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PROCEDURE AND EVIDENCE—1959 TENNESSEE SURVEY

EDMUND M. MORGAN*

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* * *

This survey of Procedure and Evidence is in most respects merely a horizontal digest of the cases which have been published between June 1, 1958, and June 1, 1959. Only a few decisions are of the character and importance that would call for comment in regular course in a law review like the *Vanderbilt Law Review*. Many of them are mere illustrations of inexcusable disregard by counsel of our applicable statutes and rules and previous decisions of our appellate courts interpreting them. Whether this sort of treatment of the subject is justifiable is open to serious question. The answer depends upon

whether it is of real service to the members of the Tennessee Bar; the editors of this *Review* will welcome comment from them as a guide for future surveys.

The following remarks concerning the herein noted decisions are submitted for what they may be worth.

1. Our supreme court manifests its commendable policy of attempting to mould our rules of procedure to accomplish the objective of the Workmen's Compensation Act—the prompt receipt by the disabled workman of the benefits to which he is entitled. It therefore discourages the use of demurrers which deal with the statements of the claim rather than the facts that they attempt to state, as well as appeals from rulings of the trial judge upon pleadings in favor of the claimant, and it allows wide latitude for amendments and for the application of the statute permitting a new action where the original action has been terminated without a decision on the merits.

2. It adopts the more liberal and sensible interpretation of the provision requiring the formal appointment of a guardian ad litem for a litigant under age where the lack of appointment is first raised after a fair trial in which counsel has in fact performed all the functions of such a guardian. This is in accord with its general policy of disregarding formal defects in procedure in the absence of what it deems mandatory statutory provisions.

3. In dealing with our statute governing remittitur of damages with consent of the claimant, it has for the first time formally interpreted it as giving to the appellate courts a reasonable discretion in determining to what extent, if at all, the verdict should be diminished. If the evidence justified the original amount, the verdict will be reinstated; if the trial judge's order or suggestion was justified, it will be affirmed; if his ruling called for the remission of an excessive amount, the amount of that excess will be restored.

4. As to presumptions, the current decisions do nothing to alleviate the existing confusion. Indeed the decision discussing the presumption of innocence has added to it, by stating what all commentators and many judicial opinions have expressly repudiated; namely, that the presumption stands as a witness for the accused until overcome by evidence of guilt beyond reasonable doubt. Does this mean that if the state has borne the usual burden of convincing the jury, the presumption creates an additional burden? If so, must the jury be so informed? If not, just what does it mean, other than that no inference can be drawn against the accused from the fact that he has been indicted or otherwise properly charged with the offense?

5. Our courts continue to slur the distinction between an admission

and a declaration against interest by using the phrase "admission against interest." Where the admission is a personal statement of a party offered against him and the fact stated was contrary to his interest at the time of the statement as well as contrary to his position at the trial, this usage may do no harm. But it may cause confusion of thought and consequent misapplication in decisions in other situations. An admission, like evidence of any other relevant conduct of a party, is receivable when offered against him. As such, it is never receivable when offered by him. It is entirely immaterial that at the time it was made, it was highly self-serving and intended to be so. There is no requirement that the admitter be unavailable as a witness. A declaration against interest must be a statement of a fact which at the time of the statement the declarant must have realized to be against his pecuniary or proprietary interest, and the declarant must be unavailable. The declaration against interest is admissible wherever relevant in favor of or against any party to any action. The distinction is especially important where the admission is a vicarious admission; that is, a statement offered against a party to the action made by another who is deemed by the court to stand in the position of the party, e.g., a predecessor in interest. In such instances the requirement that the person making the statement be unavailable is applicable to a declaration against interest but not to an admission. Clarity and accuracy of expression are essential to accuracy of thought in many situations which require careful analysis.

6. At common law there was no method of curing the error of the trial judge in refusing to direct a verdict. The decision of the full bench on a motion for a new trial was not reviewable. There was no motion for judgment notwithstanding the verdict based on the evidence. The sole remedy for a wrong verdict on the evidence was a new trial. Motions in arrest of judgment and for judgment notwithstanding the verdict attacked only the defects in the common law record. That Tennessee, with its statutory provisions for correction of errors by writ of error or appeal, should continue the common law rules governing motions in arrest and judgment notwithstanding the verdict is an anomaly that should be remedied by the court without waiting for action by the legislature.

I. Pleading

1. Demurrer—Construction of Pleading on Demurrer.—In determining whether a pleading is sufficient in substance on demurrer, the allegations of fact are treated as admitted but not allegations which state conclusions of law. In an action upon an insurance policy issued to complainant and his employer, an allegation that the policy provides

for payment of medical expenses in excess of the amount provided under the Workmen's Compensation law is an allegation of fact.[1]

A cross-bill which shows that the cross-claimant has been guilty of laches is subject to demurrer, but where the bill shows also that the original claimant is a minor and that defendant is serving a sentence of ten years in prison, it reveals good cause for delay and negatives laches. This rule is applied where the supplemental amended cross-bill was filed more than seven years after the original bill.[2]

2. Oral Pleading—Court of General Sessions.—In a court of general sessions the warrant in a civil action is not a substitute for a declaration or complaint. The pleadings are oral and judgment is given according to the proof. The same is true in the circuit court on appeal from the judgment. On such an appeal from the Court of General Sessions of Davidson County, where the amount involved was over $50, both the court of general sessions and the circuit court were courts of law, and the judge in the circuit court could not act as a chancellor and entertain an equitable defense.[3]

3. Departure—Replication—Cure by Trial—Theory of Trial.—Where plaintiff's declaration was upon a policy delivered after a binding receipt had been given to the assured and the reply set up and relied on the binding receipt, and trial proceeded upon that issue, the verdict for plaintiff was sustained on the theory that the reply was an amendment to the declaration. The usual rule applied to such a departure would declare the departure cured by the verdict. The court reaches the same result by relying upon the doctrine of theory of trial.[4]

4. Amendment—Relation Back.—In *Norton v. Standard Coosa-Thatcher Co.*,[5] the supreme court held that a nonsuit, taken on March 25, 1957, in a workmen's compensation case because plaintiff's disability was not caused by breathing fumes in course of his work, operated to save his right to bring action on June 28, 1957, for the injury caused by accidentally breathing the fumes which resulted in the permanent disability. The fact that he had knowledge of the disability more than a year before this action is no bar. The court's liberal interpretation of the saving statute was based upon the theory that plaintiff would have been permitted to amend his declaration had he moved to amend instead of taking a nonsuit; he had made a mistake in attributing his disability to an occupational disease rather than to the accident.

1. Slomovic v. Tennessee Hospital Service Ass'n, 313 S.W.2d 265 (Tenn. 1958).
2. Conner v. Holbert, 319 S.W.2d 72 (Tenn. 1958).
3. Mazikowski v. Central Mutual Ins. Co., 312 S.W.2d 867 (Tenn. App. M.S. 1958).
4. American Nat'l Ins. Co. v. Thompson, 316 S.W.2d 52 (Tenn. App. E.S. 1957).
5. 315 S.W.2d 245 (Tenn. 1958).

5. Plea in Abatement—Time for Filing.—A plea in abatement may be filed before or contemporaneously with a plea to the merits. It is reversible error to permit the filing of such a plea after a general continuance.[6]

6. Requisites of Plea in Abatement—Defects Attacked Thereby.—A plea in abatement alleges some grounds for quashing the writ without at the same time tending to deny the right of action itself. It must be verified. It is contrasted with a plea in bar which alleges some ground for barring or defeating the action.[7]

II. Parties

1. Capacity to Appear and Defend—Infancy—Guardian ad Litem.—Defendant, charged with causing plaintiff's injuries in an automobile accident, was represented at the trial by skillful counsel who presented every possible defense. He raised the issue of his minority for the first time on a motion for a new trial and alleged error in the failure of the trial judge to appoint a guardian ad litem for him. He was nineteen years old. Counsel who represented him performed all the functions of a guardian ad litem and the failure of the court formally to appoint him as such was harmless error. The court very sensibly refused to follow cases from other jurisdictions which hold the failure to make such an appointment as required by statute to be reversible error even in actions for damages for tort.[8]

2. Proper Parties.—An action for damages done by defendant to a chattel then in the possession of plaintiff may be maintained by him even though he then had and now has neither the legal nor the equitable title to the chattel: and this is true though plaintiff was a conditional vendee or mortgagor of the chattel and was in default at the time of the defendant's wrongful act.[9] This is in accord with the common law rule.

In an action for a declaratory judgment to determine whether the county or the city is liable for the expenses of a special referendum election for the acceptance or rejection of a legislative amendment to the city charter, the County Election Commission is the proper party plaintiff and the city a proper party defendant.[10]

3. Necessary Parties.—Where prior litigation had established that the defendant association had received as agent of the Commodity Credit Corporation surplus profits from the sale of tobacco and was under a duty to distribute to each of the tobacco growers his pro-

6. Troxel v. Jones, 322 S.W.2d 251 (Tenn. App. M.S. 1958).
7. *Ibid.*
8. Goodall v. Doss, 312 S.W.2d 875 (Tenn. App. M.S. 1958).
9. Ellis v. Snell, 313 S.W.2d 558 (Tenn. App. W.S. 1955).
10. Abercrombie v. City of Chattanooga, 313 S.W.2d 256 (Tenn. 1958).

portionate share of the surplus, the Credit Corporation was not a necessary party to a mandamus action by the plaintiff tobacco growers to compel defendant to make the distribution.[11] No doubt the Credit Corporation could have been joined as a proper party, but its interest in seeing that the agent performed duties owing to the plaintiffs did not require that it be joined.

4. Indispensable Parties—Representative Action.—Twenty citizens and taxpayers brought action to recover for the State the amount of warrants alleged to have been signed by defendant county judge payable to "businesses" in which he had a personal interest. The District Attorney General was not a party plaintiff and had refused to join on the ground that political issues were involved. A demurrer to the bill was properly sustained on the ground that the action was not maintainable without the intervention of the District Attorney General.[12] Here again the court applies the orthodox rule, for the Attorney General has a wide discretion in granting or withholding his permission for private citizens to represent the interests of the state or district.

III. REMEDIES

1. Certiorari—Decision of Mayor of Jackson Removing Housing Authority Act Commissioners.—In the Housing Authority Act[13] no provision is made for appeal from the action of the mayor in discharging a commissioner or commissioners. Hence T.C.A.§§ 27-801 and 802, which provide for certiorari where no appeal is given, are applicable. The mayor was acting in a semi-judicial capacity when he ordered the petitioners removed for failure to perform their duties and for misconduct in office, and on certiorari the circuit court properly held that the action of the petitioners in question did not constitute misconduct in office.[14]

2. Bill to Quiet Title.—*Montgomery v. Tapp*[15] presents an unusual situation in which a bill to quiet title was clearly a proper remedy. The grantor in a deed to *A* conveyed a specified tract of realty pursuant to the terms of a recorded contract. Prior to this conveyance but subsequent to the date of record of the contract, the grantor conveyed to *B* another tract located some distance from *A*'s tract. In the deed of conveyance to *B*, grantor purported to burden *A*'s tract with specified restrictions. To the bill which alleged that unless these restrictions were removed complainant would suffer a loss in rents and profits,

11. Neas v. Tennessee Burley Tobacco Growers' Ass'n, 321 S.W.2d 802 (Tenn. 1959).
12. State *ex rel.* v. Parker, 315 S.W.2d 396 (Tenn. 1958).
13. TENN. CODE ANN. §§ 13-801-1113 (1956).
14. Mayor of Jackson v. Thomas, 313 S.W.2d 468 (Tenn. App. W.S. 1957).
15. 321 S.W.2d 565 (Tenn. 1959).

and prayed that if the restrictions could not be removed the court award damages, the interested defendants demurred. The chancellor sustained the demurrer on grounds which do not appear in the report. The supreme court in reversing stated that where the court has acquired jurisdiction upon a ground recognized in equity, it has jurisdiction to award unliquidated damages as an incident of its jurisdiction. It is to be regretted that the report does not more fully disclose the theory of the decision of the chancellor.

3. Injunction.—Where a change in conditions makes it inequitable to enjoin violations of restrictive covenants upon the use of realty, an injunction will be denied without prejudice to the right of the covenantee to bring action at law for damages.[16]

For violation of the Sunday closing law,[17] the penalty prescribed therein is the only sanction, and a court of equity has no jurisdiction to enjoin violations.[18] A bill alleging damage to complainants by sales on Sunday to regular customers of complainants was held not to show injury to the legal or equitable rights of complainants. It was interpreted as an attempt to enjoin the commission of a crime.

4. Declaratory Judgment—Scope.—The county, and not a subordinate agency, such as a purchasing and finance commission created by private act, is entitled to the remedy, if any, against the Supervisor of Roads for preventing an audit of his books. The appropriate remedy is a bill for a declaratory judgment by the county.[19] And where there is a dispute between a city and a county concerning the respective jurisdictions of a city court as prescribed in a special act creating a court of general sessions, and the dispute results in confusion in the administration of justice, the remedy is a bill for a declaratory judgment. The judges and officers have interests beyond the interests of the general public.[20]

5. Mandamus—Non-discretionary Duty.—Where a duty of defendant to pay out a proportionate share of a fund of surplus profits to each tobacco grower has been established in previous litigation, mandamus against defendant is an appropriate remedy to compel the performance of that duty.[21]

Where by the normal procedure an applicant for a permit to construct single dwellings was entitled to it under facts found by the County Planning Commission before the incorporation of the city, and

16. Hysinger v. Mullinax, 319 S.W.2d 79 (Tenn. 1958).
17. TENN. CODE ANN. § 39-4001 (1956).
18. York v. American Service Co., Inc., 319 S.W.2d 76 (Tenn. 1958).
19. Abel v. Welch, 315 S.W.2d 268 (Tenn. 1958).
20. City of Elizabethton v. Carter County, 321 S.W.2d 822 (Tenn. 1958).
21. Neas v. Tennessee Burley Tobacco Growers' Ass'n, 321 S.W.2d 802 (Tenn. 1959).

neither a statute nor an ordinance of the city authorized its zoning board or its city manager to inquire into the facts found by the Planning Commission, the city has an unconditional duty to issue the permit and mandamus will issue to compel performance of that duty.[22]

IV. Burden of Proof and Presumptions

A. Burden of Proof—Defense of Fraud and False Swearing

In an action on a fire insurance policy, the defendant has both the burden of producing evidence and the burden of persuasion that the assured was guilty of fraud and false swearing. In the absence of any evidence relevant to this matter, the plaintiff must prevail.[23]

B. Presumptions

1. Inference Distinguished—Failure to Produce Available Evidence. —Where the prosecution fails to produce as witnesses police officers who were present when confessions were made, the trier of fact "may presume" that their evidence would not be favorable, but he is not required to do so.[24] It is clear that the "may presume" indicates merely a logical inference rather than a compelled assumption.

2. Burden as to Content of Holographic Will.—When a writing apparently complete on its face has been proved to have been executed in compliance with all statutory requirements as a holographic will, there is a presumption that it is the entire will of the testator, and the burden of overcoming this presumption is upon the contestant.[25] The context makes it clear that "burden of overcoming" means the "burden of persuasion."

3. Presumption of Innocence—Conflicting Presumptions.—The presumption that the owner of premises is in possession of intoxicating liquor found thereon is discussed in *Marie v. State*,[26] but its effect is still left in some doubt. It is pointed out that in the absence of any evidence to negative the presumed fact, the presumption will operate to sustain a conviction. This means only that even in a criminal prosecution it will put on the defendant the burden of producing evidence if he is to prevent a verdict for the state. But the court also said "it may be true . . . that it is a question for the jury to determine whether or not the evidence offered by the defendants is sufficient to overcome the legal presumption against them." This leaves us exactly where the previous opinions have put us.

But in the principal case the court had no doubt that where this

22. State *ex rel.* Wright v. City of Oak Hill, 321 S.W.2d 557 (Tenn. 1959).
23. Agricultural Ins. Co. v. Holter, 318 S.W.2d 433 (Tenn. App. M.S. 1958).
24. Wooten v. State, 314 S.W.2d 1 (Tenn. 1958).
25. Scott v. Atkins, 314 S.W.2d 52 (Tenn. App. W.S. 1957).
26. 319 S.W.2d 86 (Tenn. 1958).

presumption conflicts with the presumption of innocence of the defendant, the former must give way. In doing so, however, it added to the already existing confusion by declaring: "While we have the legal presumption against them [the defendants] we are also mindful of the fact that in the trial court there was a presumption of innocence and this presumption stands as a witness for them until it is overcome by competent and credible evidence of such probative value as to establish their guilt beyond a reasonable doubt."

V. Judicial Notice

Three current cases disclose three different aspects of this principle indicating its scope in both trial and appellate courts.

1. Common Knowledge—Geographical Facts.—In determining whether the trial judge correctly ruled that an employee was not within the scope of his employment when he was returning to his home in Memphis for a weekend, the supreme court took judicial notice that Bowling Green, Kentucky, is more than one hundred miles distant from Memphis.[27]

2. Non-evidential Use.—Although Wigmore insists that the doctrine is applicable only at the trial stage of a lawsuit where it dispenses with the necessity of producing evidence, Thayer and the vast majority of courts use it at every stage and phase of litigation. Thus in considering a contention that a statute is unconstitutional which authorizes a municipal corporation to issue bonds for expenditures the chief objective of which is the attraction of industrial enterprises to the municipality, the courts, including the Supreme Court, take judicial notice of the changes in the agricultural economy of the state and relevant results therefrom. These include the migration of country residents to cities where work is available, and if not available within the state, to places where it is available; the controlling effect of the location of industry upon shifts in population; and the consequent great public importance of inducing industries to locate within the state.[28]

3. Municipal Ordinances.—The appellate courts in Tennessee do not take judicial notice of municipal ordinances where there is in the record nothing to show that they were in evidence before the trier of fact. It is immaterial that purported copies of them were set forth in the cross-complaint of defendant and in the trial brief of the plaintiff, cross-defendant.[29] This case represents the rule applied in most jurisdictions in the absence of controlling statutes.

27. Timmerman v. Kerr Glass Mfg. Co., 314 S.W.2d 31 (Tenn. 1958).
28. McConnell v. City of Lebanon, 314 S.W.2d 12 (Tenn. 1958).
29. McCalla v. Nelson, 313 S.W.2d 462 (Tenn. App. W.S. 1956).

VI. Evidence

A. Relevance

1. In General.—The one rule of evidence to which there is no exception is that irrelevant evidence is inadmissible. Relevance indicates a relationship between two or more facts. The existence of fact *A* is relevant as tending to show the existence of fact *B* if the existence of *B* is more likely than it would be if fact *A* did not exist. Hence, evidence tending to prove the existence of *A* is relevant as tending to establish the truth of the proposition that *B* exists. In a lawsuit the propositions subject to be proved or disproved therein are determined by the pleadings, by stipulation, or by some sort of pretrial proceeding. While irrelevant evidence is always inadmissible, the converse, that all relevant evidence is admissible, is not true. Much relevant evidence is rejected for various reasons or for what passes as reasons.

2. Punitive Damages.—On an issue as to the amount of punitive damages, that is, damages awarded as punishment, the financial status of defendant is relevant, and evidence thereof is to be considered by the trier of fact along with other evidence.[30]

3. Standard of Conduct.—While the customary practice of persons engaged in a particular activity does not set the standard of conduct of reasonable men, still it is evidence for the trier of fact in determining the standard to be fixed, as in case of the standard of due care to be fixed by the jury in determining whether defendant's or plaintiff's conduct was negligent.[31] A number of cases to the contrary fail to make the distinction above noted.

B. Evidence of Slight Weight

1. Unduly Prejudicial.—Evidence that a person carries liability insurance applicable to his conduct in question in the pending action as tending to prove his negligence is of slight value and likely to be unduly prejudicial, and its reception over objection is usually reversible error. Where, however, such evidence is introduced inadvertently or incidentally in relating relevant matter, the court may properly order it stricken and refuse to grant a mistrial. Thus, when plaintiff was asked by defendant who were present when he signed a statement, his answer that two insurance adjusters were there did not require the trial judge to order a mistrial.[32] As some judges have pointed out, there is a good deal of unrealistic nonsense in assuming that jurors are not aware that in certain classes of so-called accidents,

30. McDonald v. Stone, 321 S.W.2d 845 (Tenn. App. W.S. 1958).
31. Overstreet v. Norman, 314 S.W.2d 47 (Tenn. App. M.S. 1957).
32. Goodall v. Doss, 312 S.W.2d 875 (Tenn. App. M.S. 1958).

the defendant usually carries liability insurance. It is common knowledge that the solvent owner of an automobile and the reasonably prudent business man consider protection by insurance against risk of loss by accident and litigation in the same category as protection against loss by fire.

2. Lie Detector Test.—Since the courts refuse to receive evidence of the results of a so-called lie detector test, it is generally held that evidence of refusal to submit to such a test is inadmissible. Where it is erroneously admitted, its effect depends upon the circumstances and the conduct of objecting counsel. The error usually may be cured by an instruction to the jury to disregard the evidence.[33]

C. Other Crimes

It is well settled that evidence of defendant's commission of other offenses or his conviction thereof is inadmissible as tending to prove his disposition to commit offenses and the likelihood that he acted in accord with that disposition in the case at bar. The theory is that the trier of fact may be too ready to convict him as a bad man and thus give controlling weight to otherwise unconvincing evidence. When such evidence is offered to prove relevant matter other than disposition, it is generally found to be within some specified exception to the exclusionary rule, such as motive, intent, preparation, plan, knowledge, or identity. And when the defendant takes the witness stand, he, like any other witness, may be impeached by evidence of conviction of crime. But when he refrains from testifying in a jurisdiction in which a jury fixes the penalty and the defendant is found guilty and is subject to increased penalty because of previous convictions, a difficult problem of procedure is presented. In Tennessee the defendant must be notified either by the indictment or otherwise that the additional penalty statute will be invoked. Then the order of proof is within the discretion of the trial judge. He may rule that the evidence of prior convictions is inadmissible until after a verdict of guilty has been returned. After such a verdict the same jury will be retained to consider the punishment and the evidence of prior convictions will be received. This procedure affords defendant full protection; but the trial judge is not required to follow it. He may use the timeworn and ineffective device of receiving all the evidence before the case is submitted to the jury and charge them that the evidence of the former convictions is to be considered, if at all, only after they have found the defendant guilty.[34]

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33. Marable v. State, 313 S.W.2d 451 (Tenn. 1958).
34. Frost v. State, 314 S.W.2d 33 (Tenn. 1958).

D. Hearsay

1. *Admissions.*—Under our adversary system of litigation there is no doubt that evidence of any relevant conduct of a party is admissible against him. This includes declarations or statements in words or in conduct intended as a substitute for words; and insofar as they are assertions, they are usable as evidence of the truth of the declaration or statement. This was true before a party was competent as a witness. Wigmore has insisted that such statements are not hearsay, but most modern commentators disagree and classify such receivable evidence as an exception to the hearsay rule.

(a) Statements in Pleadings.—A pleading alleging that the statutory period of limitations expired before the action was commenced is a plea in confession and avoidance, but the so-called confession is not an admission of fact that the plaintiff has a cause of action the remedy for which has been lost. At most it is a hypothetical admission made only for the purpose of reliance upon the specified defense. This is the result reached by the court of appeals in *Jones v. Bozeman*,[35] and is in accord with all the decisions. This is to be contrasted with a specific allegation of fact in a pleading, which, while it remains unqualified, is a judicial admission and is not subject to contradiction by the pleader.[36]

(b) Prior Testimony.—Evidence that defendant at a preliminary hearing before a judge of a general sessions court stated that certain money came from specified sources is admissible at his trial on the merits as tending to prove the truth of the statement.[37] The court calls it an "admission against interest." This language is very frequently used in opinions and is misleading in that it confuses admissions and declarations against interest. It is too well settled for debate that an admission of a party is admissible when offered against him even though at the time of his statement it was highly self-serving and so regarded by him. And the admitter may be available as a witness. A declaration against interest must be such that the declarant realized that the fact stated was contrary to his pecuniary or proprietary interest at the time he made it; the declarant must be unavailable as a witness; and the evidence is admissible wherever relevant regardless of the declarant's connection or lack of connection with the pending litigation.

2. *Confessions.*—In dealing with those admissions offered against a defendant in a criminal case, and particularly those which are ad-

35. 321 S.W.2d 832 (Tenn. App. W.S. 1958).
36. Aladdin Industries, Inc. v. Associated Transport, Inc., 323 S.W.2d 222 (Tenn. App. M.S. 1958).
37. Solomon v. State, 315 S.W.2d 99 (Tenn. 1958).

missions of guilt, the courts erect certain safeguards for the defendant. In many states it is said that these safeguards are needed only when the defendant's statements are admissions of guilt and not statements from which guilt may be inferred. But when the statements are classified as confessions, the proponent must show that they were made by defendant without improper inducement such as physical violence or threats or promises which would tend to produce a false confession. By the orthodox rule, which is applied in Tennessee, when an issue of improper inducement is raised, it is the exclusive province of the judge to decide it. With admissibility the jury has nothing to do. If evidence of the confession is admitted, it is the sole function of the jury to determine its weight and credibility.[38]

3. Confession as Direct Evidence.—Admissions and confessions have been termed primary evidence. In *Wooten v. State*[39] the supreme court classified a written confession made in the presence of police officers as a judicial confession. The holding was that it and a later oral confession made to a private individual constituted direct evidence so that the charge on corroboration required when the evidence against defendant is entirely circumstantial was not necessary. It is often said that a confession or admission is primary evidence. The characterization of the written confession as a judicial confession must have been a pure inadvertence.

4. Res Gestae—Spontaneous or Contemporary Statements.—Evidence of statements made by the ten-year-old victim of an offense, who voluntarily cooperated in its commission, made three weeks afterwards, is inadmissible hearsay. It cannot be considered a part of the *res gestae*.[40] This conclusion is unavoidable no matter what test is used for *res gestae* as an exception to the hearsay rule—there was nothing spontaneous about the statement and certainly it could not be called contemporaneous with the event related no matter how loosely "contemporaneous" may be construed. Nor could it be regarded as analagous to "fresh complaint" in rape.

E. Parol Evidence Rule

1. Conditions Precedent.—This rule makes legally ineffective prior or contemporaneous agreements which contradict or vary a writing that purports to embody the entire contractual transaction between the parties. It has no application to an agreement that constitutes a condition precedent to the creation of the contract.

38. Wooten v. State, 314 S.W.2d 1 (Tenn. 1958); Tines v. State, 315 S.W.2d 111 (Tenn. 1958).
39. 314 S.W.2d 1 (Tenn. 1958).
40. Sherrill v. State, 321 S.W.2d 811 (Tenn. 1959).

In *Patterson v. Anderson Motor Co.*[41] the oral statement of defendant was, "This whole thing is hinged on my partner buying my interest in Olive Branch because if he can't buy it, I can't go," and the provision in the writing was "This buy and sell agreement is conditioned on the parties getting a franchise for the sale of the Mercury Automobile from the Ford Motor Company, and further conditioned upon the approval of the Ford Motor Company of the sale of T. M. Allen, *etc.*" These were construed in effect as conditions precedent to the creation of the contract rather than to the duty of defendant to perform.

2. *Application to Unambiguous Language.*—Under the Uniform Partnership Act as construed in Tennessee, real property conveyed to a partnership is partnership property and "if acquired with partnership funds becomes personalty for all purposes." Hence a deed of a parcel of realty to a partnership "to have and to hold said land to the said Brown Bros., a partnership, its successors and assigns forever" is unambiguous and parol evidence to vary or contradict or modify it is inadmissible.[42]

F. Witnesses

1. *Obligation to Attend.*—Witnesses duly subpoenaed may properly be required to attend sessions from day to day until discharged or released. But if the trial is indefinitely postponed, a witness is not obliged to return at a later date unless again subpoenaed. He is not guilty of contempt for failure to attend upon mere notice or request of counsel.[43] This decision is made of no effect as a precedent by chapter 113 of the General Acts of 1959 which provides that a continuance shall not be deemed a discharge of a witness or of his duty to appear in the case unless expressly discharged by the court or by the party at whose instance he was summoned.

2. *Qualification—Opinion—Handwriting.*—It is the function of the trial judge to determine whether a lay witness is qualified to testify concerning whether a writing offered as a holographic will is in the handwriting of the alleged testator.[44]

3. *Competency—Court Officers.*—A witness who is otherwise qualified to testify for the prosecution in a pending criminal case is not rendered incompetent by the fact that he is the sheriff who swore out the warrant for defendant's arrest or that he was an officer in charge of the jury a few minutes before it was sworn.[45]

4. *Accomplice—Corroboration.*—Where two children, aged 10 and

41. 319 S.W.2d 492 (Tenn. App. W.S. 1958).
42. Brown v. Brown, 320 S.W.2d 721 (Tenn. App. M.S. 1958).
43. Emerson v. Porter, 314 S.W.2d 9 (Tenn. 1958).
44. Scott v. Atkins, 314 S.W.2d 52 (Tenn. App. W.S. 1957).
45. Pierce v. State, 315 S.W.2d 271 (Tenn. 1958).

11, are capable of committing an offense and engaged in doing so with defendant, each is an accomplice and his testimony against defendant must be supported by testimony of a person other than an accomplice.[46]

VII. JURISDICTION AND VENUE

1. County Court—Subject Matter.—(a) Probate.—The provisions of the statutes for the appointment of specified relatives or of creditors does not deprive the county court of its exclusive jurisdiction to appoint administrators. And where parties entitled to priority have refused or declined to act, the court may appoint a stranger as administrator subject to service in an action for wrongful death.[47]

(b) County Court—Circuit Court.—When in a proceeding for the probate of a will pending in a county or probate court, a contest is initiated, the case is immediately transferred to the circuit court. This court has exclusive original jurisdiction of contests of wills. The circuit court on transfer acts not as an appellate court but as a court of first instance in the exercise of its original jurisdiction.[48]

(c) Eminent Domain.—The county court has original jurisdiction with the circuit court under T.C.A. §§ 49-801 to 804, in an eminent domain proceeding until it appears that the condemnor and the property owner are unable to agree after the jury of view has reported. If that happens, the case on appeal may go to trial *de novo* before the circuit court. However, while the case is in the county court before appeal, the plaintiff may take a voluntary nonsuit. And this is so notwithstanding that the condemnor plaintiff with the consent of defendant property owner entered the property and made percolation tests.[49]

2. Chancery—Juvenile Courts—Subject Matter.—Chancery and circuit courts have exclusive jurisdiction over adoption proceedings. The juvenile court has jurisdiction to adjudge that an infant is an abandoned child and to commit the child to the custody of the State Welfare Department. But such a judgment does not deprive chancery of jurisdiction to entertain a petition for the adoption of the child.[50] [Chapters 41-45 of the Acts of 1959 contain further provisions governing Juvenile Courts and appeals therefrom.]

3. Chancery.—(a) Subject Matter—Award of Damages.—In *Bryson v. Bramlett*[51] plaintiff's bill in chancery sought recovery of all sums

46. Sherrill v. State, 321 S.W.2d 811 (Tenn. 1959).
47. *In re* Thompson's Estate, 314 S.W.2d 6 (Tenn. 1958).
48. Scott v. Atkins, 314 S.W.2d 52 (Tenn. App. W.S. 1957).
49. Ragland v. Davidson County Bd. of Educ., 312 S.W.2d 855 (Tenn. 1958).
50. *In re* Matthews, 319 S.W.2d 69 (Tenn. 1958).
51. 321 S.W.2d 555 (Tenn. 1958).

paid as usury and actual and punitive damages for harassment of complainant by a series of garnishments brought to collect the usurious charges. The chancellor found that plaintiff was entitled to recover $141.17 for sums paid as usury and illegally taxed garnishment costs, plus $100 for attorney's fees and $500 punitive damages. On appeal the court of appeals held that the chancellor had no jurisdiction to award punitive damages, and left in effect judgment for only $141.17. On certiorari the supreme court said that the chancellor had authority to award attorney's fees, and held that when chancery had taken jurisdiction of the suit for usury, it had jurisdiction also to award therein punitive damages and unliquidated damages for tort. It modified the judgment by restoring the award of punitive damages. It did not restore the attorney's fee but gave no reason for the omission.

(b) Exclusive Jurisdiction.—When a divorce action is begun in circuit court and its jurisdiction is not challenged by demurrer, the circuit judge acting as chancellor is entitled to try it, and the decree rendered is a decree of a chancellor. But a later bill to set aside the decree may not, over objection by a motion operating as a demurrer, be heard in the circuit court which decreed the divorce. The chancery court has exclusive jurisdiction over such a proceeding.[52]

4. Circuit Court—Maritime Torts.—United States courts have exclusive jurisdiction over actions brought in admiralty to recover for maritime torts, but if the action is brought in personam against the tortfeasor for damages caused by the tort, the common law courts of the state have jurisdiction. Thus, for damages caused to plaintiff, a contractor, by the negligence of the defendant owner of a barge tow in a collision between defendant's tow and a pier in the Cumberland River being built by plaintiff, the defendant was personally liable and an action in personam against him therefor was properly brought in the Tennessee Circuit Court.[53]

5. Person—Service of Process.—(a) Foreign Insurance Company.—Under T.C.A.§§ 56-320, 321, a foreign insurance company doing business in Tennessee, whether or not it appoints the Commissioner of Insurance and Banking its agent for service of process, may be served by serving the Commissioner in any action on "any cause of action arising in Tennessee." Consequently where a policy was secured for a resident of Tennessee by his local agent through a Kentucky agent on property located in Kentucky, the statute was not applicable to

52. Murrell v. Murrell, 323 S.W.2d 15 (Tenn. App. W.S. 1958).

53. C. F. Rule Constr. Co. v. Cumberland River Sand Co., 321 S.W.2d 791 (Tenn. 1959).

an action upon the policy brought in Tennessee, and service upon the Commissioner was ineffective.[54]

(b) Non-resident Motorist.—Service upon a non-resident motorist under T.C.A.§ 20-224 is complete when process is served on the Secretary of State. If so served within the prescribed period of one year, it is immaterial that the copy of summons and declaration mailed by the Secretary to defendant did not reach him until after the expiration of a year. Delay due to the Secretary's misdirection of the envelope, which was promptly corrected by him upon learning of the misdirection, did not affect the validity of the service.[55]

VIII. TRIAL

1. Notice of Trial—Waiver.—Ordinarily an action is brought on for trial by regular call of the trial docket; but where an action has been pending for a long time, and the judge in disposing of a motion for a new trial continued the case for receipt of the evidence on a date to be fixed, and plaintiff thereafter moved for disposition of the case and it was heard three days later, there was no reversible error.[56] It was obvious that defendant was delaying the disposition of the cause for non-meritorious reasons.

2. Right to Trial by Jury.—Where a defendant has filed a plea in abatement and plaintiff has taken issue thereon and demanded a jury, he is entitled to a trial by jury and it is reversible error to deny the demand.[57]

3. Selection of Jurors—Eligibility of Women.—The statute making women eligible to serve as jurors is a general law and it supersedes or repeals earlier special acts limiting jury service to men. And this is true as to criminal cases for trial in Chester County.[58]

4. Instructions to Jury.—(a) Requirement of Writing.—The requirement in T.C.A.§ 20-1315 that the instructions of the judge in a civil case shall be in writing upon the request of either party does not mean that this writing be delivered to the jury. That delivery to the jury is specifically required in criminal cases by T.C.A.§ 40-216 has no effect upon the practice in civil cases.[59]

(b) Questions of Law.—It is the province of the trial judge to determine whether a writing is ambiguous so as to justify the reception of parol evidence and to determine the meaning of the document.

54. Cox v. Fidelity-Phenix Fire Ins. Co. of N.Y., 313 S.W.2d 429 (Tenn. 1958).
55. Noseworthy v. Robinson, 315 S.W.2d 259 (Tenn. 1958).
56. Agricultural Ins. Co. v. Holter, 318 S.W.2d 433 (Tenn. App. M.S. 1958).
57. Troxel v. Jones, 322 S.W.2d 251 (Tenn. App. M.S. 1958).
58. Pierce v. State, 315 S.W.2d 271 (Tenn. 1958).
59. Smith v. Steele, 313 S.W.2d 495 (Tenn. App. W.S. 1956).

In *American National Insurance Co. v. Thompson*[60] the court of appeals found that a binding receipt was ambiguous and that the jury to whom the question was erroneously submitted made the proper interpretation. Hence, the error was harmless. It is commonly said that the interpretation of a writing is a question of law.

(c) Circumstantial Evidence.—In a homicide case the judge must without request give the standard charge on circumstantial evidence if all the state's evidence is circumstantial. If, however, there is also direct evidence that charge need not be given except on special request.[61]

(d) Meagerness—Inadequacy.—Where the court's general charge is inadequate or fails to define a specific term, there is no error in the absence of a special request.[62]

(e) Inadvertent Error.—In an action against two defendants, the trial judge, in explaining the theory of plaintiff's claim against the second named defendant, inadvertently used the name of the first named in a paragraph intervening between two paragraphs concerning the first. If the misnamed defendant desired to use this error to his advantage, he should have called it to the judge's attention and requested a curing instruction.[63]

(f) Mandatory Instruction Concerning Item of Evidence.—The trial judge has no authority to direct a jury to disregard specified evidence as unworthy of belief unless it is contrary to established physical facts or so inherently incredible that no reasonable person would accept it as true. In such event the judge may remove it from consideration by the jury.[64]

(g) Directed Verdict—Will Contest.—In a will contest the test to be applied in ruling on a motion for a directed verdict is the same as that in other civil litigation.[65]

(h) Directed Verdict—Criminal Prosecution.—Where the supreme court finds that there is no evidence to sustain a verdict of guilty, it will remand the case. It will not direct the trial court to enter a verdict of not guilty. But it will suggest that if no further testimony is produced, the District Attorney should nolle the case.[66]

5. Motions after Verdict—In Arrest of Judgment or *Judgment N. O. V.*—At common law it was well settled that a motion in arrest of judgment attacked either the sufficiency of the opponent's pleading

60. 316 S.W.2d 52 (Tenn. App. E.S. 1957).
61. Gray v. State, 313 S.W.2d 246 (Tenn. 1958).
62. Bluff City Buick Co. v. Davis, 323 S.W.2d 1 (Tenn. 1959).
63. Yellow Cab Co. v. Pewitt, 316 S.W.2d 17 (Tenn. App. M.S. 1958).
64. Smith v. Steele, 313 S.W.2d 495 (Tenn. App. W.S. 1956).
65. Scott v. Atkins, 314 S.W.2d 52 (Tenn. App. W.S. 1957).
66. Sherrill v. State, 321 S.W.2d 811 (Tenn. 1959).

to sustain the verdict or a defect in the verdict as being non-responsive to the issue. It was usable almost, if not quite, exclusively by defendant. The motion for judgment notwithstanding the verdict was a device by which the plaintiff secured what in effect was a default judgment—it was usable only where the defendant's pleading contained an express admission of the allegations of the declaration and pleaded in avoidance facts which were insufficient to constitute an avoidance. In the later practice, though apparently not so in England, the admission implied in setting up the affirmative defense was as effective as an express admission. These motions are still available in Tennessee and are directed only to the record, usually only the pleadings, and have no effect as a challenge to the validity of the proceedings at the trial or errors committed there, although they be set forth in a bill of exceptions or otherwise. The pleadings are construed liberally in support of the verdict or finding.

At common law a motion for a new trial must precede a motion in arrest. If made with or after a motion in arrest, it will be deemed waived. The two motions were said to be inconsistent, for it would be incongruous to insist that an otherwise valid verdict must be set aside because not supported by the pleadings and at the same time challenge the validity of the verdict for errors occurring at the trial. If the motion for a new trial is denied, then the motion in arrest is proper, for if the pleadings do not support the verdict, the defect will be fatal on writ of error. Would it not be more reasonable to hold that the order in which the court should consider these motions should be controlling, rather than the order in which the motions are made? However, the Supreme Court of Tennessee has recently considered and approved the common law rule.[67] The question was fully discussed and the application of the rule to criminal cases was declared to be proper more than 50 years ago.[68] In the *Davis* case the court also definitely held that a motion for judgment notwithstanding the verdict is a motion for judgment on the pleadings and cannot be used as a substitute for a motion for a new trial. It is not the remedy to correct the error in denying a motion for a directed verdict.

In most states there is a statute providing for judgment notwithstanding the verdict where the motion for a directed verdict was erroneously denied. In Tennessee the same remedy is provided by a motion for a new trial and the statutes requiring the appellate courts to enter the judgment which the lower court should have entered. Why, then, should Tennessee continue to apply these antiquated rules

67. Bluff City Buick Co. v. Davis, 323 S.W.2d 1 (Tenn. 1959).
68. Hall v. State, 110 Tenn. 365, 75 S.W. 716 (1903).

governing mere order of procedure and the outmoded learning that produced them?

IX. New Trial

A. New Trial Grounds

1. Defects in Verdict—In Form.—Where a mother's complaint set forth one cause of action for loss of services of her infant son and another for compensation and punitive damages for the son, and at the trial the jury rendered a single verdict of $500 compensatory damages and $500 for punitive damages, separate verdicts should have been required. The defects in the verdict were waived by failure to object and allowing judgment to be entered upon the verdict.[69] It may be asked how the court is to treat this judgment if defendant tenders payment or if execution is levied thereon. For what portion must the mother give security as guardian of the son?

2. Excessive Damages.—A new trial is granted on the ground of excessive damages only where the excess is so great as to indicate "prejudice, passion or caprice," that is, to be "so unreasonable as to shock the judicial conscience." Where a remittitur is suggested by the trial judge, the court of appeals will be slow to order an additional remittitur. Where the plaintiff suffered serious injuries causing total disability for more than six months and 25% partial permanent disability, loss in wages $8,909 and incurred bills of $1,950 for doctor, hospital and medicines, a judgment for $70,000 for these injuries, of which $10,000 was remitted, was not excessive.[70]

3. Inadequate Damages.—A new trial for inadequate damages is granted only where the amount is so low as to indicate partiality, passion or caprice. Where the evidence of plaintiff's contributory negligence is substantial, the amount which may be deducted from that which would otherwise be adequate compensation for his personal injuries may be so substantial as to justify an award less than the amount of his special damages. Thus, in such a case a judgment on a verdict of $2,000 for damages to plaintiff's person and property will not be set aside though only $580 was awarded for the personal injuries.[71]

4. Newly Discovered Evidence.—It is generally said in support of orders denying new trials that a new trial will not be granted for newly discovered evidence that is merely cumulative. Thus, where at a trial for homicide a witness testified that he had seen the alleged victim alive after the date when defendant had any opportunity to

69. Thompson v. Jarrett, 315 S.W.2d 537 (Tenn. App. W.S. 1957).
70. Yellow Cab Co. v. Pewitt, 316 S.W.2d 17 (Tenn. App. M.S. 1958).
71. Thompson v. Jarrett, 315 S.W.2d 537 (Tenn. App. W.S. 1957).

kill him and the newly discovered evidence was that of another witness to the same effect, the trial judge was not in error in denying a new trial. It should be noted that there was abundant circumstantial evidence supporting the judgment of conviction, and that the test applied in a close case is whether the new evidence would be likely to affect the result.[72]

X. JUDGMENT—RES ADJUDICATA

1. Judgment—Default Judgment—Jurisdiction of Court—Estoppel.—In Tennessee under a statute in force in 1919 a judge of a criminal court in Maury County was authorized to sit as a chancellor and had jurisdiction to hear and determine a divorce action. A decree of divorce after a hearing on default duly entered was valid and binding upon the defendant. Even had the statute not authorized this action, the judge was a de facto chancellor in this case, and after defendant had failed to question the decree for 37 years, he would have been estopped from doing so.[73]

2. Res Adjudicata.—(a) Action for Wrongful Death.—The father of a decedent duly appointed as administrator of decedent brought action under the statute for wrongful death of decedent. At the trial on the merits, the trial judge directed a verdict for defendant on the ground that there was no evidence to support the allegation of negligence of defendant. Later the decedent's mother as his next of kin brought action for the same cause. The judgment for defendant is a complete bar to this action. That the administrator's complaint failed to allege the existence of other beneficiaries than the father does not affect the finality of the judgment.[74]

(b) Judgment on Issue in Abatement.—The common law rule as to judgment upon a verdict for plaintiff on an issue in abatement has been changed by statute.[75] Defendant may thereafter plead to the merits. A verdict and judgment for defendant is no bar to a later action on the merits.[76]

(c) Decree of Dismissal Without Prejudice.—A decree dismissing a bill to enjoin a violation of a restrictive covenant in a deed of real estate on the ground that changed conditions made its enforcement inequitable is no bar to an action for damages for breach of the covenant. The decree was without prejudice to plaintiff's right to sue

72. Marable v. State, 313 S.W.2d 451 (Tenn. 1958).
73. Martin v. Dowling, 315 S.W.2d 397 (Tenn. 1958).
74. Walker v. Peels, 315 S.W.2d 400 (Tenn. 1958).
75. TENN. CODE ANN. § 20-906 (1956).
76. Troxel v. Jones, 322 S.W.2d 251 (Tenn. App. M.S. 1958).

for damages. And a finding of changed conditions did not negative plaintiff's claim of damages suffered by the breach.[77]

(d) Parties Concluded.—A judgment against an indemnitee for injuries resulting from his fault is not conclusive as to the findings on which it is based as against the judgment debtor's indemnitor, unless he is called upon to come in and defend in the action against the indemnitee. The fact that the indemnitee had full knowledge of its pendency is not the equivalent of notice to come in and defend.[78]

(e) Effect of Saving Statute in Tennessee.—In a workmen's compensation case plaintiff took a voluntary nonsuit in March 1957 in his action for permanent disability caused by his occupational hazard in breathing fumes. In June 1957 he brought a new action based on an accident in which he suffered the permanent disability by inhaling fumes released by an explosion. Defendant pleaded that plaintiff had knowledge of this permanent disability in April 1956 and this action was barred by the statute. To this answer plaintiff demurred. The court held that plaintiff in his original action would have been given leave to amend his declaration by alleging the accident as the cause of his disability, and his voluntary nonsuit brought the case within the terms of the statute allowing a new action within a year after the nonsuit.[79] It is submitted that this very liberal interpretation of the statute is highly commendable in view of the general objectives of the compensation act.

XI. Appeal and Error

A. Preliminary Requisites

1. Time.—An appeal to the circuit court from a judgment of the justice of the peace (or general sessions court) must be made before the expiration of two full days. If made later, the appeal must be dismissed on motion of appellee and the case remanded to the trial court for further proceedings.[80]

A motion to strike an appeal and affirm a judgment of criminal contempt because of failure of defendant to file his brief on time may be denied in the exercise of the court's discretion. Denial was ordered where defendant had filed his assignment of error at the time the writ of certiorari and supersedeas were filed and the charge was of a serious offense.[81]

A decree dismissing a petition for a rehearing for failure to apply

77. Hysinger v. Mullinax, 319 S.W.2d 79 (Tenn. 1958).
78. Jones v. Bozeman, 321 S.W.2d 832 (Tenn. App. W.S. 1958).
79. Norton v. Standard-Coosa Thatcher Co., 315 S.W.2d 245 (Tenn. 1958).
80. Rutledge v. Swindle, 319 S.W.2d 488 (Tenn. App. M.S. 1958).
81. Barton v. Jones, 322 S.W.2d 593 (Tenn. 1959).

therefor within the time limited by the rules of the court of appeals does not authorize a petition for certiorari to the supreme court filed more than 45 days after entry of the original decree in the court of appeals.[82]

The time to appeal under T.C.A. § 6-1011 from an administrative order or order of a municipality making an award for property condemned for a street begins to run from the date of the order and not from the date of its receipt by the property owner. An appeal taken within 20 days after the latter date is not timely.[83]

In the order denying defendant's motion for a new trial, he was allowed 60 days within which to have prepared and filed his bill of exceptions. By order dated more than 30 days after denial of the motion, this time was extended by an additional 20 days. The bill of exceptions filed within this extended period was on motion of plaintiff stricken from the record. It was beyond the power of the trial judge to grant an extension after the 30 day period had expired.[84]

2. Motion for New Trial.—On certiorari to the circuit court from an order of the Civil Service Commission to reinstate a dismissed police officer, the court ruled that the return of the Commission was defective in failing to include a proper transcript and refused to examine the return. It summarily ordered reinstatement. On certiorari to the supreme court the case was remanded to the circuit court for consideration of the matter disclosed in the return. No motion for a new trial was a prerequisite, for the ruling of the circuit court was the equivalent of a judgment on demurrer.[85]

On an appeal from the judgment for plaintiff at a second trial, defendant's wayside bill of exceptions to the order granting the new trial will be considered without the necessity of his moving for a new trial in the first proceeding.[86]

B. To What Court

1. Appeal from Probate Court.—The court of appeals has jurisdiction of a direct appeal from the order of the probate court of Shelby County denying the probate of a holographic will. Chapter 86, Private Acts of 1870, creating that court, providing for appeal to the supreme court, has no application since the creation of the court of appeals. The provision for immediate removal of a will contest is likewise inapplicable.[87]

82. National Bankers Life Ins. Co. v. Chitwood, 319 S.W.2d 77 (Tenn. 1958).
83. City of Knoxville v. Roach, 319 S.W.2d 225 (Tenn. 1958).
84. Norris v. Richards, 320 S.W.2d 730 (Tenn. App. M.S. 1958).
85. Lansden v. Tucker, 321 S.W.2d 795 (Tenn. 1959).
86. Woods v. Meacham, 316 S.W.2d 23 (Tenn. App. W.S. 1958). *Petition to rehear granted* 1958.
87. *In re* Jones Estate, 314 S.W.2d 39 (Tenn. App. W.S. 1957).

2. Appeal from Chancery Based on Findings of Fact.—In an action in chancery for possession of land and determination of its boundary line based on findings of fact, the appeal is to the court of appeals. The supreme court will order such an appeal transferred to the court of appeals. Only where the decree is upon a question of law as upon a demurrer is the appeal to the supreme court.[88]

C. What is Reviewable

1. Abuse of Discretion.—Where a trial judge refused to permit a defendant to file a plea in abatement to the summons on the second day of the term, although the tendered plea alleged that the cause did not arise in the county and there was no person or agency within the county on whom summons could be served effectively, the ruling was subject to review on certiorari to the supreme court on the ground that it was an abuse of discretion.[89] This falls within the provision for the writ for "absence or excess of jurisdiction or failure to proceed according to essential requirements of the law."

2. Final Judgment or Decree.—A decree over-ruling a demurrer, allowing defendant 20 days to answer and granting him leave to take a discretionary appeal is not a final decree. The time to appeal therefore does not begin to run from the date of the order overruling the demurrer.[90]

3. Order Directing Verdict for Co-defendant and Granting Defendant New Trial.—Where the trial judge granted defendant a new trial and directed a verdict for his co-defendant, the former has no appeal until after judgment at the new trial. An appeal by him before that time will be dismissed.[91]

D. Discretionary Appeal

Where the trial judge overruled a demurrer in a workmen's compensation case and granted a discretionary appeal, the supreme court in a commendable opinion declared that the appeal was improvidently granted, that demurrers in compensation cases are to be discouraged, and discretionary appeals especially so because of the delays involved. It proceeded to rule that the amended complaint stated a cause of action and remanded the case for trial on the merits.[92]

88. Davenport v. Blankenship, 315 S.W.2d 257 (Tenn. 1958).
89. Taylor v. Continental Tennessee Lines, Inc., 322 S.W.2d 425 (Tenn. 1959).
90. Guffee v. Crockett, 315 S.W.2d 646 (Tenn. 1958).
91. Yellow Cab Co. v. Greyhound Corp., 316 S.W.2d 15 (Tenn. App. M.S. 1957).
92. Stovall v. General Shoe Corp., 321 S.W.2d 559 (Tenn. 1959).

E. Scope of Review

1. Trial Without Jury.—Where trial is by the judge or chancellor without a jury, the court of appeals considers the evidence de novo as if the appeal were a simple appeal in equity, but the finding of the trial judge or chancellor will be sustained unless contrary to the preponderance of the evidence. T.C.A.§ 27-303 so provides.[93]

2. Trial by Jury.—Trial by jury was demanded in original bill in chancery and four days later when complainant was permitted to file an amendment, she filed therewith ten specified issues to be submitted to the jury. The chancellor submitted and the jury answered two of those issues. On appeal the court held that the verdict was as binding as any other verdict in chancery and the chancellor could not treat it as advisory only on the ground that the specification of issues was filed too late. Where trial in chancery is by jury, the chancellor cannot try the facts as if there had been no jury, nor can the court of appeals.[94] In 7 *Vanderbilt Law Review* 299 (1954) will be found a comment upon the right to a jury trial in a purely equitable suit of which chancery has exclusive jurisdiction, and the effect of a jury verdict in such a suit. That problem was not raised in this case.

3. Issues Not Raised in Lower Court.—Ordinarily the supreme court will not consider issues not raised in the trial court. But where a constitutional question is involved or when equitable considerations forbid complainant from maintaining an action, this limitation is not applicable.[95]

4. Workmen's Compensation.—The supreme court does not review the evidence to determine whether the preponderance supports the decision below. Hence an assignment of error that goes to the preponderance of evidence is an improper assignment and will be overruled.[96]

5. Matters Pretermitted by Court Below.—Where the court of appeals sustained plaintiff's assignment of error in directing a verdict for defendant and pretermitted consideration of other assignments, the supreme court had no jurisdiction to review the action pretermitting these assignments.[97]

XII. Record on Appeal

1. Appeal and Error.—In the absence of a bill of exceptions in an action tried on oral evidence by the chancellor, the court of appeals

93. Roberts v. Ray, 322 S.W.2d 435 (Tenn. App. M.S. 1958), tort action; Waller v. Hodges, 321 S.W.2d 265 (Tenn. App. W.S. 1958), chancery; Bluff City Buick Co. v. Davis, 323 S.W.2d 1 (Tenn. 1959).
94. McDonald v. Stone, 321 S.W.2d 845 (Tenn. App. W.S. 1958).
95. City of Elizabethton v. Carter County, 321 S.W.2d 822 (Tenn. 1958).
96. Nashville Pure Milk Co. v. Rychen, 322 S.W.2d 432 (Tenn. 1958).
97. LaFont v. Robison, 315 S.W.2d 266 (Tenn. 1958).

can consider only the formal record and the chancellor's finding of facts including his recital of the evidence incidental thereto. And this material cannot be considered as if it were a bill of exceptions setting forth all the evidence.[98]

2. Effect of Certificate of Judge.—In a criminal case where the trial judge certifies a record which contains a narrative of the evidence, the supreme court will hold the record adequate to protect all the legal rights of the defendant unless the record shows affirmatively that the judge abused his authority, or was grossly negligent in so certifying.[99]

3. Diminution of Record—Time For.—The petition or suggestion for diminution of record must be made before the case is called for trial in the court of appeals, though in certain instances the court may in its discretion allow a petition before final disposition (Rule 20.)[100]

4. Supplemental Transcript.—A stipulation that an order of a trial judge may be filed as a supplemental transcript to the original transcript is of no effect where it is dated four months after the date of an order signed by the trial judge allowing an extension of time to file a bill of exceptions. This is particularly true where the order granting the extension is invalid. The record shows the kind of difficulties an appellant encounters when preparation of a bill of exceptions is delayed and the rules governing extension of time are not carefully observed.[101]

There is no authority by statute or rule for a transcript supplement to the record certified by the clerk; it does not become a part of the record and is unavailable to the court of appeals for any purpose.[102]

5. Effect of Content of Motion for New Trial.—A statement of the ruling of the court recited in a motion for a new trial not contained in the bill of exceptions is no part of the record on appeal and an assignment of error based thereon cannot be considered.[103]

6. Effect of Inclusion of Material in Pleading and Brief.—Where there is nothing in the formal record or bill of exceptions to show that certain municipal ordinances were in evidence before the trier of fact, the inclusion of copies of the ordinances in defendant's cross-complaint and in the reply brief of plaintiff is entirely ineffective to make them part of the record on appeal.[104]

98. Providence A.M.E. Church v. Sauer, 323 S.W.2d 6 (Tenn. App. W.S. 1958).
99. Cline v. State, 319 S.W.2d 227 (Tenn. 1958).
100. McCalla v. Nelson, 313 S.W.2d 462 (Tenn. App. W.S. 1956).
101. Norris v. Richards, 320 S.W.2d 730 (Tenn. App. M.S. 1958).
102. Agricultural Ins. Co. v. Holter, 318 S.W.2d 433 (Tenn. App. M.S. 1958).
103. *Ibid.*
104. McCalla v. Nelson, 313 S.W.2d 462 (Tenn. App. W.S. 1956).

7. Assignment of Error.—(a) Form.—An assignment of error must comply with rule 11 of the court of appeals regarding specifications. The assignment "the Court erred in overruling the 12th ground of defendant's motion for a new trial" is insufficient.[105]

(b) Time for Filing.—The effect of failure of appellant to comply with supreme court rule 14 as to the time limit is a matter subject to the discretion of the court. The court will not strike the assignment where the record shows that the moving party was not harmed by the delay and injustice would be done to appellant by enforcing the rule.[106]

(c) Non-joinder of Parties.—The defense of non-joinder of parties plaintiff must be pleaded and tried in the trial court. It cannot be first raised or assigned as error in the court of appeals.[107]

(d) Erroneous Admission of Evidence.—An assignment of error in admitting or rejecting evidence must include a quotation of the full substance of the evidence admitted or rejected with a citation to the record where the evidence and ruling may be found (supreme court rule 14(3)). An assignment which does not make the required specification will be overruled.[108]

8. Disposition on Appeal.—(a) Remittitur under Protest.—On appeal from the trial judge's ordering or suggesting a remittitur with plaintiff's consent (T.C.A.§ 27-118), the court of appeals reviews the evidence concerning compensatory damages. When in so doing it finds ample evidence to support the verdict, it will award judgment for the full amount of the verdict.[109]

Under T.C.A.§ 27-118, 119, the court of appeals has authority to order the original verdict restored in toto or to a greater part of the original amount than that approved by the trial judge. This interpretation of the statute was reached by the supreme court after careful consideration: "The clear legislative intent, as reflected in the foregoing Sections of the Code, was to confer upon the appellate courts full power and authority to revise and correct all errors consistent with recognized rules of appellate practice and procedure." The opinion also stated that when both the trial judge and the court of appeals deemed the verdict excessive, the supreme court did not feel at liberty to hold otherwise.[110]

(b) Judgment at Later Trial—Wayside Bills of Exception.—Where defendant had preserved a wayside bill of exception at the first and

105. Scott v. Atkins, 314 S.W.2d 52 (Tenn. App. W.S. 1957).
106. Norton v. Standard Coosa-Thatcher Co., 315 S.W.2d 245 (Tenn. 1958).
107. Agricultural Ins. Co. v. Holter, 318 S.W.2d 433 (Tenn. App. M.S. 1958).
108. Nashville Pure Milk Co. v. Rychen, 322 S.W.2d 432 (Tenn. 1958).
109. McDonald v. Stone, 321 S.W.2d 845 (Tenn. App. W.S. 1958).
110. Murphy Truck Lines v. Brown, 313 S.W.2d 440, 443 (Tenn. 1958).

second trials, and he appeals from the judgment at the third trial, the court of appeals considers the bills in chronological order. In the case at bar, it held that there was no error in refusing a directed verdict at the first trial; that there was error in granting plaintiff a new trial after verdict in the second trial on the ground that the verdict of $2,000 was inadequate, and therefore set aside the verdict of $10,000 for plaintiff at the third trial and entered judgment for plaintiff on the $2,000 verdict. On certiorari the supreme court affirmed.[111] And on appeal from a judgment for plaintiff at a second trial granted after setting aside a verdict for defendant at the first trial, defendant's wayside bill assigning error in granting the new trial was first considered; the new trial was held erroneously ordered and judgment was entered on the verdict for defendant.[112]

(c) Remand.—Where the chancellor dismissed plaintiff's action on his own motion at the close of plaintiff's evidence after offering defendant opportunity to present evidence, and defendant refused to do so, the court of appeals considered the dismissal as if ordered on defendant's motion. On appeal, since the amount involved was a liquidated sum, the court rendered judgment for plaintiff without remand.[113]

9. Petition to Rehear.—(a) Compliance with Rules.—A petition to rehear which presents no matter of fact or law not dealt with by the court in its original opinion does not comply with the rules and will be denied.[114]

(b) Grounds.—The allegation in a petition to rehear that the bill of exceptions failed to include a statement that it contained all the evidence comes too late for consideration. Reargument of matter presented and considered on the original hearing is improper and ineffective.[115]

XIII. Federal Cases

A. Court of Appeals Sixth Circuit

1. Parties—Indispensable Parties.—Plaintiff, a lessee of land, contracted with *T* to mine ore from the leased premises. *T* sold mined ore to defendant and plaintiff brought replevin to recover the ore from defendant. The court held that *T* was an indispensable party,

111. Thompson v. Jarrett, 315 S.W.2d 537 (Tenn. 1957).

112. Woods v. Meacham, 316 S.W.2d 23 (Tenn. App. W.S. 1958). (Case withdrawn from reporter by order of the court).

113. Patterson v. Anderson Motor Co., 319 S.W.2d 492 (Tenn. App. W.S. 1958).

114. Bryson v. Bramlett, 321 S.W.2d 555 (Tenn. 1958).

115. Eslinger v. Miller Bros. Co., 315 S.W.2d 261 (Tenn. 1958).

for defendant's title to the ore depended upon the contract between plaintiff and *T*.[116]

2. Remedies.—(a) Declaratory Judgment—Abstract Ruling as to Construction of Ninth Amendment.—Where the complaint alleged no facts relevant to the application of the amendment and prayed a ruling as to the construction and effect of the ninth amendment to the United States Constitution, the district court properly dismissed the action.[117]

(b) Declaratory Judgment—Coverage of Liability Insurance Policy in Actions Pending in State Courts.—In actions brought in the state court of Tennessee to recover damages for personal injuries and death, the defendants included the driver of an automobile involved. The owner was insured, and the driver claimed that he was included in the policy as an "additional insured." He notified the insuror to defend him and of his intention to collect from the insuror the amount of any judgment rendered against him. The insuror filed a complaint for a declaratory judgment in the United States District Court. Judge Taylor dismissed the action. On appeal the court held that the judge did not abuse his discretion in so doing because the issues could be fully determined in the pending actions in the state court.[118]

(c) Mandamus.—In an action for temporary and permanent injunction to prevent defendants from denying immediate admission of certain negroes to the schools, the defendant filed a motion to dismiss. Plaintiff now seeks a writ of mandamus to compel the district court to hear plaintiff's motion for a preliminary injunction prior to hearing defendant's motion. The court ruled that the order of hearing the motions was within the discretion of the trial judge and that he did not abuse his discretion in setting defendant's motion for hearing before that of plaintiff.[119]

3. Evidence.—(a) Illegally Obtained.—The court of appeals explained the frequently misunderstood case of *Benanti v. United States*[120] and reaffirmed the accepted rule that evidence secured by state officers by unlawful search and seizure is admissible in United States courts where there is no collusion or cooperation with United States officers. The *Benanti* case deals with an interpretation of the wire tapping act.[121]

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116. McCormick v. Tipton, 259 F.2d 913 (6th Cir. 1958).
117. Ryan v. Tennessee, 257 F.2d 63 (6th Cir. 1958).
118. Utilities Ins. Co. v. Ledford, 255 F.2d 123 (6th Cir. 1958).
119. Prater v. Boyd, 263 F.2d 788 (6th Cir. 1959).
120. 355 U.S. 96 (1957).
121. Graham v. United States, 257 F.2d 724 (6th Cir. 1958).

(b) Admissions—Effect of Statement Used as Basis for Estimated Income.—Entries in the books of defendant corporation of estimates of vacation pay for 1956, based on payments made in 1955 filed with the 1955 income tax report in 1956, cannot be made the basis for summary judgment on claims for 1956 vacation pay by plaintiffs who were on strike when the report was filed and who did not thereafter return to work. The evidence challenging the estimates supported judgment for defendant.[122]

4. Trial—Instructions to Jury—Special Requests.—A requested instruction accurately stating a pertinent proposition need not be given if its content is substantially incorporated in the general charge; and a correct proposition having no applicability to any issue in the case is properly denied.[123] It is a curious commentary upon professional conduct in appellate practice that these hornbook propositions have to be constantly reiterated.

5. Motion After Trial to Amend Findings and Conclusions—Time For.—A motion to amend findings and conclusions is not barred by the filing of them and an order for judgment in accord with them. If the amendment is granted, it may warrant a different judgment.[124]

6. Motion for New Trial.—(a) Inconsistent Verdicts.—When an action of a minor for personal injuries and an action by the father for loss of services of the minor were consolidated for trial at which no evidence of the amount of the father's loss was offered, a verdict awarding $10,000 for the minor's injury and nothing for the father contained no necessary inconsistency. Denial of new trial was affirmed.[125]

(b) Misconduct Affecting Jury—Handbook of Jurors.—Distribution to the entire panel of *Handbook for Jurors* prepared under direction of the Judicial Council containing the statement that a verdict of guilty in a criminal case does not necessarily mean that accused will receive a long sentence or that he will be required to serve any sentence did not constitute prejudicial error.[126]

(c) Misconduct of Counsel.—In his argument to the jury counsel was permitted to state that to the state's prima facie case made by showing defendant's possession of narcotics, his only defense was that he obtained them from a doctor or druggist. Counsel also used the affidavit upon which the search warrant for the narcotics was

122. Miller v. Blue Ridge Glass Corp., 264 F.2d 634 (6th Cir. 1959).
123. United States Fidelity & Guaranty Co. v. Canale, 257 F.2d 138 (6th Cir. 1958).
124. Cohn v. United States, 259 F.2d 371 (6th Cir. 1958).
125. Kingsport Utilities, Inc. v. Lamson, 257 F.2d 553 (6th Cir. 1958).
126. Horton v. United States, 256 F.2d 138 (6th Cir. 1958).

issued on the theory that it was in evidence because the defendant had offered in evidence the warrant and return and the affidavit was upon the back of the warrant. These features of the argument were held to be misconduct so prejudicial as to require a new trial.[127]

7. Judgment—Res Adjudicata.—(a) State Court.—A judgment for defendant in a workmen's compensation case on the ground that plaintiff's injury did not arise in the course of his employment does not bar an action against defendant in the United States District Court to recover for the same injury on the ground of common law negligence.[128]

(b) Collateral Estoppel.—In an action by plaintiff's employee against plaintiff, the jury found that the employee was injured while engaged in his employment and judgment was entered on the verdict. In a later action by plaintiff against his insuror, the judgment estopped plaintiff from relitigating the same issue.[129]

In an action under Tennessee Workmen's Compensation Act to recover for the death of her husband, defendant pleaded "in abatement" that the husband was not in defendant's employ and that the death did not occur in the course of employment. Judgment was entered for defendant. Plaintiff then brought action in the United States District Court under the Longshoremen and Harbor Workers Act. The Tennessee judgment is not res adjudicata on the merits, since it was rendered on pleas in abatement. Nor is it a ground for collateral estoppel on the issue of course of employment, for there was no finding on that issue.[130] This is in accord with the accepted rule. Where a general finding or verdict is the basis of a judgment on several issues, it is impossible to determine upon which issue the verdict and judgment were based.

8. Appeal and Error.—(a) Notice of Appeal—Where Filed.—A notice of appeal from an order denying permission to appeal *in forma pauperis* filed in the court of appeals is ineffective. This court has no jurisdiction to grant an appeal from a final judgment; and if the notice is to be treated as a petition for leave to appeal in forma pauperis, it is insufficient because not accompanied by a certificate of probable cause by the district court.[131]

(b) Disposition on Appeal—Remand.—Where the failure of appellant to file a transcript of the record is due to the death of the court reporter and the time for filing is about to expire, the court

127. Graham v. United States, 257 F.2d 724 (6th Cir. 1958).
128. Palm Beach Co. v. Crum, 262 F.2d 586 (6th Cir. 1958).
129. Clinchfield Railroad Co. v. United States Fidelity & Guaranty Co., 263 F.2d 932 (6th Cir. 1959).
130. Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304 (6th Cir. 1958).
131. 28 U.S.C. § 2253 (1952). Stuart v. Bomar, 261 F.2d 274 (6th Cir. 1958).

will remand the case to the trial court to determine whether a new trial should be granted because a fair and satisfactory record cannot be prepared for an appeal.[132]

When the trial judge had ruled that no punitive damages could be awarded but in his memorandum denying a motion for a new trial on the ground of excessive damages commented upon the circumstances which were relevant only to punitive damages, the court remanded the case for reconsideration by the judge.[133]

(c) Disposition Without Remand.—When the court denies the defendant's application for leave to appeal in forma pauperis, and the facts relied on by petitioner are not in dispute, the court will not remand the case for further proceedings in the district court.[134]

B. United States District Courts

1. Parties—Third Party Practice.—(a) Party Primarily Liable.—In an action against defendant for damages for negligently inflicted injuries, defendant sought to bring in a third party on a third-party complaint alleging that the third party was primarily liable and under a duty to indemnify defendant for any sum recovered against him. The court overruled third-party defendant's demurrer. The decisions dealing with joint tortfeasors between whom there is no contribution are inapplicable.[135]

(b) Tortfeasors Subject to Contribution.—Under the Tennessee rule which permits a defendant whose negligence is passive to recover contribution from a joint tortfeasor whose active negligence is the proximate cause of the wrong done to plaintiff, the defendant is entitled to bring in the latter as a third-party defendant under the Federal Rules of Civil Procedure.[136]

2. Remedies—Election of Remedies.—Plaintiff was entitled to rescind a transaction with the holder of warehouse receipt or to proceed on the theory that the holder was the owner and liable to plaintiff for damages suffered by the fraud. Where he elected the latter course by filing in bankruptcy a claim for the full amount of his original claim and by bringing action and recovering judgment against the surety of the holder, he had elected his remedy. He was no longer entitled to proceed on the theory of rescission and "to follow the res" or its proceeds.[137]

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132. Herring v. Kennedy-Herring Hardware Co., 261 F.2d 202 (6th Cir. 1958).
133. Montgomery Ward & Co., Inc. v. Morris, 260 F.2d 504 (6th Cir. 1958).
134. Woody v. United States, 258 F.2d 535 (6th Cir. 1957).
135. La Ferry v. Ajax Truck Rentals, 161 F.Supp. 707 (E.D. Tenn. 1958).
136. Vaughn v. Terminal Transport Co., 162 F.Supp. 647 (E.D. Tenn. 1957).
137. Continental Grain Co. v. First Nat'l Bank of Memphis, 162 F.Supp. 814 (W.D. Tenn. 1958).

3. Jurisdiction and Venue—Removal of Causes.—The amount involved sufficient to give the United States District Court jurisdiction in actions based on diversity of citizenship and therefore to authorize removal is $10,000.[138] The amendment which fixes this requirement is applicable to causes sought to be removed after the effective date of the act even though they were previously pending in the state court.[139]

XIV. LEGISLATION

The following enactments of the legislature in the 1959 session concerning the jurisdiction, procedure and evidence in the courts of Tennessee should be noted. Some of them deserve careful consideration by the Bar.[140]

1. Sponsored by the Tennessee Bar Association.—Chapters 8, 54, and 109 were sponsored by the Tennessee Bar Association and are of prime importance. Chapter 54 was supplemented by chapter 262.

(a) Chapter 8.—This is the Uniform Jury Commission Law which creates a jury commission and provides a method of summoning jurors which assures impartial selection of qualified jurors and protection against prejudicial irregularities.

(b) Chapter 109.—This chapter provides for a court of general sessions in 87 of the 95 counties of Tennessee. It abolishes the judicial functions of justices of the peace and vests them in the court of general sessions.

(c) Chapter 54.—This chapter supplemented by Chapter 262 authorizes the taking of depositions for purposes of discovery as well as for use at the trial and prescribes the effect of taking the deposition and using it at the trial. It is modelled on the similar provision of the Federal Rules of Civil Procedure. It does not repeal existing statutes except where inconsistent; it is intended to be cumulative rather than exclusive. This *Review* will later publish a note dealing in detail with the subject. It is here sufficient to observe that there is no provision for obtaining information known to the parties by interrogatories, as authorized by federal rule 33. The process of securing depositions is often expensive, while the cost of interrogatories is usually small. Chapter 54 is a great liberalization of existing law. In this connection, chapter 275 should be noted. It amends T.C.A.§ 24-913 and provides for content and service of notice of taking a deposition.

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138. 28 U.S.C. § 1332 (1952), as amended, 72 Stat. 415 (1958).

139. Casteel v. Great Southern Trucking Co., 167 F.Supp. 435 (E.D. Tenn. 1958).

140. The following text references are to chapters of the 1959 Tennessee Public Acts.

2. Juvenile Courts.—The respective jurisdictions of the juvenile court and the circuit court with reference to abandoned children, and adoption are the subject of chapter 42. Chapter 111 concerns availability for adoption. The normal procedure of the juvenile court in offenses involving motor vehicles is modified by chapter 45, and that involving serious offenses by a child over sixteen years of age by chapter 206.

Detailed discussion of these enactments and others dealing with the treatment of delinquent or abandoned juveniles does not belong in this section of this survey.

3. Remedies.—Chapter 78 prescribes the right to certiorari to the Circuit Court of Davidson County from the Board of Review under the Plant Pest Act (T.C.A.§ 43-519). It regulates the scope of the inquiry and forbids the taking of additional evidence.

4. Burden of Proof.—Chapter 130 amends the law concerning statutory signals at grade crossings and regulates the burden of proof upon the issues of contributory negligence and proximate cause.

5. Evidence.—(a) Privileged Communications.—(1) Chapter 24 expands the usual statutory provisions creating a privilege of a penitent that disclosure of his communications to a priest shall not be compelled without his consent. It forbids the disclosure by the priest, under penalty, and is applicable to all members of various religious sects or denominations whose duties are similar to those of ministers of the gospel. Whether a particular member has the prescribed qualifications is a question for the judge. (2) Chapter 27 makes inadmissible in any civil proceeding the testimony given by a witness before a committee of the general assembly without the consent of the witness.

(b) Certified Copy of Record of City Ordinance.—Chapter 221 makes admissible a copy of a record or an ordinance or of a photostat of the ordinance certified by the mayor, city recorder or official custodian of the record.

(c) Certificate of Physician.—Chapter 209 provides that in proceedings for distribution of property of an insane ward to his dependents, the sworn certificate of a physician of specified qualifications that the insanity of the ward is of long duration shall be "competent medical proof."

6. Witnesses.—Chapter 113 provides that a witness properly summoned in a case need not be resummoned after a continuance of the case unless expressly discharged by the court or by the party who caused him to be summoned originally.

7. Judgments.—Chapter 112 provides that in will contests a foreign

judgment of probate is conclusive as to personalty of the testator but not as to realty located in this state.

8. Miscellaneous.—(a) Service of Process.—Chapter 237 provides that service of process by an agent or employee of a party to an action is forbidden and that such a service is ineffective.

(b) Search Warrants.—Chapter 241 contains stringent regulations governing the issue of search warrants and the method of serving a search warrant and preserving the original and proof of service. Failure to comply with the regulations makes the warrant invalid, and search and seizure thereunder is unlawful.

(c) Notice to the Landowner.—Chapter 194 regulates such notice in condemnation suits.

(d) Computation of Time for Filing Bills of Exception.—Chapter 56 provides that where the thirtieth or ninetieth day of the period prescribed for the approval and filing of a bill of exceptions falls on Sunday, it shall be excluded in computing the period. (See T.C.A.§ 27-111).