendant was a nonresident and after a return of not-found by the sheriff, plaintiff attached by garnishment on a local bank which disclosed it had a large sum in the account of defendant. Plaintiff's complaint had two counts in defamation. On pleas in abatement to these counts, the court held that the plea must be sustained. "That a suit for either libel or slander cannot be maintained by way of attachment *without an attachment bond* does not admit of debate."[96] For this no authorities were cited, but it has long been settled in Tennessee that though a plaintiff may begin a tort action upon a pauper's oath, and may thereafter secure either an original or an ancillary attachment,[97] still he cannot begin by pauper's oath an action for defamation or get an attachment therein without an attachment bond.

Same—By Appearance: Filing a plea in abatement attacking the court's jurisdiction over the subject-matter by alleging pertinent facts is not such an appearance as to give the court jurisdiction[98] over the person of the defendant. In many jurisdictions filing a demurrer to a complaint for lack of jurisdiction of the subject matter is held to be a general appearance. Such decisions indicate an impatience with litigants who have full notice of the pending action and full opportunity to defend but who still insist that they have not been properly summoned. Yet the Federal Rules of Civil Procedure, which are generally considered most liberal, allow motions and pleas attacking jurisdiction over the person or subject matter to be joined with those to the merits without waiving the attack on jurisdiction, and in Tennessee a similar view obtains. Thus, while a motion to strike allega-

93. Parker v. Reddick, 268 S.W.2d 357 (Tenn. 1954).
94. Lee v. Harrison, 270 S.W.2d 173 (Tenn. 1954).
95. 270 S.W.2d 342 (Tenn. 1954).
96. *Id.* at 344; see also TENN. CODE ANN. § 9080 (Williams 1934).
97. Barber v. Denning, 36 Tenn. 267 (1856); Doty v. Federal Land Bank of Louisville, 173 Tenn. 140, 114 S.W.2d 953 (1938).
98. Hobbs v. Lewis, 270 S.W.2d 352 (Tenn. 1954).

tions in one count of a declaration is a general appearance as to that count, it has no such effect as to counts to which defendant has pleaded in abatement for lack of jurisdiction of the subject matter. This is necessarily true in a system of pleading in which pleas to the merits and pleas in abatement may be pleaded together and tried together, and in which if a plea in abatement pleaded and tried by itself is found against defendant, he has a right to plead to the merits as if he had not first pleaded in abatement.[99]

Jurisdiction and Venue Distinguished: In *Brandon v. Warmath*[100] the court took occasion to distinguish between jurisdiction and venue in actions against foreign corporations. Where a foreign corporation has complied with the statute by appointing an agent for service of process, service upon that agent gives the court jurisdiction over the corporation regardless of the place within the state where the cause of action arose and regardless of the venue in which the action should be brought or tried. Chapter 34 of the Public Acts of 1953 deals with venue and authorizes actions against a foreign corporation to be brought in the county in which the cause of action arose. Consequently the agent of a foreign corporation in Knox County may be properly served there in an action brought in Humboldt County where the cause of action arose.

Where a collision between a bus of the Greyhound Company, a foreign corporation, and an automobile of a nonresident motorist occurred in Maury County and there injured plaintiff, jurisdiction of the corporation may be secured by service upon an officer of the company in Davidson County and upon the nonresident motorist by service upon the Secretary of State, and Davidson County is a proper venue although the cause arose in Maury. Had all the defendants been nonresidents, the proper venue would have been Maury; but the Greyhound Company has an office in Davidson and may properly be sued there, and counterpart summons may be properly issued against the nonresident.[101]

Motion for Continuance: The granting or refusing of a continuance for absence of witnesses is discretionary with the trial judge. This is the universally accepted rule. Reversal is granted only for abuse.[102]

TRIAL

Challenges to Jury—To the Array: It is not error to overrule a challenge to the array where it is undisputed that the challenged jury as members of the regular panel had heard the trial judge impose jail sentence in a number of drunk driving cases tried at the same term

99. Forgey v. Wallin, 270 S.W.2d 342 (Tenn. 1954).
100. 277 S.W.2d 408 (Tenn. 1955).
101. Hamilton v. Shrider, 270 S.W.2d 316 (Tenn. 1954).
102. Rushing v. State, 268 S.W.2d 563 (Tenn. 1954).

and immediately preceding the trial; that in one of them the jury had convicted and fined the drunk driver and the trial judge in conformity with his practice had added a 10-day jail sentence. The jury in the instant case found defendant guilty of drunk driving and imposed a fine of $75 and imprisonment for 10 days. The Supreme Court after noticing that the members of the panel had not been questioned by defendant and that there was no evidence as to whether they had been influenced by these facts held that, granting that the jurors knew that the judge had imposed such jail sentences in an effort "to break up drunk driving in his circuit," still there was no reversible error. Counsel could have made the same argument had the knowledge of the jurors come through reading newspapers or otherwise.[103] Upon the facts, this seems an eminently sound decision. Had this conduct of the judge revealed attitudes which were mere idiosyncrasies or involved matters bearing upon guilt or innocence or even matters of general policy not known to the public generally, a different result might well have been required in a jurisdiction where the judge is forbidden to express his opinion in his charge to the jury.[104]

Same—To the Polls—For Actual Bias: Where a juror in response to a question whether he knew of any reason why he could not try the case fairly and impartially answered in the negative and was permitted to serve, the defendant could not properly raise the objection that the juror was disqualified *propter defectum, i.e.,* for implied bias, upon later discovery of his relationship of first cousin of the wife of the prosecuting witness. But where it is shown that he was such a close kin and that friendly relations and associations existed between the two families, the challenge *propter affectum, i.e.,* for actual bias, was applicable and the juror's answer must be regarded as false. Hence, defendant after conviction was entitled to a new trial.[105]

Charge to Jury: The trial judge may properly outline the contentions and theories of the respective parties.[106] The charge must be taken as a whole. Thus, where the judge first describes a dying declaration as the equivalent of a statement in a deposition but later correctly charges the jury fully concerning it, warning that it should be received with great caution, the error in the first description is cured.[107] And if a party deems the charge insufficient in some particular, he must request the court to amplify it. For example, if in a holographic will contest, the judge does not charge upon the matter of abandonment or the effect of a failure to call an available witness, the aggrieved party should submit a pertinent request.[108] The same is true when

103. Ervin v. State, 268 S.W.2d 351 (Tenn. 1954).
104. See Veal v. State, 268 S.W.2d 345 (Tenn. 1954).
105. Toombs v. State, 270 S.W.2d 649 (Tenn. 1954) (on rehearing).
106. Blalock v. Temple, 276 S.W.2d 493 (Tenn. App. E.S. 1954).
107. Crawford v. State, 273 S.W.2d 689 (Tenn. 1954). *Accord,* Erwin v. State, 268 S.W.2d 351 (Tenn. 1954).
108. Nicely v. Nicely, 276 S.W.2d 497 (Tenn. App. E.S. 1954).

in a prosecution for rape the defendant desires a charge upon attempt to commit rape or attempt to commit a felony;[109] or in a prosecution for larceny, a charge upon the weight to be given to expert testimony as to fingerprints;[110] or in any case a charge limiting the use of relevant evidence to the issue upon which it is admissible as, for example, to its effect upon the credibility of the witness as contrasted with its use for the truth of the matter asserted.[111] It is hardly necessary to call attention to repeated decisions that the judge need not give a requested instruction the substance of which has been adequately covered in the general charge.[112] And it goes without saying that no instruction should be given upon which no evidence has been admitted.[113]

In a criminal case a request to charge the jury that they should fix the punishment must be seasonably made to the trial judge, and it will not suffice for counsel to ask the jury to do so in his closing argument.[114]

Verdict—Inconsistent Verdicts: See New Trial.

Polling the Jury: In an opinion published in the advance sheets of the Southwestern Reporter but not included in the bound volume, the court held that in a criminal case the defendant has no right to have the jury polled even where the verdict is one of guilt carrying the death penalty.[115] The matter lies within the sound discretion of the trial judge and polling is not required to comply with due process. The court did not refer to its recent decision in *England v. State,*[116] in which it declared that the judge should on request poll the jury or have the clerk do so, but it did thoroughly consider the conflicting precedents and adopted the view set forth in an early Connecticut case, *State v. Hoyt.*[116a] It stated that the better practice is to poll the jury, and that the judge should always be satisfied that the verdict is that of each and every juror. The usual query to the jury when the foreman reports the verdict, "So say you all, gentlemen," is not polling. In the instant case, where the evidence of guilt was clear and convincing, the judge properly exercised his discretion against defendant. In view of the final nonpublication of this decision, which was much more carefully considered than that of *England v. State,* query as to the rule in Tennessee in the absence of a pertinent statute.

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109. Rushing v. State, 268 S.W.2d 563 (Tenn. 1954).
110. East v. State, 277 S.W.2d 361 (Tenn. 1955).
111. Crawford v. State, 273 S.W.2d 689 (Tenn. 1954).
112. Chattanooga Gas Co. v. Underwood, 270 S.W.2d 652 (Tenn. App. E.S. 1954); Blalock v. Temple, 276 S.W.2d 493 (Tenn. App. E.S. 1954).
113. East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591 (Tenn. App. E.S. 1954).
114. James v. State, 268 S.W.2d 341 (Tenn. 1954).
115. Voss v. State, 270 S.W.2d 644 (Tenn. 1954).
116. 264 S.W.2d 815 (Tenn. 1954), 7 VAND. L. REV. 914.
116a. 47 Conn. 518 (1880).

Judgment—Form and Content: In *Parks v. McGuire*[117] the court pointed out that there were many statutory differences between the bond required in an original replevin action and the bond required to secure the return of attached chattels. It noted that in actions begun by original attachment if defendant appears and plaintiff prevails, the judgment should order the attached property to be condemned for sale, specifically describing it, or if defendant has replevied it, judgment should be entered against him and the sureties on his replevy bond. If plaintiff has judgment entered only for the money due and does not amend before the court loses jurisdiction by lapse of time or ending of the term, he waives his right to enforce the attachment. In an original replevin action if plaintiff wins, he gets judgment for damages; if defendant wins he should have judgment entered for its return or for its value as prescribed in Code Section 9299. The decision in this case should warn counsel to be careful in seeing to it that judgment in proper form is entered both in replevin cases and cases involving attachment. The provisions of the applicable statute should be meticulously followed. In the instant case the complications were caused by defendant's bringing what seemed to be an original action of replevin to recover the attached goods and giving a bond apparently drawn to replevy them in the attachment suit.

Same—Res Adjudicata—Joint Tortfeasors and the Like: It is well settled that when the wrong causing plaintiff's injury is caused by separate acts of two or more persons, each independently liable for his own conduct, a judgment for or against one of them does not destroy the cause of action. Thus in this country a judgment in an action against one joint tortfeasor is no bar to a later action against another of the joint tortfeasors. So also when an action is brought against a lessor and his lessee for injuries negligently caused to a pedestrian by a door in the leased premises which opened out upon a public sidewalk, a verdict and judgment for the lessee is no bar to a later action for the same injuries against the lessor.[118]

Same—Same—Alternative Remedies: Where plaintiff brought action pursuant to Code Section 7315 to recover the amount of interest usuriously exacted from him and recovered judgment therefor, the judgment is a bar to an action for personal injuries resulting from defendant's exaction of the usury, which was wrongful and illegal under other sections of the Code. The majority of the court thought it clear that plaintiff had a cause of action in contract under Section 7315 and a cause in tort because the exaction of the usury was clearly a legal wrong, but that he was entitled to only one recovery. Mr. Justice Swepston agreed, but argued that defendant's wrong unjustly

117. 270 S.W.2d 347 (Tenn. 1954).
118. Shuey v. Frierson, 270 S.W.2d 883 (Tenn. 1954).

enriched defendant's estate at the same time that it injured plaintiff by depleting his estate and by causing him physical harm. Had he brought his tort action, he could have recovered all damages proximately resulting but by suing in contract he waived the tort.[119] Query, would the theory of the majority have permitted full recovery had plaintiff first sued in tort? Quite obviously the fact that plaintiff may recover in quasi-contract for money had and received does not make his failure to repay a breach of contract which would entitle the promisee to recover special damages. Furthermore the personal injuries were the result not of failure to repay but of the original exaction. The result in this case is not unlike that reached by the English courts where separate actions are brought against several joint tortfeasors; judgment against one bars action against any of the others.

An apparently analogous problem was presented in *Ragsdale v. Hill.*[120] A will may be probated in Tennessee under Code Section 8098.4 or under Section 8098.7. The former governs wills executed in Tennessee; the latter, those executed outside Tennessee. On August 13, 1948, the will of Hill was filed in the office of the county court clerk; on September 30, 1949 the county judge entered an order denying probate because the will was not executed as required under Section 8098.4. On March 28, 1950 petition was filed in the county court asking that the will be admitted to probate; the petition was dismissed. On appeal to the circuit court the circuit judge after trial without a jury decreed the paper a valid will. In passing upon the validity of the plea, that the order of September 30, 1949, denying probate from which there had been no appeal, was a bar to the second proceeding, the court of appeals analyzed the case as one in which a party has two distinct rights or titles, namely, the right to probate the will under Section 8098.4 as a Tennessee will and the distinctly different right to probate it under Section 8098.7 as a foreign will, and held that the decision denying probate under the former was no bar to the proceeding for probate under the latter.

The validity of this analysis seems open to serious questions. If this kind of proceeding is to be treated like an ordinary action at law, is it to be analyzed like a common-law action under the formulary system where the litigant has one right but secures his writ in a form which is inapplicable, as, for example, if he had sued in covenant for breach of an unsealed promise? If so, judgment for defendant would not bar an action begun by a suitable writ. Under the codes where there are no forms of action, if a plaintiff drafts his pleading upon a theory which his evidence does not support and judgment goes against him, he is in many decisions held to be barred from main-

119. Harris v. Tindall, 277 S.W.2d 374 (Tenn. 1955).
120. 269 S.W.2d 911, 917, (Tenn. App. M.S. 1954).

taining an action for the same wrong upon a theory which his evidence would sustain. For example, if he sues for injury caused by eating contaminated food in a restaurant on the theory that the restaurant keeper warranted that the food was fit for human consumption and the court at the close of the evidence directs a verdict against him, and judgment is entered accordingly, would the judgment not bar a later action which alleged that the unfit food was negligently served to him? Is this merely a decision that he has chosen the wrong remedy? Did he have a right to proceed on the theory of warranty, and another distinct right not to have the food negligently served to him?

In the instant case was there more than a single right, namely, to have a duly executed will admitted to probate, with two possible theories justifying admission, and was the case not one in which the decision should preclude later litigation of any issue that could have been properly presented in the earlier action. The doctrine of res judicata is said to be based upon the policy of determining a single controversy in one proceeding in order to avoid harassment of the opponent, undue expense to him and to the public and the delay which results to other litigants that crowded calendars always cause. Are these reasons not applicable to the case at bar? There is, however, little doubt, if any, that the result reached was entirely proper, for the first order was entered ex parte with no opportunity for persons interested in sustaining the will to be heard, with no notice, actual or constructive, of the pending proceeding.

Same—Same—Applicability to Compulsory Counterclaim: Rule 13(a) of the Federal Rules of Civil Procedure requires a party having a counterclaim arising out of the same transaction as the claim set forth in the opponent's pleading to interpose it in the pending action. In *Meacham v. Haley*[121] the Court of Appeals held that where a trustee in bankruptcy had a claim arising out of the claim filed by a creditor, this rule was applicable; and the judgment or decision in the bankruptcy proceeding barred a later action by him in a Tennessee court upon the claim which he should have pleaded as a counterclaim in the bankruptcy proceeding.

Same—Collateral Estoppel: The Restatement of Judgments distinguishes between cases where the first and second actions are for the same cause of action, and those in which the second action is upon a different cause between the same parties but an identical issue of fact or law is involved in both. In the former the judgment operates as res judicata and extinguishes the original cause; in the latter it estops the parties from again litigating any issue actually tried and decided, but has no such effect upon any other issue. To this concept the questionable phrase "collateral estoppel" is applied. Both courts

121. 270 S.W.2d 503 (Tenn. App. E.S. 1954).

and text-writers generally recognize the distinction but usually call both either res judicata or estoppel by judgment. *Cline v. Cline*[122] applied the latter concept. A husband brought action for divorce against his wife and after personal service of summons secured a decree of divorce which did not purport to award the custody of the children of the marriage or provide for their support. In a later action the wife who had supported the children during a period after the husband had left her and prior to the decree sued him for the sums expended by her therefor. The court held that this was an entirely separate action and that the divorce decree did not operate as an estoppel.

Same—Applicability of Doctrine to Decisions of Administrative Tribunals: To what extent is the doctrine of res judicata or collateral estoppel applicable to decisions of a beer board? The Supreme Court was recently confronted with this question.[123] In 1952 the "city fathers" of Chattanooga refused to furnish Polsky a certificate of good moral character which was a condition precedent to the granting of a license to sell intoxicants by the Commissioner of Finance and Taxation. Polsky filed his petition with the commissioner alleging that the refusal was arbitrary. The commissioner notified the city officials that the petition was filed and a hearing would be held on a fixed date. The hearing was attended by counsel for Polsky and an assistant attorney general for the State but no city official appeared. At the hearing Polsky testified at length concerning an incident which occurred on November 1, 1952, which he thought to be the reason for the refusal of the certificate and gave his explanation of his conduct on that occasion. The commissioner granted the license for 1953. When Polsky sought a like certificate of good moral character for his application for a 1954 license, it was refused. He then filed his petition with the commissioner who notified the city officials of a hearing thereon. These officials appeared by counsel and answered setting forth their reasons for withholding the certificate including a charge made by a third person of a sale of whiskey to a minor on October 11, 1952. The commissioner denied the license; on certiorari the circuit court reversed the commissioner. The Supreme Court in affirming said that they felt since the former commissioner had granted the 1953 license "on evidence that was sought to be introduced against the 1954 license or at least on such evidence as was within the bosom of the City officials of Chattanooga, even though they did not see fit to present it, that this is binding on the present commissioner, and that on that alone the license should have been awarded, there being nothing new against the applicant arising since

122. 270 S.W.2d 499 (Tenn. App. E.S. 1954).
123. Polsky v. Atkins, 270 S.W.2d 497 (Tenn. 1954).

the action on the 1953 license. Fair play demands such a holding. It of course amounts to [applying] the doctrine of res judicata to this kind of proceeding."[123a] After citing cases dealing with this question the Court concluded: "Be this as it may we feel that fair play and the statutes enacted by the Legislature hereinabove referred to authorizing a proceeding of this kind demand that the doctrine should be applied."[123b] This decision with its reasons is treated at length because if the orthodox doctrine were to be applied, the first question would be whether the 1954 application was not an entirely new proceeding. It certainly seems to be so, just as an assessment of taxes for one year is an entirely different proceeding from an assessment for a prior year. In such event the doctrine, whether called res judicata or collateral estoppel, operates only to prevent later litigation of a matter actually tried out; it does not in any way affect an issue as to which there was a default. A judgment for plaintiff after contest based on a denial of plaintiff's allegations does not prevent reliance upon an affirmative defense to the same allegation in a later action upon a different cause. It is only where the same cause is the subject of both actions that the judgment in the earlier action completely destroys the cause so as to bar a later action regardless of the issues actually litigated. This is not to say that in a proceeding such as that in the instant case, considerations of fair play should not determine the result.

NEW TRIAL

The decisions published during the past year deal with the usual grounds for interfering with the verdict or judgment although some of the situations presented have some novelty.

Defects in Verdict: The record of the proceedings at the trial may make it clear that the verdict is the result of a total misunderstanding of the issues or of unjustifiable compromise or of deliberately capricious or arbitrary conduct by the jury. For example, take the case of *Flexer v. Crawley.*[124] The plaintiff suffered personal injury and property damage in an automobile collision. Defendant admitted that the property damage amounted to $223.61. The evidence showed that though plaintiff drove to her office after the accident, she soon became ill there, that she was confined to the hospital for thirteen days, that her expenditures for medical attendance, hospital bills, and medical supplies amounted to $937.83, and that she was employed at a salary of $7,500. The undisputed medical testimony was that her illness was serious but not dangerous. The jury returned a verdict for the admitted amount of property damage and $575 for the per-

123a. *Id.* at 499.
123b. *Ibid.*
124. 269 S.W.2d 598 (Tenn. App. W.S. 1953).

sonal injuries. The trial judge denied a new trial, and it is well settled in Tennessee that when a verdict is approved as to amount by the trial judge, it is entitled to great weight on appeal.[125] The Court of Appeals, nevertheless, reversed and ordered a new trial, saying that if the plaintiff was entitled to recover for damages to her car and a portion of her medical expenses, she was entitled to reasonable damages for her personal injuries including pain and suffering. The opinion indicates that the verdict was so grossly inadequate as to show passion, prejudice or unaccountable caprice on the part of the jury.

In another collision case[126] two actions were consolidated for trial. In one the father of the driver of an automobile involved in a collision sued for damages to the automobile and for medical expenses incurred for the son who was injured in the collision; in the other the son sued, by his father as next friend for his personal injuries. The damage to the automobile amounted to more than $1,400, the medical expenditures, to $136. The defendant counterclaimed for damages to his automobile. The jury at first returned a verdict that defendant pay the medical expenses. The court sent the jury back with proper instructions. They returned with verdicts that defendant's cross-action and plaintiff son's action be dismissed and that the plaintiff's father recover $136. The court refused to accept the verdicts as inconsistent. The jury retired and returned with separate verdicts of $75 for each plaintiff and dismissing defendant's action. The trial judge denied the motions of plaintiffs for a new trial. The Court of Appeals reversed on the ground that the jury was confused and the verdict was the result of compromise. "We think that justice can only be done by reversing and remanding both cases for a new trial." Of course, there can be no doubt that the verdicts could not stand as verdicts for plaintiff. If the father was entitled to anything he was entitled to the full amount of the damage to the automobile and reasonable amount for the medical expenses. The son was entitled to compensation for his injuries and his pain and suffering and not for the expenditures made by his father. But the first and second verdicts which the jury tried to return make it perfectly clear that they were convinced that neither the son nor the defendant should recover anything and they wanted to give the father a nominal amount, practically as a gift. When they found this impossible they then gave each plaintiff a nominal amount. Isn't the reasonable interpretation of their action a finding of no liability and an award of merely nominal damages—an award harmful to the defendant but harmless to plaintiff, and may not the trial judge's refusal to

125. Finks v. Gillum, 273 S.W.2d 722, 730 (Tenn. App. M.S. 1954).
126. Horne v. Palmer, 274 S.W.2d 372 (Tenn. App. E.S. 1954).

grant a new trial be properly approved on this basis? The jury may have been confused as to the rules of law, but were they confused as to the negligence of the parties involved in the collision? And did their confusion harm the plaintiffs?

Misconduct of Parties: The fact that a defendant carries insurance against liability for damage caused by the conduct which plaintiff charges as having caused injury to plaintiff is almost universally held to have no appreciable relevance upon the issue of negligence. Further it is held to be so prejudicial in its effect upon the jury as to outweigh any possible relevance it might have. It is, therefore, reversible error for a party to bring it to the attention of the jury during the trial. But where a plaintiff as a witness mentions the fact inadvertently or as a naturally relevant part of an otherwise proper answer, the trial judge may properly rule that this is no ground for a mistrial or for a new trial.[127] This is particularly true if on the hearing of the motion for a new trial the jurors swear that they heard no mention of insurance and there was no discussion about it in the jury room.[128]

Misconduct of Jury—Improper Argument in Jury Room: Where a juror argues that a verdict should be rendered for the plaintiff because defendant had lots of money and the case would go to a higher court, this was improper conduct but not sufficient to require a new trial.[129] The court referred to the ancient doctrine that jurors are not permitted to impeach their verdict by showing that they did not fairly try the case as they had taken oath to do. Of course, this rule does not apply in Tennessee to evidence by jurors of objective misconduct in the jury room, and if a juror has stated matter which in effect amounted to testimony by him, it may be shown and might constitute ground for reversal; but obviously it would be fatal to hear, or to base any decision upon, the content of arguments in the jury room for or against a particular verdict. For matter of this kind it would be well to apply the ancient rule with rigor.

Same—Quotient Verdict: Tennessee follows the usual rule that a quotient verdict is not inherently improper. If the jury agree in advance to be bound by it, their agreement amounts to fatal misconduct. But where the quotient is to be used as a basis for discussion and later acceptance or rejection, the procedure is legitimate. In *Thompson v. State*[130] this practice was used in a criminal case. After the jury had agreed upon a verdict of guilty, and were still in disagreement as to the sentence, each juror set down the amount

127. Finks v. Gillum, 273 S.W.2d 722 (Tenn. App. M.S. 1954).
128. East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 609 (Tenn. App. E.S. 1954).
129. Nicely v. Nicely, 276 S.W.2d 497 (Tenn. App. E.S. 1954).
130. 270 S.W.2d 379 (Tenn. 1954).

of fine and length of imprisonment, and each sum resulting from addition was divided by twelve. For twenty minutes thereafter they discussed the propriety of using the quotients as a proper sentence before agreeing upon them. There was no error in returning the quotients as part of the verdict.

Misconduct of Judge: It is the function of the judge to rule upon the admissibility of evidence, and in order to determine whether to admit or exclude evidence to which an objection has been made, he is entitled to insist that the proponent state the theory of his case or defense, and to advise counsel that in refusing to disclose it, counsel is taking inconsistent positions. Thus, he is entitled to ask defendant's counsel whether it was a part of the defense that defendant had a right to search the automobile at which he had fired a pistol shot because it was transporting whiskey, and to characterize his refusal to answer as inconsistent.[131] But it was reversible error for the judge in a criminal case to shake his head in disagreement while counsel for the defense was making his argument to the jury without making any explanation to the jury for so doing.[132] Does this add a new pitfall for the trial judge? May a party now object to the tone of voice or gestures of emphasis of the judge when delivering his charge?

Newly Discovered Evidence: The usual rule prevails in Tennessee that even in a criminal case a new trial for newly discovered evidence should be denied if the evidence is merely cumulative or if the moving party fails to show that by the exercise of due diligence he could not have discovered it in time for presentation at the original trial.[133] But the Court of Appeals correctly reversed the trial judge for refusing to grant a new trial on an assignment that he had erroneously stricken defendant's counterclaim on a ground which was applicable to counterclaims by residents of Tennessee, when defendant on his motion offered evidence discovered after the trial, that plaintiff was a nonresident of Tennessee, a fact of which the plaintiff necessarily had knowledge and which made it improper for him to move to strike the counterclaim.[134]

Appeal and Error

Introduction: Speaking generally the appellate courts are inclined to disregard procedural errors and consider the merits as disclosed by the record except where the error involves violation of a constitutional or statutory provision affecting jurisdiction. They resort on numerous occasions, often much to the dissatisfaction of members of the bar,

131. Shields v. State, 270 S.W.2d 367 (Tenn. 1954).
132. Veal v. State, 268 S.W.2d 345 (Tenn. 1954).
133. Ivy v. State, 277 S.W.2d 363 (Tenn. 1955).
134. Sliger v. Parks, 270 S.W.2d 319 (Tenn. 1954).

to the statutory mandate to disregard errors which do not work substantial prejudice to the objecting litigant. Of course no valid objection could be made to a decision which held harmless an error in directing a verdict for defendant upon a count in a declaration which averred that the death of an injured person resulted from the wrong alleged as the basis of the claim in two other counts upon which the jury found for defendant.[135] But in other cases which involve rulings upon evidence or alleged misconduct of jurors or counsel or faculty charges to the jury, the judgment of the court as to the probable effect of the erroneous ruling is always subject to debate, for it is impossible to be sure what influence, if any, a particular event had upon the minds of the jurors. If upon the whole record the court believes the result to be a satisfactory adjustment of the controversy, it is likely to declare the error nonprejudicial. Most commentators and students of procedure think such a practice highly commendable, while the losing advocates resent it as an invasion upon the theory of the adversary system and the American view of the proper division of functions among judge, jury, and advocates.

Current decisions afford examples of commendable disregard of formal procedural requirements: where defendant before a beer board made a motion to dismiss, the Supreme Court treated the case as if he had filed a properly framed plea in abatement, and as if his allegations therein had been admitted, for the hearings had been conducted on that assumption both before the board and on certiorari to the circuit court.[136] In *Lee v. Drabkin*,[137] where plaintiff's proper procedure was to make a motion for a new trial, she filed a purported amended complaint; the chancellor purported to pass upon its sufficiency, found against her, and allowed her an appeal in error. The Supreme Court considered the amended complaint as a motion for a new trial and the chancellor's action thereon as an order denying the motion. Again, a motion to dismiss a plea in abatement asserting immunity from service of process was regarded by both the circuit court and the Supreme Court as a demurrer, and the ruling thereon as a proper subject for a discretionary appeal under Chapter 154 of the Public Acts of 1953.[138] It is everyday practice for an appellate court to disregard the form in which the proceeding for review is cast, if the proper form would have been available upon the record. Thus, where a simple appeal was authorized in a case tried by the court without a jury, an appeal in the nature of a writ of error used in such a case was given the same effect as a simple appeal.[139]

135. Roach v. Franzle, 268 S.W.2d 118 (Tenn. App. M.S. 1953).
136. Evers v. Holman, 268 S.W.2d 97 (Tenn. 1954).
137. 273 S.W.2d 473 (Tenn. 1954).
138. Parker v. Reddick, 268 S.W.2d 357 (Tenn. 1954).
139. Ragsdale v. Hill, 269 S.W.2d 911 (Tenn. App. M.S. 1954).

What is Reviewable: The problems arising within this topic defy classification, but do require notice. A judgment rendered on certiorari by a circuit court reversing a decision of a beer board is appealable, and a party is not entitled to enjoin such an appeal.[140] The case seems to demonstrate the difficulties that may follow reliance by counsel upon a headnote without a careful reading of the opinion.[141] A decree pro confesso, if properly excepted to is appealable,[142] and on such appeal the denial of a motion to set aside the decree is assignable as error, but is reversible only for abuse of discretion.[143]

In *Ivy v. State*[144] the court in disposing of an assignment of error for refusal to direct a verdict declared that it had "repeatedly held that such is not the proper practice." The explanation for this unusual rule is doubtless that in a criminal appeal the court will review the evidence to determine whether the verdict is against the preponderance of the evidence.[145] This salutary doctrine is frequently phrased in inaccurate languages. It is said that on appeal the defendant is presnmed guilty and has the burden of proving his innocence.

Two issues are presented in condemnation proceedings, (1) the right of the condemnor to take the land, (2) the amount of damages to be awarded the land owner. When the first issue is adjudicated, it may be reviewed. But under the statute the right to take is not adjudicated until the report of the jury of view has been approved and the land "decreed to the petitioner." In *Harper v. Trenton Housing Authority*[146] the problem was raised on a confused record. The circuit court had entered its order that the condemnor had the right to take the designated land; the jury of view had reported but its report had not been confirmed except by an order entered after the expiration of the term, which was consequently void. The landowner petitioned for certiorari assigning as one error the duly entered order that the condemnor had the right to take. The Court of Appeals held that the order affirming the jury's report was void but that the order that the condemnor had the right to take was valid. The landowner's petition for certiorari to the Supreme Court was dismissed without prejudice. After denying one petition to rehear, permission to file a second petition was granted, but, due to the death of the justice who granted it, it was not promptly brought to the attention of the court. Both parties desired that the court consider the validity of the judgment of the Court of Appeals upon the condemnor's right to take because of the public importance of an early determination of

140. Black v. Nashville, 276 S.W.2d 718 (Tenn. 1955).
141. *Id.* at 719.
142. Gamble v. Waters, 274 S.W.2d 3 (Tenn. 1954).
143. Columbia Production Credit Ass'n v. Polk, 276 S.W.2d 737 (Tenn. 1955).
144. 277 S.W.2d 363 (Tenn. 1955).
145. See Jones v. State, 277 S.W.2d 371 (Tenn. 1955).
146. 271 S.W.2d 185 (Tenn. 1954).

the controversy. The Supreme Court reluctantly held that no action of the trial court with reference to the right to take was reviewable, and since the power of review was created and regulated either by the constitution or by statute, consent of the parties was ineffectual, and the petition must be dismissed.

In another anomalous situation the court found itself unable to make an authoritative pronouncement: judges of the circuit and criminal courts had enjoined certain named professional bondsmen from making bonds in general sessions court in the county. A trial judge who had approved bonds made by one of the enjoined bondsmen was cited to show cause why he should not be punished for contempt in so doing. Before there was any formal hearing or judgment, he petitioned the Supreme Court for certiorari and a supersedeas. The Court in denying the petition intimated that the citation was probably unwarranted.[147]

Where a decree settles only a part of the case, even though it dismisses one of the defendants, it is not appealable by plaintiff as of right, and where the chancellor has denied a discretionary appeal, certiorari will be granted only when the chancellor's action is in effect arbitrary or beyond his jurisdiction or irreparable injury to the plaintiff will result.[148]

A decree sustaining a demurrer to a bill of review is appealable, but the court will not consider assignments of error which do not appear on the face of the record, as errors based on disputed issues of fact which appear in the record of the original cause are not before the court.[149]

To Which Court: Appeals in all civil actions, except where a constitutional question as to a statute or city ordinance is the only question involved, are to be taken to the Court of Appeals. Hence where the judgment below was being attacked on the ground that the defendant had not violated the statute as charged, and that the statute was unconstitutional, an appeal taken to the Supreme Court was improper and the case was transferred to the Court of Appeals.[150] The same limitation requires an appeal from a judgment in a proceeding for civil contempt to go to the Court of Appeals, though a judgment for criminal contempt is properly appealable to the Supreme Court.[151] The Supreme Court can acquire power to review a judgment of the Court of Appeals only upon petition for certiorari. It has no authority to extend its jurisdiction beyond the

147. Gilbreath v. Ferguson, 260 S.W.2d 276 (Tenn. 1953).
148. Wattenbarger v. Tullock, 271 S.W.2d 628 (Tenn. 1954). See text at note 32 *supra*.
149. Todd v. Baugh, 273 S.W.2d 2 (Tenn. 1954).
150. Findley v. Davis, 278 S.W.2d 87 (Tenn. 1955).
151. Hamilton v. Hamilton, 268 S.W.2d 362 (Tenn. 1954).

limits fixed by the constitution or statute.[152]

Requisites: Where a bill of exceptions is required, it must of itself or by endorsement thereon show that it was filed in the office of the clerk. The clerk's certificate to that effect will not suffice.[152a] And the record must show that it was authenticated by the trial judge within the time prescribed by statute. Otherwise the bill will be stricken on motion, and in a proper case, judgment will thereupon be affirmed.[153] But where the order of the court as to the extension of the term for the purpose of entry of judgment is ambiguous, and the ambiguity is explained by a later order, the time for filing the bill of exceptions is determined by the time of entry of the judgment pursuant to the later order, notwithstanding an erroneous entry by the clerk and his failure to make the proper entry.[154]

Where the appellant relies upon error upon the face of the technical record, no motion for new trial is necessary.[155] A statute provides that where an action is tried by the court without a jury, no motion for a new trial is a requisite to appellate review but that does not make such a motion improper. Where one is made, the making of the motion suspends judgment until decision of the motion, and for the purposes of appeal the judgment is regarded as entered at the time the motion for a new trial is denied.[156] A prerequisite of the power of the Supreme Court to remove from the Court of Appeals a case which has been finally determined by that court depends upon the presentation of a sworn petition within the time prescribed. A petition which is not sworn is insufficient, and the court has no power to act upon it.[157]

Record on Appeal: A motion for a new trial is a part of the record without being included in a bill of exceptions, and the same is true of findings of fact of the circuit judge which are embodied in his opinion.[158] But where the decree of the chancellor recites that he has rendered an opinion which is made a part thereof by reference and no such opinion is filed, it cannot be made a part of the record by stipulation. The trial judge or chancellor alone can authenticate "all matters going to make up and constitute the record" and he cannot delegate this function. No oral statement, even though stenographically taken down, can be incorporated into a decree or into the record on appeal.[159] And it goes without saying that no errors

152. Depew v. King's, Inc., 276 S.W.2d 728 (Tenn. 1955).
152a. Wilson v. State, 270 S.W.2d 340 (Tenn. 1954).
153. Trussell v. Trussell, 268 S.W.2d 120 (Tenn. App. M.S. 1953).
154. Hoodenpyle v. Patterson, 277 S.W.2d 351 (Tenn. 1955).
155. Honeycutt v. Nabors, 271 S.W.2d 859 (Tenn. 1954).
156. Ragsdale v. Hill, 269 S.W.2d 911 (Tenn. App. M.S. 1954).
157. Depew v. King's, Inc., 276 S.W.2d 728 (Tenn. 1955).
158. Findlay v. Monroe, 270 S.W.2d 325 (1954).
159. Freeman v. Freeman, 270 S.W.2d 364 (Tenn. 1954).

can be considered on appeal which do not properly appear in the record.[160]

Extent of Review: As hereinbefore pointed out, in a criminal case the court will review the evidence to determine whether the verdict is contrary to the weight of the evidence. But in a workmen's compensation case it will inquire only whether the findings of the trial judge are supported by substantial evidence[161] and where a case is referred to a master, his reported findings of fact, if they are approved by the Chancellor, are regarded as conclusive.[162]

Effect of Decision: When the Supreme Court, in reversing the Court of Appeals and the trial court, determines that the defendant is not liable to plaintiff under the contract sued upon, it finally disposes of the case and there is no need or occasion for remand.[163] When it denies certiorari, it thereby approves the conclusions of the court below.[164] When on a former appeal the Court of Appeals decided that in a malicious prosecution action the burden of proving that defendant acted in good faith on the advice of counsel was upon the defendant, and that the evidence was sufficient to take the case to the jury, the ruling as to burden of proof was the law of the case on the subsequent retrial, and the same was true as to the other ruling if the evidence on the subsequent trial was substantially the same as on the earlier trial.[165]

FEDERAL DECISIONS

Two decisions of importance dealing with evidence were handed down by the United States Court of Appeals for the Sixth Circuit. The first[166] declared that a pleading signed only by counsel which was later withdrawn was inadmissible as an admission. Upon this question there is a conflict of authority. The Second Circuit has taken a contrary view.[167] In the instant case the statement in the withdrawn pleading was totally irrelevant, for it was merely an allegation against a co-defendant who was dismissed before the trial began. The second dealt with the interpretation of Code Sections 9777 and 9780. Five claimants filed a joint claim against the estate of a decedent for breach of decedent's promise, and each filed a separate claim for the amount promised to him by the same promise. As to these, of course,

160. See, *e.g.*, Parker v. Reddick, 268 S.W.2d 357 (Tenn. 1954); Rushing v. State, 268 S.W.2d 563 (Tenn. 1954); Satterfield v. State, 269 S.W.2d 607 (Tenn. 1954).
161. Atlas Powder Co. v. Leister, 274 S.W.2d 364 (Tenn. 1954).
162. State v. Breedlove, 270 S.W.2d 582 (Tenn. App. E.S. 1953); Commercial Credit Corp. v. Monroe, 277 S.W.2d 423 (Tenn. App. M.S. 1954).
163. Blue Ridge Ins. Co. v. Haun, 276 S.W.2d 711 (Tenn. 1954).
164. Rutledge v. Rutledge, 268 S.W.2d 343 (Tenn. 1954).
165. Ernst v. Bennett, 273 S.W.2d 492 (Tenn. App. M.S. 1954).
166. Louisville & N. R.R. Co. v. Tucker, 211 F.2d 325 (6th Cir. 1954).
167. Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195 (2d Cir. 1929).

no single claimant had any interest in another's claim, and each of the others would have been a competent witness for him under section 9780; but since there was a single promise only of which each claimant was a promisee, the court held all claimants incompetent to testify to the promise.[168]

168. Appolonio v. Baxters, 217 F.2d 267 (6th Cir. 1954).