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TENNESSEE LAW REVIEW

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THE TENNESSEE LAW OF JUDICIAL ESTOPPEL

The term "judicial estoppel", as used in the Tennessee Reports, indicates particularly that class of estoppels arising from sworn statements made in the course of judicial proceedings.

In some of our cases the question of judicial estoppel is perhaps confused with the question of equitable estoppel; hence the general statements in some of the opinions with regard to acting so as to mislead another to his prejudice.

It is obvious that a case may exist where both principles are involved. Thus, a party may make a sworn statement or admission in a deposition or pleading, and another party may act on the strength of this statement. But while this is generally spoken as a judicial estoppel, it might be perhaps more accurately classified as an equitable estoppel —for the party making the statement would be equally estopped if it were **not** under oath. The gravamen of the estoppel in such cases is the reliance which the other party placed upon the statement.

The Tennessee law of judicial estoppel—properly so-called—has nothing to do with other parties to the suit; nor does it matter whether they even knew of the sworn statement.

It is based solely upon that public policy which upholds the sanctity of an oath, and precludes a party who has made a sworn statement—even in another litigation—from repudiating the same when he thinks it to his advantage to do so.

It might well be termed "estoppel by oath."

Of course this class of estoppels is chiefly, if not entirely, concerned with statements of fact—for litigants in general know nothing of legal principles, and swearing to a legal conclusion in most cases is simply an expression of the counsel's belief concerning the legal question involved.

But in two reported cases sworn legal conclusions seem to have been the basis of the estoppel.

Thus, "A", a married woman, who had attempted to convey her interest in certain slaves, gave a deposition in which she swore that she had sold all her right and interest and considered that she had no interest in the matter. Afterwards, she brought suit against her vendee, claiming that the alleged transfer was void because of her coverture and for want of a privy examination. She was held to be estopped by her sworn disclaimer.[1]

So, in another case, "B", to subserve his purposes, swore that a will was properly probated, and claimed under it. Afterwards, in a subsequent litigation it became his interest to attack the will, and he then attempted to say it was never properly probated.

Held, that a judicial estoppel existed which precluded him from taking such a position.[2]

It may be questioned whether the foregoing cases can be reconciled with the broad language used by the Court in **Allen v. Westbrook,** 16 Lea 251, (1886), **and Tate v. Tate,** 126 Tenn. 169 (1912). Certain it is, however, that the Court has never expressly overruled them in any published opinion, if in fact, they have been criticised, or distinguished.

Another feature of the law of judicial estoppel emphasized by the Tennessee cases in the presence or absence of explanation of the previous statement made under oath.

While the appellate courts of Tennessee have, for more than fifty years, upheld and preserved the sanctity of an oath by the application of this principle, yet, in order to avoid injustice, the severity of the rule has been tempered by this exception, viz; — if the party sought to be estopped can

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[1] **Cooley v. Steele,** 2 Head. 605 (1859).
[2] **Grier v. Canada,** 119 Tenn., 17 (1907).

show that his previous statement under oath was made inadvertently or through mistake—"inconsiderately," as many of the cases say—he will not be precluded by his former statement.[3]

There is, as previously indicated, another class of cases which deals with **unsworn** statements made, or with positions taken, by litigants, during the litigation. While these cases are sometimes spoken of in the opinions of the Tennessee Supreme Court, as involving judicial estoppels, it is evident that they are not based upon the rule under consideration.[4]

These cases proceed upon the theory that a litigant may not assume inconsistent positions. Thus, in **Heggi v. Hayes, supra,** it was held that in a seduction case, where defendant's counsel, in argument before the jury conceded that the plaintiff bore a good reputation, and the case was tried on that theory, he could not, on motion for a new trial, introduce evidence tending to besmirch her character. The Court says, at page 227:

"This is a proper case for the application of the doctrine of judicial estoppel which we have just discussed in **Stearns Coal & Lumber Co. v. Jamestown Ry.,** 141 Tenn. 203, 208 S. W. 334."

In **Stearns Lumber Co. v. Jamestown Ry. Co., supra,** the holding was that where an ejectment bill was filed by the

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[3] For cases where no explanation was made of the previous sworn statement, see:
Hamilton v. Zimmerman, 5 Sneed 39 (1857).
Cooley v. Steele, 2 Head 605 (1859).
Nelson v. Claybrooke, 4 Lea 687 (1880).
Chilton v. Scruggs, 5 Lea 308 (1880).
McEwen v. Jenks, 6 Lea 289 (1880).
For cases where a satisfactory explanation was made, see:
Smith v. Fowler, 12 Lea 163 (1883).
Seay v. Ferguson, 1 Tenn. Chy. 287 (1873).
Allen v. Westbrook, 16 Lea 251 (1886).

[4] As illustrating this class of cases, see:
Murrel v. Watson, 2 Shan. Cases 244 (1877).
Watterson & Riley v. Lyons, 9 Lea 568 (1882).
Verhind v. Ragsdale, 96 Tenn. 532 (1896).
Barnes v. Brown, 1 Tenn. Chy. App. 726 (Court Chy. App. 1901).
McLemore v. Railroad, 111 Tenn. 639 (1902).
Parkey v. Ramsey, 111 Tenn. 302 (1903).
Stearns Coal & Lumber Co. v. Jamestown R. R. Co. 141 Tenn. 203 (1918).
Heggie v. Hayes, 141 Tenn. 219 (1918).

complainant to recover a strip of land occupied as a right of way by the Railroad Company, and the bill charged that an amendment to the Company's charter was void and it was not a legally organized corporation, but showed on its face that the complainant had previously sued the Company as a corporation, the bill was properly dismissed on demurrer. The Court says, at page 206:

"While the law of judicial estoppel is ordinarily applied to one who has made oath to a statement of facts in a former judicial proceeding, which in a later proceeding he undertakes to contradict, yet it is frequently applied, where no oath is involved, to one who undertakes to maintain inconsistent positions in a judicial proceeding.[5]

In **Stamper v. Venable, supra,** it was held that a litigant who had contended in the Chancery Court and in the Court of Chancery Appeals that certain documents were deeds, could not, in the Supreme Court, shift his position and claim that they were wills—the Court saying, at page 562:

"It may accordingly be laid down as a broad proposition that one, without mistake induced by the opposite party, who has taken a particular position deliberately, in the course of litigation, must act consistently with it. One cannot play fast and loose."

The foregoing paragraph is quoted by the Court from Bigelow on Estoppel (5th Ed.) page 717, and it may be noted that the Tennessee cases on this point simply follow the current of authority. They will not, therefore, be further discussed. As has been pointed out, the rule governing them is not strictly one of estoppel, but rather a rule of positive procedure, necessary for the orderly dispatch of litigation.[6]

The distinctive feature of the Tennessee Law of Judicial Estoppel is the expressed purpose of the Court, on broad grounds of public policy, to uphold the sanctity of an oath. The sworn statement is not merely evidence against the litigant, but (unless explained) precludes him from denying its truth. It is not merely an admission, but an absolute bar.

The foundation of this doctrine appears in **Hamilton** v.

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[5] **Stamper v. Venable,** 117 Tenn. 557; 97 S. W. 812.
[6] **10 R. C. L. 698.**

Zimmerman, 5 Sneed 39, decided in 1857 through Judge McKinney. In this case Hamilton and McNairy had been in the drug business, and being about to fail, sold out the business Thereafter Hamilton remained in the drug store, ostensibly as Zimmerman's clerk, but in reality, as he claimed, in the capacity of a secret partner. Subsequently Zimmerman sold out the business, and Hamilton filed a bill for an accounting to obtain his share of the partnership profits. Zimmerman in his answer denied partnership.

The proof showed admissions by each party contrary to his sworn pleading—Zimmerman having admitted to various parties that Hamilton was a partner, and Hamilton having very frequently stated that he was nothing but a clerk. Hamilton undertook to explain these former statements and parole admissions by showing that his idea in making them was to conceal from his creditors his interest in the drug business, so as to provide a support for his family.

Under these circumstances the Court seems to think that complainant might well be repelled from a Court of equity, if nothing else had appeared; but the actual decision was placed on another ground.

It appeared that some time after the sale by Hamilton to Zimmerman, and prior to the filing of Hamilton's bill for an accounting, Hamilton and McNairy had filed a bill against Zimmerman, seeking specific performance of the contract of sale. Zimmerman filed an answer, in which he said that, ".....one of the complainants in the bill (n. ning Hamilton) was then in the house of respondent as clerk and had full knowledge of the whole business of respondent," etc. Zimmerman also filed a cross-bill against McNairy and Hamilton, and answering this cross-bill under oath Hamilton states **"that he has read carefully the answer of Zimmerman, and also his bill, and believes that the allegations of said answer and bill are substantially true."**

The Court held that he was precluded from denying this statement, and could not claim that he was a partner, saying:

"This is at least an implied admission of the truth of the statement of Zimmerman—that Hamilton was merely his clerk. And for all the purposes of the present bill, the admission must be taken as true, without enquiring whether, as a

matter of fact, it be so or not. The law, as against the complainant, presumes that it is true; and this presumption proceeds upon the **doctrine of estoppel,** which, from motives of public policy or expediency, will not, in some instances, suffer a man to contradict or gainsay what, under particular circumstances, he may have previously said or done. This doctrine is said to **have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case;** and in the policy of the law to suppress the mischief's from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. And this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. **The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath."**

Having enunciated this doctrine, Judge McKinney states its exception or qualification as follows:

"Admissions or declarations made **in pais** are often entitled to little or no consideration, because made inconsiderately or in ignorance of the facts, or not correctly understood or reported. And even when made with more deliberation, and under oath, it may be made to appear that they were made inconsiderately or by mistake; and if this be so, the party ought certainly to be relieved from the consequences of his error."

After discussing certain inferences prejudicial to the complainant's case, the Court concludes as follows:

"But we leave the case, resting its determination mainly upon the legal principle that the complainant is precluded by his admission, without undertaking to adjudge how the truth of the matter really is."

It may be noted that the Honorable Edwin H. Ewing, the Special Judge who delivered the Court's opinion in the later case of **McEwen v. Jenks,** 6 Lea 289, was one of complainant's counsel in this case. On reading the opinion of Judge McKinney it is easy to understand the remark of Special Judge Ewing in **McEwen v. Jenks,** that a technical estoppel was not

involved. For the statement consituting the estoppel was the express admission in an answer filed in a proceeding between the same parties concerning the same subject matter. Judge Ewing evidently thought that the term "estoppel" was more properly applicable to a case like **McEwen v. Jenks,** or **Cooley v. Steele, 2 Head 605, where the party** in giving a deposition made a disclaimer of interest in the subject matter.

Judge McKinney, in **Hamilton v. Zimmerman,** was stressing the sanctity of an oath—**for it seemed evident that each party had sworn falsely, as shown by previous parole admissions.** The complainant, however, had made an admission of record in a sworn answer, which definitely fixed his former position on the question of the partnership. The Court, therefore, refused to uphold his attempt to swear just the contrary in the case under consideration.

Following this case, with or without citing it, a large number of reported cases have undertaken to apply or distinguish the principle announced by Judge McKinney. These will now be reviewed.

The case of **McCoy v. Pearce,** 1 Shan. Cases, 87, was decided through Judge Wright, in 1858.

The land of John Muncher had been sold under execution and bid in by another, subject to Muncher's right of redemption in two years. Three days prior to the expiration of the redemption period, the execution purchaser, with the assent and at the direction of Muncher, assigned his title to the land to Polly Ann Pearce, Muncher's daughter. Subsequently the question arose between father and daughter as to whether the daughter had redeemed the land for her father's benefit. After deciding against the father on other grounds, the Court says at page 90:

"There is another view of the case which is decisive. In a suit between Pearce and one Loney for this land, Muncher, when offered as a witness for Pearce, being objected to because of his alleged interest, swore he had no interest in the land and that it belonged to his daughter, Polly Ann. We have repeatedly held that the party who thus swears—either in an answer, or as a witness, is estopped to set up title to the property. 5 Sneed, 39."

It will be noticed that Judge Wright, although citing no

case except **Hamilton v. Zimmerman,** 5 Sneed, 39, refers to repeated decisions of the Court along this line. This may, of course, mean that the Court had frequently followed **Hamilton v. Zimmerman,** decided in the previous year, or that the principle was well settled when the Hamilton case was decided.

In 1859 Judge McKinney delivered the opinion in **Cooley v. Steele,** 2 Head 605.

This case involved the interest of Mrs. Cooley, a married woman, in certain slaves. In a previous litigation her mother had filed a bill to set aside a transfer of her life estate in these slaves, making Mrs. Cooley and other remaindermen parties. In answering this bill Mrs. Cooley stated that she had transferred all of her interest in said slaves to one Steele, and that Steele was the bona fide owner of the same.

Afterwards, Mrs. Cooley filed a bill against Steele, claiming that the attempted transfer was void, etc.

With regard to the admission in her previous answer, the Court says:

"But it seems this answer was not sworn to by the wife, and therefore it can only be treated as the husband's answer, and is no estoppel as to the wife."

Judge McKinney, as will be seen, does not seem to regard the **unsworn** statement of the wife—although an express admission—as constituting an estoppel. He continues:

"In the progress of said case, however, the complainant's deposition was taken, in which she repeats that she sold all her right and interest in said slaves to Steele, and considered that she had no interest in the matter."

After stating complainant's legal contention that her conveyance to Steele was not binding, by reason of her coverture and for want of a privy examination, etc., the Court says at page 608:

"To this measure of relief the complainant would be clearly entitled, upon well established principles, **but for the estoppel created by her solemn disclaimer on oath, in the before-mentioned deposition..** From this she cannot escape Coverture confers no privilege or license to commit either fraud or falsehood, under sanction of an oath; nor protection from

the consequences. The complainant has offered no explanation of the sworn statement in her deposition, and she must abide by it. On this ground she must be repelled."[7]

This case was decided only about a year after **Hamilton v. Zimmerman,** by the same Judge, and is expressly based upon that case. As in the Hamilton case, Judge McKinney emphasizes the sacredness of an oath. Although the complainant had made an express admission in her answer, this was held not to estop her. But when she swore in her deposition that Steele was the **bona fide** owner of her interest, this was a "solemn disclaimer" which precluded her. The oath, it would seem, made all the difference.

It may further be noted that this statement in the deposition was apparently **a mistaken legal conclusion.** Judge McKinney in effect so decides when he shows that the attempted conveyance to Steele was void, and that complainant would be entitled to recover the slaves were she not precluded by her deposition.

The fact is further emphasized that the complainant made no explanation of the language of her deposition.

Seay v. Ferguson, 1 Tenn. Chy 238, was decided by Chancellor Cooper in 1873, and illustrates the exception to the rule.

This was a bill filed by Seay to enjoin Ferguson from relying upon an alleged judicial estoppel arising from an affidavit inadvisedly made by Seay, in an action at law.

The complainant set out fully the facts, explaining why the mistake was made, and upon demurrer Chancellor Cooper held the bill good. The substance of this case is well stated in Chancellor Cooper's brief head-note:

"Equity will relieve a party from consequences of admissions made inconsiderately, or by mistake, under the sanction of an oath, in the course of judicial proceedings."

The case of **Stillman v. Stillman,** 7 Baxter 169, was decided in 1874—the opinion of the Court being delivered by Nicholson, C. J.

This case involved a question of alimony, and certain property had been given to the wife as the property of the husband. Thereafter, the husband's sisters, Julia and Sarah, filed a bill,

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[7] **Hamilton v. Zimmerman,** 5 Sneed, 39, 48.

alleging that the property in question belonged to a partnership of which they and the husband were members. The Court, however, pointed out that in the divorce suit Sarah and Julia had sworn that the husband was never a partner, but was merely a clerk on a small salary, saying at page 175:

"It is manifest that complainants Julia and Sarah are estopped from setting up claim to the property in opposition to their sworn statements in their depositions in 1866. **Cooley v. Steele,** 2 Head 605."

Stephenson v. Walker, 8 Baxter 289, was decided in 1874—Judge Freeman rendering the Court's opinion.

This was a bill filed by a married woman to assert title to a tract of land, on the ground that the certificate of privy examination to a deed executed by her and her husband was fraudulently obtained; and that she never, in fact, acknowledged it.

Two defenses were held to be conclusive:

1st. The deed was registered for more than twenty years.

"2nd. In a bill filed by her after discoverture, and before filing the present one, she expressly admits that she had acknowledged the deed, or joined in the sale of this land. This bill is sworn to."

Continuing, the Court says, at page 290:

"In the language of the court in the case of **Cooly v. The State et als.,** 2 Head, 608, when a married woman was held estopped by her sworn statement, even "coverture does not confer the privilege or license to commit fraud or falsehood, under the sanction of an oath, nor protection from its consequences." She has offered no explanation of her sworn statement, and must abide by it. The case is much stronger when a party is under no disability at the time.[8]

It will be seen that in the case under consideration the married woman claimed that the acknowledgement was fraudulently obtained, and that she, in fact, never did acknowledge it. The language of the sworn bill is not given, but seems to have been taken by the Court as involving a statement of fact, in that the complainant there swore that she **had** acknowledged the deed.

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[8] See also **Hamilton v. Zimmerman,** 5 Sneed, 39 to 48.

The next reported case on this point is **Nelson v. Claybrooke,** 4 Lea 687, decided in 1880 through Judge Turney.

The complainants brought suit to recover lands conveyed to Claybrooke by their ancestor, by deed absolute on its face; they claimed that Claybrooke really held the lands in trust to pay the debts of their ancestor, Winchester; that the trust had been performed, and the property in question remained in the hands of the Trustee, after paying the debts. Claybrooke claimed in his answer that he had bought the lands and paid for the same, and also relied upon a deposition given by Winchester in 1851 in another case, wherein Winchester swore "that the conveyance was made to Claybrooke without any reservation of trust." This statement was made by Winchester for the purpose of qualifying himself as a witness—as a disclaimer of all interest in the subject matter. The Court says at page 692:

"In that deposition, Winchester, under the obligations of his oath, says, that he did, in 1842, convey the property to Claybrooke for a valuable consideration; that no reservations whatever were made except those expressed on the face of the deed; that the sale was absolute, and he is not aware of any reservation upon the face of the deed for his benefit; that the land in controversy is embraced in his deed to Claybrooke, who, with others, is interested in the suit.

He shows himself to be a very sensible and well-informed man. Is cautious and guarded in the use of language employed to convey his meaning. There is nothing in this very long deposition, written in the most part by Winchester himself, showing inadvertence, ignorance or mistake; on the contrary, it discovers care, thought and prudence as well as a thorough knowledge of the facts deposed to. That Winchester understood what he was doing, and meant what he said, there can be no doubt, and **those claiming under him are estopped to deny it. They must submit to the title remaining where he placed it."**

"Even though Winchester may have been mistaken in his belief that the deed of 1842 to Claybrooke embraced the land in controversy in the suit in which his deposition was given, still the question was the same, and he and Claybrooke were as much interested in its settlement, as if it had been made upon

the deed of 1842. Being so intended, and **both believing** the property claimed by Claybrooke was involved, Winchester **made his solemn disclaimer under oath** in the beforementioned deposition, in a judicial proceeding: 2 Head, 604."

This case, as will be observed, decides that the rule applies as against the heirs of the person estopped.

It is further to be noted that the rule applies, although Winchester, may in fact, have been mistaken, and although the land in question was not actually involved—if he believed it to be involved, and under that belief made his solemn disclaimer.

The case of **McEwen v. Jenks,** 6 Lea 289, was decided in 1880 through Hon. Edwin H. Ewing, as Special Judge.

This was a bill filed to have re-conveyance of an undivided interest in the estate of complainant's father, which the complainant had previously made to his brother for the separate use of Mrs. Jenks. The conveyance was alleged to have been obtained by undue influence when the mind of complainant was enfeebled by heavy drinking, etc. The complainant further charged that there was a verbal agreement at the time of the conveyance that the property should be reconveyed to him when he had quit his dissipated habits and recovered his health.

After stating that the case would be a close one on the proof offered, the Court continues:

P. 291. "But there is in the proof offered by the defendants Jenks and wife, a deposition of the complainant taken in another case in 1853, in which under oath, he asserts that he has no interest whatever in his deceased father's estate, that he had conveyed the same absolutely and that there was no promise or understanding that in any event the same should be reconveyed to him."

The Court says that this statement was not made in a pleading, nor by a party to the case, being made upon cross-examination to test his competency on the score of interest in that suit.

The Court then adds:

"By making this statement he establishes his competency, and was thus enabled by his testimony in chief in that cause to affect beneficially or injuriously, the rights of them."

The Court comments upon **Hamilton v. Zimmerman,** and **Cooly v. Steele, supra,** saying with regard to the **Hamilton case:**

"In the case in 5 Sneed, the word estoppel in such a case would not be technically correct." p. 293.

And then adds:

"These cases have not been since deviated from by this Court, and, in our opinion, should not be. They are entirely analogous to the present case, and we feel it our duty to follow them."

This case does not cite nor refer to **Nelson v. Claybrooke supra,** decided in the same year, which bears close analogy to it. In each case, to qualify himself as a witness in another litigation, the party estopped disclaimed any interest in the property, and afterward tried to set up a parole trust.

It is also evident, from the Court's comment, that the doctrine announced in the two first cases was then thoroughly stablished.

The case of **Chilton v. Scruggs,** 5 Lea 308, was also decided in the year 1880, the opinion being delivered by Judge Cooper.

This was a bill filed by Chilton against defendant W. C. Scruggs, to enjoin him from pleading the statute of limitation.

In a previous suit the defendant had made statements, both in his sworn answer and in his deposition, which would make him liable for complainant's claim, and would also prevent the running of the statute of limitation. Judge Cooper after reviewing the facts at considerable length, and setting out the statements in the answer and deposition, says, page 318:

"In his answer and deposition in this case the defendant has changed his mind, and ignores his sworn statements in the previous suit, **without, however, showing or attempting to show, that they were made inconsiderately or without full knowledge of the facts.** The presumption is that he knew the facts at that time when they were fresh in his mind better than he did at the commencement of the present suit. The doctrine of estoppel, under these circumstances, applies, and the defendant cannot be permitted to deny his solemn admissions of record and under oath.[9]

[9] **Hamilton v. Zimmerman,** 5 Sneed 40.

"The same estoppel equally operates to prevent the defendant from relying upon the plea of set-off filed in the action at law. He has solemnly sworn that he did not hold the fund in controversy as indemnity against liability as a surety of R. D. Scruggs, but in payment of so much of the debt on which the complainant was liable as security."

It is worthy of remark that Judge Cooper, in this opinion, seems to thoroughly approve the doctrine enunciated by Judge McKinney, that it was incumbent upon the person sought to be estopped to explain his previous sworn statement and to show that it was made inconsiderately. Judge Cooper appears afterwards to have changed his view on this point, for in the case of **Allen v. Westbrook,** 16 Lea, 251, he seems to adopt the conclusion that the sworn statements in order to estop must be shown to be **wilfully** false.

In 1883 Cooke, Special Judge, delivered the opinion in the case of **Smith v. Fowler,** 12 Lea, 163.

This was a suit in equity brought by Smith, a non-resident, against Fowler to collect for certain mill machinery furnished by Smith. Smith, in his sworn bill, erroneously stated the terms of the contract. Fowler filed an answer and cross-bill, and Smith in turn filed an answer to the cross-bill. In this later pleading he correctly stated the terms of the contract.

The Court points out that the bill, although signed by local counsel, was sworn to before a foreign Notary Public, and was evidently prepared and forwarded to Smith and sworn to by him on information and belief. It is also stated that the proof abundantly supported the statements of the contract as set out by the complainant in his answer to the cross-bill.

The Court of referees had decided that the complainant was bound by the allegations of his original bill, but this decision was reversed, the Court saying at page 171:

"We do not concur in this conclusion, while the doctrine of estoppel applies with peculiar force to admissions or statements made upon oath, in the course of judicial proceedings, yet if it satisfactorily appears that the party made such admissions inconsiderately, or without full knowledge of the

facts, it is proper that the Court should relieve him from the consequences of his error: **Hamilton v. Zimmerman, 5 Sneed, 39; Seay v. Ferguson, 1 Tenn. Ch. R. 287.**

"We think it manifest that the allegations of the original bill, as to the terms of the contract were made under a misapprehension of the facts, and that they were correctly stated as shown by the proof in the answer to the cross-bill, and by which the allegations of the original bill were corrected and explained, and from the whole pleadings taken together, the real terms of the contract sufficiently appear and are clearly sustained by the proof."

This case also furnishes a good illustration of the exception to the rule. The complainant in his subsequent pleading corrected the erroneous statements made under oath in his first pleading. Moreover, the fact appears that the bill was prepared by resident counsel, and forwarded to complainant who swore to the same on information and belief in another state, and without the opportunity for conference with his counsel.

The case of **Allen v. Westbrook, 16 Lea, 251,** was decided by the Court in 1886, Judge Cooper delivering the opinion.

Westbrook was an ignorant negro who could neither read nor write. He executed a deed to his wife, conveying certain real and personal property, on certain terms not necessary to be stated. After the wife's death, Westbrook continued to live on the property and to use the personalty. While so doing, a levy was made on some of the personalty as his property, under executions against him.

Westbrook's daughter had married Allen, and Westbrook came to Allen and wife and told them that this land and the property levied on belonged to the daughter, Allen's wife. He induced them to replevy the personalty and to reside upon the land. They were successful in replevying this personalty.

On the trial of the replevin suit Westbrook was examined as a witness, and testified that the property levied on and replevied belonged to his daughter, Jane, and produced a certified copy of the deed as evidence of the fact. The complainants, Allen and wife, were successful in the replevin suit. Thereafter, Westbrook was indicted for perjury, tried, and acquitted.

He then brought an action of replevin for the personalty and an action of forcible detainer for the land against Allen and wife.

Allen and wife filed a bill to enjoin the prosecution of these suits, and to have a construction of the deed.

The Supreme Court held that on a proper construction of the deed the property belonged to the defendant Westbrook. It was insisted, however, by both of complainants that Westbrook was estopped to assert title, by reason of his sworn statements in the replevin suit.

Judge Cooper says that "it may be considered as settled by the decisions of this Court that a person cannot, **upon grounds of public policy,** be permitted to set up title to property after a solemn disclaimer of title under oath, or a solemn admission under oath of title in another, in a pleading or deposition in a previous suit: **McEwen v. Jenks, 6 Lea 289; Cooley v. Steele, 2 Head, 605; Stillman v. Stillman, 7 Baxt. 169; Stephenson v. Walker, 8 Baxt. 289, McCoy v. Pierce Thomp. Cas., 145.** It is equally well settled that such statements will not estop the party from proving the truth, if he can show that they were made inconsiderately, by mistake, or without full knowledge of the facts: **Seay v. Ferguson,** 1 Tenn. Ch. 287; **Chilton v. Scruggs,** 5 Lea, 308; **Smith v. Fowler,** 12 Lea, 163; **Hamilton v. Zimmerman,** 5 Sneed, 39."

Having thus clearly and accurately stated the rule and its exception, as established by the previous decisions of the Court, Judge Cooper introduces an entirely new thought in the following language:

"In other words, the oath to be binding as an estoppel must be wilfully false, or must have the effect of misleading the other party to his injury; **Behr v. Insurance Co.,** 2 Flip. 692."

This statement Judge Cooper proceeds to explain as follows:

"Our cases have generally involved admissions or statements by sworn pleadings or depositions, but, as statements **in pais** will often estop the party making them, an oral statement, under oath, **if wilfully false or acted upon, must be** equally as binding as if reduced to writing. The statement held to be an estoppel in **McCoy v. Pearce,** Thomp. Cas., 147,

seems to have been oral, having been made upon the examination of the party as a witness upon his **voire dire.** It would be more difficult to establish an oral statement satisfactorily, but when established its effect must be the same as if written."

Judge Cooper then proceeds to take up the facts in the instant case, saying:

"In the case before us, the statement is not only satisfactorily proved by others, but is admitted by the defendant himself, both in his answer and deposition. But, he says, he only stated what he had been told by others was the legal effect of the deed. The defendant is an ignorant negro, who can neither read nor write, and his legal adviser, as well as the Court who tried the replevin suit, construed the deed as giving the property, after the death of Martha Westbrook, to complainant, Jane. Under these circumstances, we cannot say that the statement he made as a witness was **wilfully false. He was really swearing to a conclusion of law,** the legal effect of the deed, not to a fact."

Having thus eliminated the doctrine of judicial estoppel, the Court proceeds to apply the rule of **equitable** estoppel as to the personal property concerned, saying:

"But his statements were acted upon by the complainants to their injury, and they were binding upon him, so far as they are concerned, whether true or false, for they undertook the expense of the suit and secured the property upon the faith thereof."

The Court next eliminates the question of a judicial estoppel as to the land, saying:

"There is no estoppel as to the land, which was not involved in the suit, and as to which there were no solemn statements under oath."

It is, with great deference, submitted, that the eminent Judge who delivered the foregoing opinion, might have reconciled his opinion with previous decisions of the Court, by taking the position that Westbrook's testimony, showing that he had merely relied on what his lawyer told him about the deed, brought him within the exception to the rule, both as to the land and as to the personalty, and was a full explanation of his statement under oath.

And as to the personalty, he might well have said that there was an equitable estoppel, without discussion of the doctrine of judicial estoppel.

But he seems to have been bent upon introducing a new doctrine, to-wit: that the statements must be wilfully false or must be acted upon to the prejudice of the other party, and that they must relate to questions of fact, as distinguished from legal conclusions.

This was in effect to overrule the case of **Cooley v. Steele, 2 Head, 605,** for, as previously shown, the estoppel of Mrs. Cooley was really based upon her testimony as to a legal conclusion; ie. whether she had or had not made a valid transfer to Steele.

It is also submitted that the conclusion of the learned opinion is somewhat lame.

As to the personalty, the Court decides the case on the ground of **equitable** estoppel, and as to the land it is said that "no solemn statements under oath" were made about it, because it was not involved in the replevin suit.

This seems an admission that all of the discussion of the rule of judicial estoppel, as applied to legal conclusions, was **dictum.** It would apparently have been more logical to say that Westbrook could not be estopped either as to the land or as to the personalty, because he was merely swearing to the legal opinion of his counsel as to the meaning of the deed; or that his sworn statement was fully explained and excused.

The next reported case on this point is **Grier v. Canada,** 119 Tenn. 17, decided in 1907, in an opinion by Judge McAlister.

A. M. Grier owned a tract of land which he bequeathed to his son by a will, reading as follows:

"That I give and bequeath unto my son, James P. Grier, as after all my just debts being settled, all my personal property and real-estate, and at his death I direct that my real estate be divided equally among his bodily heirs."

This instrument was a holographic will, and was probated as such—or rather an attempt was made to probate it, **but the attempted probate was fatally defective** for reasons pointed out by the Court. The son, James P. Grier, assuming that he had a fee simple title, undertook to sell the land to Canada and wife, who went into possession of the same.

Thereafter, Canada and wife had some occasion to file a bill concerning this land, and believing, evidently, that the will of A. M. Grier was a muniment of title in their favor, stated in this bill (which was sworn to) **that the will was duly probated.**

After the death of James P. Grier, his son brought suit against Canada and wife, claiming that under a proper construction of the grand-father's will, James P. Grier took only a life estate, and that he as remainderman was entitled to possession of the land.

There was a demurrer to the bill, and upon appeal the Supreme Court adjudged that the son's contention was correct—the father, under a proper construction of the will, having taken mere a life estate and the case was remanded for further proceedings.

Thereupon, Canada and wife filed their answer, setting up the defense that the will of A. M. Grier (the grand-father) **was never properly probated;** and they objected to said will when offered as a muniment of title in a subsequent trial of the case.

On a second appeal of the case the Supreme Court held that Canada and wife, having each sworn to a bill in which it was alleged that this will was duly probated, were estopped by this solemn admission under oath, saying at page 36:

"We are therefore of opinion that appellants, on account of the recitals and solemn admissions under oath in their former pleadings, are now estopped to deny the valid execution of the will of A. M. Grier, or the regularity of the probate proceedings."

The order made by the County Court in probating the will was as follows:

"A paper writing purporting to be the last will and testament of A. M. Grier, deceased, was this day produced in open Court, and the handwriting of the said A. M. Grier proven by the oaths of W. J. R. Becton and H. J. Thomas, who, being duly sworn, depose and say that they are well acquainted with the handwriting of the said A. M. Grier, and the signature thereto is in his handwriting. Whereupon said instrument was admitted to probate as the last will and testament of W. A. Grier, deceased; ordered put to record."

As pointed out by the Court, this order does not show that the handwriting of the testator was proved by three witnesses, nor does it appear that said paper writing was wholly in the handwriting of the testator, etc.

It is difficult to reconcile this decision with the doctrine advanced by Judge Cooper in **Allen v. Westbrook, supra.** The sworn statements of Canada and wife that this will was properly probated certainly did not involve questions of fact. The probate spoke for itself and was manifestly and patently defective. This case might possibly have been decided under the general rule announced in **Heggie v. Hayes, 141 Tenn, 219,** and **Stearns Coal & Lumber Co. v. Jamestown R. R. Co., 141 Tenn., 203,** that a litigant may not assume inconsistent positions. But it seems to have been based, like **Cooley v. Steele,** upon the sworn statement as to what was really a legal conclusion.

The last reported case on this point is Tate v. Tate, 126 **Tenn. 169,** which the Court, speaking through Chief Justice Neil, decided in 1912.

Mrs. Hillsman had died, leaving a husband, John T. Hillsman, and two daughters, Mary Hillsman and Mrs. Tate.

By the terms of her will, the land in controversy was devised in substance to her husband to hold the same for his own use and benefit during his natural life, "and at his death to be equally divided between my children, share and share alike, and in fee, the issue of any child that may have died to represent and take the share of the deceased parent."

Inasmuch as there was nothing in this will to show that the testatrix had any particular "children" in mind, the Court, after an elaborate review of our cases, applied the "class doctrine," and held that since Mary Hillsman had died before her father, the life tenant, she took nothing.

The litigation arose in this manner:

Mary Hillsman, joining with her father, had executed certain mortgages or trust deeds, conveying this property. After her death, and after the father's death, the surviving daughter, Mrs. Tate, filed the bill under consideration, and joined the holders of the mortgages as defendants, possibly

to have the instruments cancelled as clouds on the title, though the exact nature of the litigation does not appear from the opinion.

It was insisted for the complainant that since the father had only a life estate, by the express terms of the will, and since the devise to the "children" fell within the "class doctrine," the holders of these mortgages took nothing.

The mortgagees contended that under a proper construction of the will the interest of Mary Hillsman was a vested interest; and further contended that Mrs. Tate and her husband were **estopped** to deny that said Mary Hillsman had a vested remainder interest in the land:

(a) Because of certain bills which had previously been filed, one of them sworn to by the husband, Tate, and the other sworn to by the wife, Mrs. Tate.

(b) Because in certain trust deeds executed by Tate and wife recitals appear which show that Tate and wife construed the will as giving Mrs. Tate a vested remainder interest.

(c) Because it was claimed that the mortgagees had been influenced by reason of the sworn bills, and also by reason of the execution of the deeds or mortgages by Mr and Mrs. Tate, and because of this had loaned the money to John T. Hillsman and his daughter, Mary.

It will thus be perceived that the Court, in considering this case was dealing with **three kinds of estoppel:**

(1) Judicial estoppel.

(2) Estoppel by deed.

(3) Estoppel **in pais.**

The Court did not seriously consider the contention of estoppel by deed because the persons claiming the estoppel were not parties to the deeds.[10]

The question of estoppel **in pais** was very fully considered by the Court. But this point was decided adversely to the holders of the trust deeds, because the record did not show that they in fact relied upon these recitals and sworn allegations of Tate and wife in making the loans to Hillsman and his daughter, Mary. (P. 218).

[10] 126 Tenn. p. 214.9

In dealing with this question of equitable estoppel, the Court gives a very instructive review of the case of **Parkey v. Ramsey,** 11 Tenn. 302, and other Tennessee cases.

The judicial estoppel claimed was based upon the fact that Mr. Tate had previously sworn to a bill in which he stated ".....that by the will of said Mary H. Hillsman, which was probated August 31, 1883, her entire property was given and devised to her said husband for life, **with remainder in fee to her said two daughters**....."

This bill appears never came to a hearing, but was dismissed by consent.

Another bill was filed by Mrs. Tate against her father and her sister Mary, and another defendant named Nealis, **to have the tax title of Nealis and the claims of the State and City declared clouds upon the title,** etc. "This bill likewise described the interest of herself and her sister in the same manner in which it was described in the bill already referred to. This bill was sworn to by Mrs. Tate."

The Court, at page 212, states the doctrine of judicial estoppel in the following language:

"The law upon this subject, as exhibited in our cases, is to the effect that where one states on oath, in a former litigation, either in a pleading, or in a deposition, or in oral testimony, a given fact as true, he will not be permitted to deny that fact in a subsequent litigation, although the parties may not be the same. **Hamilton v. Zimmerman, 5 Sneed, 39; Cooley v. Steele,** 2 Head, 605; **Stillman v. Stillman,** 7 Baxt. 169, 175; **Stephenson v. Walker,** 8 Baxt., 289; **Nelson v. Claybrooke,** 4 Lea, 687, 692; **McEwen v. Jenks,** 6 Lea, 289; **Watterson & Riley v. Lyons,** 9 Lea, 566; **McCoy v. Pierce,** 1 Tenn. Cas., 87. But such statements will not estop the party from proving the truth, if he can show they were made inconsiderately, by mistake, or without full knowledge of the facts. **Allen v. Westbrook,** 16 Lea, 251, 255, 256; **Seay v. Ferguson,** 1 Tenn. Ch., 287; **Chilton v. Scruggs,** 5 Lea, 308; **Smith v. Fowler,** 12 Lea, 163. The estoppel does not apply to mere conclusions of law upon undisputed facts. **McLemore v. Railroad,** 111 Tenn., 639, 666, 667, 69 S. W., 338; **Murrell v. Watson,** 2 Tenn. Cas., 244; **Barnes v. Brown,** 1 Tenn. Ch. App., 726; **Verhine v. Ragsdale,** 96 Tenn., 532, 35 S. W., 556."

The Court then undertakes a review of certain cases above cited in the following language:

"In **Cooley v. Steele,** supra, a married woman was held estopped to claim certain negroes by a statement which she had made in a former deposition that she had sold all her right and interest in said slaves to one Steele and considered that she had no interest in the matter.

"In **Nelson v. Claybrooke, supra,** an heir was held estopped to claim certain land by a deposition given by his ancestor in a former case to the effect that he had conveyed the property to Claybrooke for a valid consideration; that there were no reservations made, except those expressed on the face of the deed; and that the land in controversy was embraced in his deed to Claybrooke.

"In **McCoy v. Pierce, supra,** one Munsher was held estopped to claim certain land because in a former suit he had testified that he had no interest in it, and that it belonged to his daughter.

"In **Grier v. Canada**, 119 Tenn., 17, 107 S. W., 970, a party was held estopped to question the probate of a will in the county court, where he had alleged in a former proceeding that probate was good, and had relied on it."

After thus reviewing previous cases, the conclusion of the Court is announced in the following language:

"We do not think that the present case falls under either of the foregoing authorities. The bills referred to did not purport to state any fact within the knowledge of the complainants therein, but only a construction of the will of Mrs. Tate's mother. This will was a matter of record, and was open to examination by every one, **No one can be said, in a legal sense, to have been misled by such a construction,** since the construction of a writing is a pure question of law. Of course, if in the suit referred to. rights had been based upon the construction stated in the bill, and **assented to, and acted on by another person interested therein,** a different question would arise; but we have no such question here."

In announcing the above conclusion Mr. Justice Neil seems to have gone back to the dictum of Judge Cooper in **Allen v. Westbrook, supra,** although the case is not reviewed, nor is it even cited to the point that estoppel does not apply to mere

legal conclusions. The cases cited to support the last named principle, as will be observed, are without exception cases **where no sworn statement was involved.**

With all respect to the distinguished Judge, it is submitted that such of the foregoing language was properly directed to defendant's contention regarding equitable estoppel, or estoppel **in pais**, rather than judicial estoppel. Acts and conduct, and the defendant's reliance thereon, had nothing to do with the sanctity of an oath and the public policy forbidding its violation, which, as has been pointed out, is the underlying basis of the Tennessee doctrine of judicial estoppel.

The husband's oath could not estop the wife, as was expressly decided in **Cooley v. Steele, supra**. Hence the real judicial estoppel claimed arose from the bill to which the wife swore in order to set aside a tax title. In swearing to this bill it was, of course, of no advantage to her to claim a vested remainder interest. Any interest would permit her to attack the tax title. Hence the element of deliberation—of taking a stand to gain some advantage for herself—did not appear.

It is submitted that the case might have been put upon this ground, instead of resting the decision upon the dictum of Judge Cooper in **Allen v. Westbrook.**

The distinction here suggested is clearly pointed out by Judge Ewing in **McEwen v. Jenks, supra**, where he says, in speaking of McEwen's disclaimer of any interest in the property:

"By making this statement he establishes his competency, and was thus enabled by his testimony in chief in that case to affect beneficially or injuriously, the rights of them" (the parties to the litigation).

It is further submitted that the broad statement of the learned Justice to the effect that the doctrine of judicial estopped (using the term as he uses it) "does not apply to mere conclusions of law upon undisputed facts," is erroneous. This is directly contradicted by such cases as **Stamper v. Venable,** 117 Tenn. 557, and **Stearn Coal & Lumber Co. v. Jamestown R. R. Co.,** 141 Tenn., 203.

In **Stamper v. Venable,** the "judicial estoppel" arose because a party who had in one Court claimed an instrument

to be a deed, was in another Court claiming it to be a will. This is, of course, a case falling exactly within the language of Judge Neil, since the legal conclusions advanced flow from the undisputed **language of a written instrument.** No doubt he meant to restrict this language to **sworn** statements; but as above noted, the cases which he cites to support it, all refer to **unsworn** statements.

It is further to be observed that Judge Neil, in a subsequent opinion (**Kobbe v. Harriman Land Co.,** 139 Tenn. 251, 278), cites the case of **Tate v. Tate** on a question of equitable estoppel—thus confirming the view that he had an equitable estoppel, rather than a judicial estoppel, properly so-called, in mind, in the decision of the **Tate case.**

Summarizing the Tennessee law of judicial estoppel, we repeat that the early decisions of the Court stressed the sanctity of an oath, and were founded on the broad principle of public policy that an oath should be regarded as a sacred thing and not to be lightly or inadvisedly taken in a judicial proceeding.

The earlier cases, for the most part, it is true, deal with questions of fact. Thus, **McCoy v. Pierce, supra,** it was a question of fact whether Muncher, the father, redeemed the land for himself or his daughter; and in **McEwen v. Jenks,** and **Nelson v. Claybrooke, supra,** there was a question of fact whether the deed made was absolute, or whether there was a parole addition or reservation of a trust in favor of the grantor. In **Cooley v. Steele,** however, the validity of the married woman's conveyance would appear to have been primarily a question of law; and in **Grier v. Canada,** the effect of the probate of a holographic will would certainly seem to be purely a conclusion of law arising from the facts shown in the order of probate.

All these cases might perhaps be reconciled with the the opinion of Judge Cooper in **Allen v. Westbrook** and the opinion of Chief Justice Neil in **Tate v. Tate,** on the theory that where a party, **to gain some advantage for himself,** has sworn to a conclusion of law, he is estopped; but if no advantage accrue to him by swearing to this particular legal conclusion, (as in the case of Tate v. Tate) he is not estopped.

It seems on the whole probable that the Court by its

latest decision intends to repudiate the case of **Grier v. Canada,** and to hold in accordance with Judge Cooper's suggestion, that there should never be a judicial estoppel where the oath is made with regard to the construction of a will or deed, although this might include sworn disclaimers of title.

But the other innovation suggested by Judge Cooper, and emphasized in **Tate v. Tate,** viz: that to make a judicial estoppel effective the statement **must have been acted on by another to his prejudice**—seems to be destructive of the whole doctrine.

The latter principle is the principle of equitable estoppel which, of course, applies irrespective of an oath. If judicial estoppels are to be merely turned into equitable estoppels, the whole doctrine falls to the ground, and a very valuable restraint on false swearing is taken away.

It is hardly necessary to point out how much the doctrine of judicial estoppel will thus be weakened, but some of the effects will be briefly noted.

(a) Equitable estoppel must be pleaded.

No case holds this with regard to a judicial estoppel, and from the nature of such an estoppel, it should not be incumbent upon the litigant to plead it. It is based on public policy, and might be raised by the Court itself.

(b) A statement to constitute the basis of an equitable estoppel must be maide with the knowledge or intent that it be relied upon by the other party.[12]

(c) The person claiming to have been influenced must have been not only without knowledge of the state of facts, but without available means of acquiring such knowledge. Where both parties have the same means of ascertaining the truth, there can be no equitable estoppel.[13]

(d) An equitable estoppel does not arise out of the pleadings in another case, where there is want of mutuality, and the matter is purely **res inter alios.**[14]

As has been pointed out, none of these principles and

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[11] **Dunlap v. Sawvel,** 142 Tenn. 696, 703.

[12] **Early v. Williams,** 135 Tenn. 249, 261.

[13] **Early v. Williams,** 135 Tenn. 249, 261.

[14] **Kobbe v. Harriman Land Co.** 139 Tenn. 251, 278.

limitations apply to the true doctrine of judicial estoppel, which is based upon public policy, as announced in the earlier cases.

It is further submitted, that the alternative idea suggested by Judge Cooper in **Allen v. Westbrook,** that the sworn statement must be shown to have been **wilfully false,** in hurtful deviation from the older cases, which, in effect, place the burden on the party who makes a sworn statement to show that it was inadvertent. Judge Cooper's idea seems to shift the burden of proof to the party who claims the estoppel.

In conclusion it may be said that the true doctrine of judicial estoppel, as set forth in the earlier cases, is sound and wholesome; and if followed and applied, would necessarily have a beneficial effect, and prove a useful restraint upon reckless or perjured litigants.

ADDENDUM

Since the foregoing article was written in December 1921, three more opinions, involving the subject of "Judicial Etoppel," have been published, but only the last deals with the branch of the doctrine now under discussion.

The case of **Southern Coal & Iron Company v. Schwoon,** 145 Tenn. 191; 239 S. W. 389, was decided December 8, 1921, —the Court's opinion being delivered by L. D. Smith, Special Judge. In this case the Attorney of the Southern Coal & Iron Company appeared before the County Court of Grundy County, Tennessee, and in an ex parte proceeding, by unsworn statements, without petition or other written pleading filed, procured the County Court to make an order releasing the Company from the payment of taxes on certain lands—claiming that they did not belong to the Company. Afterward, in the above case, the Company sought to assert title to these lands.

The defendant set up and relied upon an estoppel in pais, and also a judicial estoppel; but the Court held that neither defense was valid.

It is of interest to note that the Court in this opinion clearly makes the distinction between "estoppel in pais" and "judicial estoppel," to which reference has been made, saying, (page 226-227):

"This doctrine, (equitable estoppel) as we have seen, can only be invoked generally by persons who have been prejudiced. But the exception which entitles any party, **whether prejudiced or not,** to invoke the doctrine, constitutes what has been referred to in the decisions as judicial estoppel" —quoting the familiar extract from **Hamilton vs. Zimmerman, supra,** as to the sanctity of an oath.

The case of **Equitable Trust Company v. Central Trust Company,** 145 Tenn. 148; 239 S. W. 171, was decided March 7,. 1922. Mr. Justice Hall delivered the Court's opinion.

Certain creditors of a foreign corporation brought suit against the stockholders, claiming that they were liable as partners, by reason of the Company's failure to comply with the laws of this State regarding registration of charter, etc. In a petition to rehear, the defendants pointed out that these creditors had filed their claims against this Company as a Corporation in a bankruptcy proceeding, and also in a general creditor's suit brought in the State Court against the Company. It was claimed that the right to proceed against the corporation and the right to proceed against the stockholders were alternative and not cumulative, and that the election to pursue and enforce one right operated as an estoppel. The Court held that these positions were not inconsistent, under the decisions dealing with that branch of the rule. There is no discussion of statements under oath, and no such question seems to have been presented.

The case of **Johnston v. Cincinnati N. O. & T. P. Ry., Co., et al,** 240 S. W. 429, was decided May 1, 1922, in an opinion delivered by Charles C. Trabue, as Special Judge.

In this case the only evidence relied upon to sustain the verdict of a jury upon certain issues of fact was the evidence of the complainant, who swore with equal positiveness on both sides of the question. Both in his direct examination and in his cross-examination he swore that the contract was as claimed in his bill, and also that it was as claimed by the defendants. The Court held that under these facts there was no evidence to go to the jury on this issue, and that a peremptory instruction for the defendants should have been given. It is said at page 436:

"The question here is not one of the credibility of a witness, or of the weight of evidence; but it is whether there

is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way."

The Court quotes with apprval the statement of the rule made by Judge McKinney in **Hamilton v. Zimmerman, supra,** and also cites and approves **Stamper v. Venable, supra** and **Stearns Coal & Lumber Co. v. Jamestown R. R. Co., supra,** saying:

"The principle underlying these decisions runs throughout the administration of justice, and is that a litigant who has deliberately taken a position will not as a matter of law be allowed to advantage himself by taking an inconsistent one either in the same or in another suit."

As will be perceived, the Court applies both branches of the rule. An interesting case apparently of first impression.

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LAND LAWS OF TENNESSEE

1. **The Scope of this article.** It is not within the scope of this article to discuss the general rules of law relating to real estate in conveyancing, neither is the article intended as a treatise on the subject indicated in the title, but merely to call attention to some of the very interesting and valuable facts and legislation, as well as the judicial interpretation thereof, connected with the disposition of the public domain within the territory of Tennessee.

This country was new in civilization as well as in population when the first and many of the later efforts were made looking to the disposition of the public lands. Viewing the situation from the present when the territory is not only occupied by millions of enlightened people, having within its boundaries many cities, towns and villages, factories, shops and stores, farms, schools and churches, but so far advanced as to almost forget that a little more than two hundred years has passed since there was not a civilized person living within the boundaries of Tennessee, it is not strange that few persons even among the legal profession are familiar with the legislative and judicial process which led to the disposition of public lands, nor with the conditions which have ocassioned the many controversies relating to land titles, which have had their source in the early legislation of the country. Therefore the principal purpose and scope of this article will be to afford the student a basis for learning some of the most important events which figured to such a large extent in the land litigation which filled our Courts in the early history of the State and which even at this time continue to afford serious difficulties to be solved.

2. **The source of land titles in Tennessee.** It is of course within the knowledge of every student of history that at the time of the discovery of the American Continent there was no enlightened or civilized Governmnt here, but that the country was inhabited by the Indians who had only a semblance of Government limited almost altogether to the regulation of

local and individual affairs, and that among them all controversies over land were finally settled by resort to battle. Many years elapsed before the white man gained any extensive control in the particular territory with which we are dealing. It is equally well known to the student that the Governments of Great Britian and France contended among themselves for many years for supremacy and dominion over this particular territory. Although almost from the beginning the Government of Great Britian asserted practical control, the claim of France to this territory was not finally settled until the treaty of peace signed at Paris in 1763 between the Kings of Great Britian and France, whereby it was agreed for the future that the confines between the two dominions of the crowns in America should be fixed by a line drawn along the middle of the Mississippi river from its source as far as the river Iberville and from thence by a line drawn along the middle of this river and the Lakes Maurapas and Ponchartrain. By this treaty and ever thereafter all the nations of Europe recognized the sovereignty of Great Britian over the territory which we call Tennessee. However, when the conflict came on between the colonies of Great Britain which resulted in the Revolutionary War our own people were not disposed to recognize that treaty, preferring to consider France and Spain as their friends in the contest with Great Britain. This attitude, however, had no appreciable effect upon the disposition of the public lands. Long prior to this treaty Great Britain had asserted with practical effectiveness its sovereignty and control over this country.

The first effort made to make a permanent disposition of the public domain within the territory now embracek within the State of Tennessee was in the fifteenth year of the reign of Charles II in the year 1662. Prior to that James I, in 1606, gave and granted to the Earl of Salisbury and the Earl of Suffolk and a number of other persons that country now embraced in the States of Virginia and Kentucky. Charles II granted to the proprietors of Carolina all that province of Carolina extending to the end of an island called Luke Island and the south Virginia Seas within sixteen degrees north latitude and "west as far as the South Seas and south respectively as far as the river Matthias which bindeth upon the coast

of Florida and within thirty-one degrees of north latitude and southwest in a direct line as far as the South Seas aforesaid." This territory was at first called "Our County of Albermarle in Carolina," but later came to be called "the Colony of North Carolina." Most naturally the description of the territory was so general in these patents, the boundaries being unlocated, much controversy arose between Virginia and North Carolina with respect thereto. The Virginians had taken up lands to the south of the proper limits and the Carolinians were charged with having taken up lands that belonged to the crown. This controversy with respect to this boundary line continued for many years and not until quite recently has all controversy ceased, and these controversies have furnished many interesting and important decisions, the most of which terminated in the Supreme Court of the United States. Space available at this time will not permit a consideration of these various controversies. It sufficeth to say that the territory under consideration is situated almost altogether within the boundaries of the Colony of North Carolina.

Great Britain, following these patents to the Lord Proprietors, set up a Colonial Government and undertook to make provision for the disposition of the public lands. The plans promulgated by the British Government operating through the Colonial Government for the settlement of the country while not directly involved in a consideration of the subject, nevertheless furnished the foundation or system later adopted and forms the direct source of many of our titles.

The Colonial Government of North Carolina had in operation prior to the year 1715 some kind of system for the disposition of public lands, but just what the exact provisions were is not important in this connection. We know particularly from statutes passed in the year 1715 that much land in North Carolina had been patented by the Lords Proprietor and that many disputes had arisen. For example, Chapter 29 of the Acts of the Colonel Government of 1715 recites in its caption, "Whereas disputes do frequently arise concerning lands already surveyed and patented to the vexation of many people holding and enjoying those lands, and for settling such differences as may hereafter arise," it was enacted; and in

Chapter 33 of the Acts of the same year it was recited in the caption, "that great inconveniences had arisen by many of the irregular proceedings and methods in entering and taking up land."

By the Acts of the Colonial Government above referred to provision was made for the sale of vacant lands. Under the system thus provided one desiring to acquire land had only to procure from the Secretary's office a warrant to the Surveyor General mentioning the quantity of land desired to be acquired. This warrant, together with an account of where the land lay was presented to the Surveyor General. The Surveyor General endorsed this "location" together with the time of the receipt of the warrant and furnished to the claimant a copy. The land thus designated was to be surveyed within eight months and upon return of the warrant and survey the applicant was entitled to have a patent issued to him.

No provisions were made by the Acts aforesaid for the preservation of the record leading up to the issuance of the grant . It therefore cannot be determined whether any of the public land situated within the present bounds of Tennessee were disposed of under this legislation. So far as I have been able to learn none of the grants issued under these Acts were situated within our boundaries and therefore this legislation is of no consequence to the title investigator other than that the plan itself was subsequently followed in a large measure by the legislation of the State of North Carolina after the Declaration of Independence. Especially is this true as to the Act of 1783 which made provision for the appropriation of land within certain boundaries to the officers and soldiers of the Continental Army.

In 1776 the Colonies declared their independence of the British Government and at once stablished, as is well known, and successfully maintained dominion and soevreignty over their respective territories. It results therefore that we do not have to look beyond that Government to find the source of title for all the lands within our boundaries.

At this point it is interesting and necessary to a complete understanding of our land laws to remember that early in the history of the State of North Carolina and after the Declara

tion of Independence a large portion of the territory in Tennessee was occupied by the Cherokee and Chickasaw Indians, each asserting claims to certain portions of territory; the Cherokees in the eastern part of Tennessee and the Chickasaws in western Tennessee.

The people of North Carolina realizing that they would only be able to maintain their sovereignty along with the other Colonies by fighting to a successful conclusion a war with Great Britian found it desirable as far as possible to make peace with and friends out of the Cherokee Indians particularly. So that on the 20th of July, 1777, a treaty was negotiated with the Cherokee Indians. This treaty was known as the Treaty of Long Island and gave to the Indians the territory west of a certain line or boundary known as Brown's line. The right of the Cherokee Indians to the land west of that boundary was again recognized by the legislature which met in 1878. The line itself was described as beginning on the Kentucky line, running thence to the Holston at the mouth of Cloud Creek; thence to the highest point of High Rock or Chimney Mountain; thence in a southwest course to the Ridge of the Great Iron Mountain.

Inspired doubtless by the necessity of raising money to meet the expenses of the Revolutionary War, the legislature passed the Act of 1777, for establishing offices for receiving entries of claims for lands in the several counties within the State, and for ascertaining the method of obtaining title to the same. This Act made it the duty of the justices of the peace to appoint for each county in the State an entry-taker to receive entries "for any land lying in such county which had not been granted by the crown of Great Britian, or the Lords proprietors of North Carolina, or any of them, in fee, before the fourth day of July, 1776—or which had accrued or should accrue to the State by treaty or conquest. (2 Tenn. 412).

At the same session of the General Assembly the county of Washington was erected. It was bounded on the west by the Mississippi river and embraced the entire territory of Tennessee. By this Act we have the first definite boundary of the State and all other counties in the State have been erected and established out of the territory that originally belonged to the county of Washington.

The Act defines the bundaries of Washington County as follows: "Beginning at the most northwestern part of the county of Wilkes on the Virginia line; thence with the line of Wilkes county to a point thirty-six miles south of the Virginia line; thence due west to the ridge of Great Iron Mountain which heretofore divided the hunting grounds of the overhill Cherokees from those of the middle settlements and valley; thence running a southwesterly course along the said ridge to the Unicoi Mountain where the trading path crosses the same valley to the overhills; thence south with the line of this State adjoining the State of South Carolina; thence due west to the great river Mississippi; thence up the said river with the courses thereof to a point due west from the beginning; thence due east with a line of this State to the beginning."

By the Act of 1777 above referred to, the office of entry-taker was created for each county in the State and thereby the entire boundary of Tennessee which was embraced within Washington County was opened to appropriation. Shortly thereafter and by Chapter 39, Washington County was established and an entry-taker appointed for that county. It was assumed that the entire territory would be acquired from Great Britian either by treaty or conquest and the fact that most of the territory had been conveyed to the Cherokee Indians was entirely overlooked. The system for disposing of public lands was this: any person, who was or should thereafter become a citizen of the State according to the Constitution, desiring to acquire lands, filed with the entry-taker a description and location of the lands which he desired to appropriate, setting forth the name of the County, the nearest watering courses as well as the natural bounds and the lines of other persons which divided it from their lands. This location was required to be endorsed by the entry-taker with the name of the County and the number of acres embraced in it. A copy of the location was to be entered in a book kept for the purpose and all entries were to be entered and numbered in the order in which they were received by the entry-taker. It was also made the duty of the entry-taker to deliver to the parties a copy of the entry with its proper number and an order to the county surveyor to survey the same. By a

certificate being filed in the office of the Secretary of State a grant was authorized to be issued. A man named John Carter was appointed entry-taker for Washington County. Entries were immediately thereafter made which conveyed a very large territory. So anxious were the people to obtain grants to lands that they began to make entries west as well as east of the boundary line established by the treaty of Long Island. The next legislature seeing the serious consequences which might arise by the appropriation of the Indian lands in the offense that might be given to the Cherokees thereby, and feeling the necessity of retaining the friendship of the Indians in the conflict with Great Britain, passed an Act (Chapter 3) prohibiting entries within the Cherokee hunting grounds or without the limits ceded by or conquered from them. All entries which had been made were declared void and the entry-taker was required to refund all monies taken for such lands, their own fees included.

As a result of the issuance of grants within the Indian boundaries, much litigation arose between claimants to land under these grants and grants subsequently issued after the Indian title was extinguished. In every one of the cases which reached the Supreme Court it was decided that these entries were void and afforded no defence against persons claiming the same land under entries made after the extinguishment of the Indian title, the theory of the Court being that the lands were not subject to being entered under the Act of 1777, and therefore the effort to appropriate the land was a nullity and the entries void.

The Legislature of 1778 undertook to specifically provide against any land being entered within the Indian hunting grounds, but in doing so changed the line so as to move it westward. This did not prevent encroachments upon the lands of the Indians, but the encroachments were of no avail to the enterer as the entries were held to be void.

In 1779 the Legislature of North Carolina took cognizance of the fact that the Government of Great Britain had issued patents prior to the 4th of July, 1776, and that patentees had made improvements thereon, and so it was provided that such persons should have preference to all others to enter or obtain grants for the same, if such entries

were made prior to the 1st, of January, 1779. But we need have no concern with respect to this Act since no such entries had been made under the rule of Great Britain in Washington County. By Chapter 7 of the Acts of 1781 of the Legislature of North Carolina, all the land offices in the State were closed, and it was made unlawful thereafter to enter any land with an entry-taker, and the Act of 1777 was declared void. Thus ended the land-office of John Carter. But it is easy to see and understand how rights became vested under the Act of 1777 and how this disturbed titles and occasioned litigation; since we learn through a report made by Thomas Jefferson, who was then Secretary of State for the United States, to enable him to make his report in obedience to a resolution of the Congress on the 8th day of November, 1791, entries had been made in Washington County amounting to 746,3621½ acres. It is quite probable, however, that some of this land was entered after the land office was re-opened in 1783.

Another effect of this Act was to prevent the North Carolinians invading the territory of the Indians, who under the treaty were entitled to protection against the appropriation of many thousands acres of rich, fertile soil, upon which the white man had set his heart. It was not long therefore until the white man found means for acquiring a title to lands within the Indian boundary, for in 1783 the Legislature of North Carolina conceived the idea, if it was not well founded in fact, that the Indians had rendered aid to the British in the Revolutionary war and the whole territory of the State was thrown open for appropriation, so far as the Indians were concerned, excepting the reservation bounded on the notrh, west and east by the Tennessee, Holston, French Broad and Big Pigeon Rivers, and on the south by the boundary of the State.

The Act in this respect, however, brought about no complications in land titles for the reason that subsequently and in 1826 the Indians had surrendered all claims to Tennessee except a small territory called the Ocoee District, and later on the Legislature validated all grants that had been issued for territory west of Brown's line where money had been paid for it.

There was another exception to the Act of 1783 which excluded a large territory from entry, that territory being known as the Military Reservation. This reservation had first been made by an Act or resolution of 1780, but there is no record of this Act, in fact, in existence, but in 1782 another Act was passed which recognized that the Legislature of 1780 had made this reservation. The location of this reservation under the Acts of 1780 and 1782 was left to Commissioners in behalf of the State. It was first designated as being that tract of land bounded on the south by the western boundary of the State, on the north by a line parallel thereto and fifty-five miles distant, by the Mississippi River on the west, and on the east by the meridian of the intersection of Elk River and the southern boundary of the State.

This territory embraced the counties of Shelby, Fayette, Hardeman, McNairy, Hardin, Wayne, Lawrence, Tipton, Chester, Lewis, and parts of Giles, Murray, Hickman, Perry, Decatur, Henderson, Madison, Haywood and Lauderdale. Subsequently and in the year 1783 this military reservation set apart for the officers and soldiers of the Continental Army, was changed by Chapter 3, Section 7, so as to embrace a tract of country beginning on the Virginia (now Kentucky) line, where the Cumberland River intersects it, running south 55 miles east, thence west to the Tennessee River, thence down the Tennessee River to the Virginia line, thence with the Virginia line to the beginning. This reservation embraces within its boundaries the present counties of Johnson, Morgan, Truesdale, Sumner, Robertson, Montgomery, Stewart, Houston, Hickman, Cheatham, Davidson, Wilson and Smith, and probably portions of one or two other counties.

Another reservation out of the Act authorizing the incorporation of all the lands of the State was the Great Island in the Holston River.

We shall first notice the method adopted for the disposition of lands outside of these reservations.

By this Act the land office was reopened and John Armstrong elected entry-taker for Washington County Legislation with respect to lands in that County has generally been referred to in the decisions and in some of the enactments as the "County Office of J. Armstrong."

Under this Act any citizen of North Carolina was allowed to enter not exceeding 5,000 acres of land, but before entering a claim he was required to pay the entry taker ten pounds in specie for every 100 acres entered, together with fees of the entry-taker. The claimant was required to produce to the entry-taker a writing signed by him setting forth where the land was situated, the nearest water courses, mountains and natural boundaries, and the lines of other persons, if any.

This entry was to be entered in a specially prepared and bound book and every entry was to be made in the order of the time in which it was received, and so numbered. The entry-taker after waiting three months within which some other person might make claim for the same land, would then deliver a copy of the entry with its proper number and a warrant to the surveyor directing him to survey the same. If some other person appeared and set up a claim to the land that fact was to be noted and the whole proceeding was to be transmitted to the Court. The Surveyor was to transmit his return to the Secretary of State, whose duty it was to make out grants to be authenticated by the Governor and recorded in the Secretary's office before delivery to the parties. This grant was recorded within twelve months after its issuance and had to be registered in the Register's office of the County where the land was located. When another person appeared and set up any claim to lands so entered this proceeding was called a caveat, and when an entry was caveated and claim was set up it could not be surveyed until a determination was had by the Court having jurisdiction.

This procceding of caveating, as we shall see, became later obsolete, the question of priority of right under the entries being determined by the court in direct proceedings between the claimants.

In 1784 the Legislature of North Carolina closed John Armstrong's office, and all entries made in it after that date were declared void except those made by the commissioners who laid off the military reservations and their attendants. The decisions of the Supreme Court disclose the fact that a very large number of entries were made in John Armstrong's

office and that many complicated and complex problems were presented to the Courts for decision, growing out principally of the conflict of boundaries of entries.

In the Act making provisions for the officers and soldiers in the Continental line, each soldier then in the service who continued to the end of the war, or such as from wounds or bodily infirmities were rendered unfit for service, was entitled to have 640 acres of land, and every officer possessing the same qualifications, a greater quantity in proportion to his pay; that is to say, a private 640 acres, each non-commissioned officer 1,000 acres, a subaltern 2560 acres, a Captain 3840 acres; a Major 4,800 acres; and a Lt. Colonel 5,760 acres; and a Lt. Col- Commandant 7,200 acres, a Colonel 7,200 acres; a Brigadier-General 1,200 acres; and a Chaplain 7,200; each Surgeon's mate 2,560 acres. It also provided that where any officer or soldier had fallen in the defense of his country, his heirs or assigns should have the same quantity that such officer or soldier would have been entitled to had they served during the war. These lands of course were to be set apart out of the country reserved for that purpose.

The Legislature of 1783, realizing that no mode for selecting and locating the land authorized to be issued in favor of the officers and soldiers had been pointed out, undertook to supply the defect. The plan provided for was this: Every person entitled to land under that Act was required to make an application to the Secretary of the State, and obtain or receive from him a warrant or survey for such quantities of land within the limits of the land reserved as he or she might be entitled to. This warrant was to be directed to Colonel Martin Armstrong specially employed as surveyor, for the purpose, who was required to execute and return the same into the Secretary's office within the same time and in the same manner as provided for in other cases. Where two or more persons desired to have his warrant located on the same land, they were required to cast lots for the choice, and the one upon whom the lot fell had the preference. Officers and soldiers were allowed three years from the first day of October following the passage of the Act to secure their land. Grants were to be issued from the office of the Secretary of State.

Under the Act which provided for the laying out of the military reservation, the commissioners and their as-

sistants were to be paid for their services in land, which might be entered in the military boundary or in John Armstrong's office. Each commissioner was to receive in one tract 5,000 acres. There were three of the Commissioners. Each Surveyor 2,500 acres. There were three surveyors provided for. The usual number of chain-carriers and markers and as many as six hunters employed to supply provisions, 640 acres. Each member of the guard not exceeding 100, with proper officers 320 acres. The officers of the guard were entitled to land in proportion to his military pay. If these persons entered lands in the military reservation they were to obtain title by entering them with the entry-taker of Davidson County. The surveyor of the military reservation was also allowed to lay off for himself within the reservation a quantity of land equal to the amount of his fees, rating the land at ten pounds to the one hundred acres.

In 1786 it became necessary to protect the inhabitants of Davidson County against the depredations of the Indians, so the Legislature made provisions for the enlistment and formation of a military body, to continue two years, commencing from the date of their general redezvous at the lower end of Clinch Mountain. Every private of this corps was allowed 400 acres of land to be laid off and located in some part of the State west of Cumberland Mountain, in full satisfaction of one-half of his first years pay, and in the same proportion for the time he should serve over and above one year. The commanding officer was to be allowed 2,000 acres. All other officers were to receive land in proportion to the quantum of their pay.

The decisions of our Supreme Court reveal the fact that although the lands allotted were to lie west of the Cumberland Mountain, a grant issued to one of these claimants for land east of the mountain could only be voided by the State, and was evidence of title in a grantee against a mere possessor of the land.

There were also a number of Acts making provisions for the issuance of grants to particular private persons—for example, Chapter 38, Acts 1783 granted 200,000 acres of land to Richard Henderson, et al., located principally in Powell's Valley and which were described in the Act. This conces-

sion was made to Henderson in settlement of a claim by him of having purchased through influence of Daniel Boone a very much larger territory from the Cherokee Indians. Large boundaries of land were granted to David Wilson, General Nathaniel Green, and others.

There was still another source of title provided for by the Legislature of North Carolina which was founded on settlements made on the public lands. This territory was located partly in the military reservation and partly in that section of the country south of the French Broad and Holston Rivers. During the discontinuance of the land offices in consequence of the occurrence of the Revolution, many people had settled upon and improved public lands with the intention of purchasing them at some future time. They were granted a preference to enter and obtain grants upon the payment of five pounds per one hundred acres. Provisions were made from time to time for determining claims of this character. It will be remembered that under the Act of 1783 the lands south of the French Broad and Holston Rivers was reserved for the Cherokee Indians and excluded from entry and appropriation. Notwithstanding this fact much of the land in this territory was settled, and the settlers were given the right of preemption under certain conditions and by proceedings that will be interesting and valuable to notice later on.

This in a general way brings us to the time when the State of North Carolina ceded the territory originally embraced in Washington County, to the United States Government for the purpose and with the intention of establishing a State government and by which the State of Tennessee was subsequently admitted into the Union of States.

Up to that time we find that there existed under the Statutes of North Carolina provisions by which the whole territory of the State was open for appropriation, complicated by the recognized rights of the Cherokee Indians to that territory lying west of what is called Brown's line, and embracing by far the greater portion of the State which was subsequently moved further west; also provisions by which there was opened and appropriated for the officers and soldiers of the Continental army certain territory to be set apart for that purpose, complicated by the fact:

(1) That the lines of the first reservation were quite indefinite and only partially established; (2) that there was a change in the territory set apart for that purpose; (3) that the location of warrants was not in fact confined to the territory designated; (4) that the quantity of land might be located part in one place and partly in another, and after being located might be withdrawn on account of conflicts with other claims, and removed to other localities; and, (5) by the conflict in boundary under the same Act with claimants under the County Entry-taker's plans and actual settlers who had prior rights of appropriation.

Added to these we have complications growing out of inaccurate surveys, method of settling conflicts by adjudication of Commissioners and court proceedings instituted by caveat in the entry-taker's office, and by other methods allowable under the statutes.

We find that the sovereignty of North Carolina affords the source of all titles emanating prior to the Cession Act.

It is but natural to suppose and the fact is, that many titles originated after the date of the Cession Act, and even the most general view of our land laws cannot be obtained without a knowledge of the plans under which the public lands were disposed of after that date. A brief summary of these events will therefore be noticed in this article.

L. D. SMITH, Knoxville, Tenn.

NOTE—This article is the first of a series being written by Mr. L. D. Smith which wil appear in future numbers of the Tennessee Law Review and later be published in book form.

The Editor.

THE TENNESSEE PRACTICE OF DIRECTED VERDICTS

There is no instance of action by a court which has been more conducive to the speedy and efficient administration of justice than the adoption and development of the doctrine of "directed verdicts," or "preemptory instructions,"[1] by the Supreme Court of Tennessee. A review of the genesis and growth of this practice as defined by the Supreme Court is most significant as illustrating and emphasizing the power inherent in a court of last resort to adopt what amount to rules which expedite and render more certain the administration of justice without the aid or interference of the legislature.

As we now consider the question in retrospect, we realize what a step backward it would have been had the Supreme Court failed to adopt the practice of directed verdicts, and had it instead adhered to that of demurrers to the evidence as the exclusive method of obtaining the decision of the trial judge as to whether on the undisputed facts one party was entitled to prevail.

Prior to 1896, it was uncertain whether either method of obtaining a ruling of the trial judge on the undisputed facts prevailed in Tennessee. So early as 1818, it had been intimated that a demurrer to the evidence was proper,[2] but this practice had fallen into desuetude until it was revived by the opinion of Mr. Justice McAlister in **Hopkins v. Railroad.**[3] Before the decision of **Hopkins v. Railroad,** the Supreme Court of the United States has considered the Tennessee practice and, referring to the early case[4] as declaring that practice, had intimated that this, and not the practice of directing a verdict,

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[1] The terms are interchangeable. Aizenshatatt v. Jackson, 1 Tenn. C. C. A. 805.

[2] **Bedford v. Ingram,** 5 Haywood 155 (1818).

[3] 96 Tenn. 409 (1896).

was the sole method of presenting such a question in Tennessee, saying:

> "Although a direct instruction to return a verdict for defendant may not be in accordance with the practice in Tennessee, yet, the decision showed that the question whether a recovery can be had or not, can be presented i n some appropriate form in that state."[5]

In **Hopkins v. Railroad,** the question was thoroughly and elaborately considered and the practice of demurring to the evidence was definitely established and defined. In that case the court not only approved the practice, but impliedly, if not expressly, disapproved the procedure of directing a verdict.

After the decision of **Hopkins v. Railroad** it seemed that the method of obtaining a decision of the trial judge as to the sufficiency of the evidence to support a recovery was definitely established; that this method was by demurring to the evidence; and that it was exclusive. The fact that there were earlier cases containing dicta which disapproved of the practice of directing verdicts lent emphasis to this view. In fact, the question remained settled for only eight years. In **Greenlaw v. Railroad,**[6] the question of directed verdicts was directly presented, and the court, in an opinion by Mr Justice Wilkes, definitely approved the practice, and pointed out that, while the court had not theretofore expressly adopted this method, yet it had become the practice of trial judges to direct verdicts and that the Supreme Court had affirmed those cases where a right result had been reached.[7]

In deciding **Greenlaw v. Railroad**, Mr. Justice Wilkes did not equivocate, but frankly stated that there were in Tennessee a number of cases which seemed to hold that the practice of directing a verdict did not prevail. He showed, however, that the same result could be reached by a demurrer to the evidence, and argued that the practice of directing

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[4] **Bedford v. Ingram**, supra.

[5] **Louisville & Nashville Railroad Co. v. Woodson**, 134 U. S. 614 33 L. Ed. 1032 (1890).

[6] 114 Tenn. 187 (1904).

[7] **Graham v. Bradley**, 5 Humph, 476 (1844); **Farquhar v. Toney**, 5. Humph, 502 (1844); **Robinson v. Railroad**, 2 Lea 594 (1879); **Gregory v. Underhill**, 6 Lea 207 (1880); **Jones v. Cherokee Iron Co.**, 14 Lea, 157 (1884).

a verdict was as well supported by reason as that of demurring to the evidence and was preferable to the latter practice because "in its practical application it is more simple, direct, and easier understood and better calculated to do justice and arrive at a correct result." It was because of its greater desirability as thus expressed by Mr. Justice Wilkes, that the court adopted this practice which had formerly been disapproved by it, and for its frank and effective action in being willing thus to recognize the demand for the more modern and simpler procedure it earned the gratitude of the bar and litigants.

While **Greenlaw v. Railroad** is the first case which expressly adopts the practice of directing verdicts the leading case upon the subject is **Tyrus v. Railroad,**[8] decided the year following the Greenlaw case, the opinion being by the same judge and being found in the same volume of reports. It may truthfully be said that decisions on this subject which have followed **Tyrus v. Railroad** have been but commentaries upon that case. The opinion in **Tyrus v. Railroad** had superseded that of **Greenlaw v. Railroad,** because it much more fully and elaborately discusses the question and much more specifically settles the practice. The reason of the court for again discussing this question was, no doubt, twofold. In the first place, in **Tyrus v. Railroad** a constitutional question was presented, it being insisted that the practice was in conflict with our constitutional provision that "judges shall not charge jurors with respect to matters of fact....."[9] An objection based upon this same constitutional provision had been made to the practice of demurring to evidence and had been disallowed.[10] It was again disallowed in respect to the practice of directed verdicts, the court holding that where there is no controversy as to any material fact, the question is one of law for the court, and not of fact for the jury, and that the action of the judge in directing a verdict under such circumstances is not an evasion on the province of the jury.[11] No doubt, another reason which influenced the court to publish

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[8] 114 Tenn. 579 (1905).
[9] Article 6, sec. 9, Constitution of Tennessee of 1870.
[10] **Hopkins v. Railroad, supra.**
[11] **Tyrus v. Railroad, supra.**

an opinion upon this question so soon after the decision of **Greenlaw v. Railroad,** was its desire finally to settle the practice and convince the bar that there would be no withdrawal from the position it had taken in the first case.

While **Tyrus v. Railroad** did, of course, materially modify so much of the Hopkins case as disapproved the practice of directing verdicts, yet it did not by any expression discountenance the practice of demurring to the evidence, and in theory this practice still exists.[12]

The importance of **Tyrus v. Railroad lies,** not only in its examination and discussion of all of the cases bearing upon the subject, but also in the minute way in which at its inception it defined the practice. In a few sentences, Mr. Justice Wilkes indicated the lines of development, all of which, except in one instance, have been exactly followed by succeeding cases. In stating the rule as to when a verdict should be directed, he said:

> "There can be no constitutional exercise of power to direct a verdict in a case in which there is a dispute as to any material evidence. **or any legal doubt as to the conclusion to be drawn from the whole evidence of the issues to be tried."**

After thus stating the rule he pointed out the methed of applying it:

> "If there is no evidence in the record to support the verdict, this court, will, upon proper assignment to that effect, reverse the judgment, and remand the cause for a new trial. In the latter aspect of the matter, on motion properly made in the court below **for a peremtory instruction,** and an improper refusal of it by the trial judge, this court would be enabled to dispose of the case finally, and thereby save the State the delay and expense of an additional trial, in the absence of any reversible error in rulings upon evidence or otherwise."

It will be noted that implicit in this language is the idea that there are cases when a verdict will not be directed even though the evidence is undisputed. It, of course, has been so held by the court in cases which will be discussed later

[12] **King v. Cox,** 126 Tenn. 563 (1912).

and which decide that where different inferences may be drawn, and under the possibility other circumstances, a verdict will not be directed. Not only in this respect was Mr Justice Wilkes' language accurate, but in referring to the possibility of making a final disposition of the case on appeal, he, of course, indicated the practice, since adopted by the Supreme Court, of dismissing cases where the motion for a directed verdict should have been sustained. In one respect, however, the implication of the dictum of Mr. Justice Wilkes was inaccurate. He indicated that the final disposition in the appellate court could only be made provided there had been a "motion properly made in the court below for peremtory instruction." The later decisions of the court do not recognize this as a necessary condition precedent to the final disposition of the case by dismissal. In other respects, however, the principles laid down by Mr. Justice Wilkes were aodpted and amplified by the court, when cases arose in which these questions had to be decided.

It is believed that a correct statement of the rule as gathered from all the Tennesse case is: A verdict will be directed when the undisputed evidence and all reasonable inferences to be drawn from it upon some material determinative issue show either the one party or the other to be entitled to prevail. The first element of the rule as thus stated is that the evidence must be undisputed, or, in the language of one of the cases, "the court must take as true the strongest legitimate view of the evidence in favor of the verdict and discard all countervailing evidence."[13] Even if the evidence be undisputed, the rule is not applicable unless the requirement is met that all reasonable inferences must lead to a conclusion favorable to the party making the motion. This branch of the rule is, of course, applicable to those cases where the facts are undisputed, but where on the record there is a question as to whether certain facts do, or do not, constitute negligence. To say that a verdict will not be directed if different inferences can be drawn, is merely to state that in such cases the court must take the most favorable

[13] Walton v. Burchel, 121 Tenn. 715 (1907); Kinney v. Y. & M. V. R. R., 116 Tenn. 450 (1906).

view of the evidence appearing in the record, supporting the rights asserted by the party against whom the motion is made.[14]

The definition of the rule given by no means requires that the evidence in the case be entirely undisputed in order to entitle one party or the other to a directed verdict. It only means that upon some issue, which if decided one way or the other is determinative of the entire litigation, the evidence must be undisputed and the inferences all one way. If such is the situation, disputes on other issues in the case are entirely immaterial and a verdict should be directed.[15]

The illustration given by the court is a case of a railroad accident:

> "It may be a disputed and controverted fact which one of the two roads did the injury, and it is therefore a material question to determine which one did it. But it may further develop that, no matter which road it was, there was gross contributory negligence which proximately caused the injury, and the injured party could not, therefore, recover in any event. In such case, the court should give peremtory instructions against the plaintiff notwithstanding the conflict of evidence as to who caused the injury or whether the road was itself guilty of negligence."[16]

Other illustrations are those where the question of defendant's liability may be in dispute, but where the disputed evidence shows plaintiff's claim to be barred by the statute of limitations.[17] or by a release properly executed.

It is, of course, entirely immaterial whether the plaintiff or defendant makes the motion for a directed verdict, and whether it is sought because of the failure of the other party to produce proof on an issue on which the burden is

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[14] Kansas City R. Co. v. Williford, 115 Tenn. 108 (1903); Knoxville Traction Co. v. Brown, 115 Tenn. 323 (1905); Kinney v. Y. & M. V. R. R. Co., 116 Tenn. 450 (1906); Norman v. Railroad, 119 Tenn. 401 (1907); Railroad v. Morgan, 132 Tenn. 1 (1914); Mayor and City Council v. Reese, 138 Tenn., 371 (1917).

[15] Knoxville Traction Co. v. Brown supra; Louisville & Nashville R. R. Co. v. Fort, 3 C. C. A. Tenn. 723.

[16] Knoxville Traction Co. v. Brown, supra.

[17] Seymour v. Southern Ry. Co., 117 Tenn. 98 (1906).

on him, or because of the fact that the party upon whom the burden rests has produced evidence exonerating himself which is undisputed and susceptible of but one inference.[18]

There was at first some doubt as to whether a verdict could be directed on the ground that the undisputed evidence showed a plaintiff to have been guilty of proximate contributory negligence. It was apparently overlooked that in **Greenlaw v. Louisville & Nashville Railroad Company,** the case in which the rule was recognized by the court, the verdict was directed on precisely this ground. At any rate the question was again presented in **Mayor and Aldermen of Knoxville v. Cain**[19] that the question of whether the plaintiff's negligence contributed proximately to the injury was always one for the jury, although upon appeal the appellate court "will determine whether the facts proven clearly show contributory negligence upon the part of the plaintiff below, that acted as the proximate cause to produce the injury, and, upon ascertaining the extent of such proximate contributory negligence will reverse the judgment."[21] Without discussing its earlier decision in the Greenlaw case, the court made a logical application of the rule and held that, regardless of whether the problem concerned negligence or contributory ngligence, and of whether the question was the existence of such negligence, or its proximate or remote nature, it was a question of law for the court where the evidence was undisputed and the inference inevitable. This conclusion is of course correct because the application of the rule requires only the existence of undisputed evidence and necessary inference to justify the direction of the verdict. It may, of course, happen that upon some material issue the evidence

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[18] **Cooper Co. v. Simpson,** 6 Tenn. C. C. A. 536; **Nash v. Davis,** 3 C. C. A. Tenn. 634 (1913). This is subject to the limitation that in a felony case a verdict of guilty cannot be directed even though the evidence of guilt is undisputed. **Shipp v. State,** 128 Tenn. 498 (1914). The Supreme Court has now apparently held in an unreported case that a verdict cannot be directed by the judge trying a criminal case, neither for or against the accused. (**Shedrick Yancey v. State,** appealed from Shelby County and decided June, 1922, without written opinion.)

[19] 128 Tenn. 250 (1913).

[20] 112 Tenn. 712 (1904). See also **Knoxville v. Cox,** 103 Tenn., 367.

[21] Ibid. See **Railroad v. Williford,** 115 Tenn. 108 (1905).

is undisputed and the inference inevitable, but that this issue is not necessarily determinative of the case. Under such circumstances, as where the declaration is separated into counts, and the evidence shows without dispute one party or the other entitled to prevail upon one of the counts, the proper practice is to direct a verdict as to that count or issue and submit the others to the jury.[22]

It is believed that there are no real exceptions to the rule as above stated. Certainly it does not impinge upon it to hold that, when testimony is produced by a party upon whom rests the affirmative of the issue and this testimony is inherently incredible,[23] or the witnesses are impeached either by showing contradictory statements, or by evidence as to their reputation, the party relying upon such testimony to establish an affirmative defense is not entitled to a directed verdict.[24] In such a case the party upon whom rests the affirmative of the issue has not produced testimony which is credible upon its face, and the credibility of his witnesses is a question for the jury. So we can conceive a case where a fact is capable of scientific ascertainment, and where evidence is produced on the one side which merely amounts to opinions, and on the other which is a scientific demonstration of a physical fact. In such a case it seems that the party in whose favor the physical fact was demonstrated is entitled to a directed verdict, notwithstanding the opinion evidence offered on the other side. [25] There may be also cases where the testimony produced is so inherently improbable and incredible that it does not amount to evidence, because it is in conflict with the laws of nature, or certain other scientific and established truths.[26]

The requisites of undisputed evidence and inevitable inference distinguish the right to a directed verdict from the right to have set aside a verdict which is against the weight of the evidence. This distinction is emphasized by our statute

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[22] **Red Boiling Water Co. v. Robt. McEwen**, 3 C. C. A. Tenn. 687.
[23] **King v. Cox, supra.**
[24] **Frank v. Wright**, 140 Tenn. 535 (1917).
[25] **Nashville, Chattanooga & St. Louis R. R. v. Justice**, 5 C. C. A. Tenn. 69, (Writ of certiorari denied by the Supreme Court.)
[26] **Quock Ting v. U. S.**, 140 U. S. 417, 35 L. Ed. 501 (1891).

prohibiting the trial judge from granting more than two new trials on this ground.[27] The Court of Civil Appeals has suggested that in this respect the practice in Tennessee differs from that in the federal courts, intimating that in those courts a verdict will be directed whenever it would be set aside as against the weight of the evidence.[28] It is believed, however, that, whatever the rule may be in other circuits, at least in the Sixth Circuit, the rule is the same in the federal courts as it is in the Tennessee state courts.[29] The practical importance of this difference is considerably less in the federal courts than in the state courts, because the power of a federal judge to set aside a verdict an unlimited number of times enables him to control the result of the litigation in those cases where he concludes that the weight of the evidence is with the one party or the other. The one advantage in the federal court to the party against whom the trial judge considers the preponderance of the evidence to weigh, is that, instead of having his case concluded by a directed verdict, he at least has the opportunity of taking a nonsuit, and seeking a more favorable tribunal after the verdict is set aside.

Inasmuch as the purpose of a motion for a directed verdict is to test the sufficiency of the evidence of the party against whom it is made, it necessarily follows that proper practice requires that the motion be made only after the party whose testimony is to be tested has concluded his evidence. If the defendant be the mover, the motion would necessarily be made either at the close of the plaintiff's evidence, or at the conclusion of all the evidence.[30] If the plaintiff be the mover, it would necessarily follow that the motion should be made at

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[27] Sec. 3122, Code 1858, sec. 4850 Shannon's Code.

[28] **Sells v. Lathan**, 3 C. C. A. Tenn. 141; **Thurman v. Bradford**, 3 C. C. A. Tenn. 474 (1912).

[29] **Carolina C. & O. Ry. Co. v. Stroup**, 239 Fed. 75, (C. C. A. Sixth Circuit, (1917); **Leahy v. Detroit M. & T. Short Line Ry.** 240 Fed. 82 (C. C. A. 6th Cir. 1917). **Nelson v. Ohio Cultivator Co.**, 188 Fed. 620, 112 C. C. A. 394 (C. C. A. 6th Cir. 1911); **McIntyre v. Modern Woodmen**, 200 Fed. 1, 121 C. C. A. 1, (C. C. A. 6th Cir. 1912); **Hettler Lumber Co. v. Olds**, 221 Fed. 612, 137 C. C. A. 336; (C. C. A. 6th Cir. 1915); **Richards v. Mulford**, 236 Fed. 677, 150 C. C. A. 69, (C. C. A. 6th Cir. 1916); **Bergert v. Payne**, 274 Fed. 785, (C. C. A. 6th Cir. 1921).

[30] **Nashville Railway & Light Co. v. Henderson**, 118 Tenn. 284 (1906).

the close of the defendant's evidence, or at the conclusion of all of the evidence. It is improper for the motion to be made or sustained against a party who has not concluded the production of evidence,[31] and, if the motion is not made at the proper time, and counsel begins his argument to the jury before moving for a directed verdict, the court may refuse to entertain the motion,[32] In some instances trial judges have sustained motions for directed verdicts made at the conclusion of the plaintiff's or defendant's opening statement to the jury, this being done upon the theory that the statement itself, fully made, affirmatively showed no possible right in the one side or the other. This question has not yet come to either the Court of Civil Appeals or the Supreme Court for adjudication in any reported case, but in theory it is not proper practice because the formal statement of the case is made in the pleadings. If the pleadings do not state a case, or a defense, the method of testing their sufficiency is by demurrer. If, however, the statement of the case to the jury does affirmatively show the lack of any right in the party against whom the motion is made, and a verdict is directed by the trial judge, it seems likely that this action would be affirmed on the principle, that, while perhaps not correct in theory, a right result had been reached. It is thought probable that the Supreme Court would act upon the idea that counsel would not be more conservative in their opening statement to the jury than the witnesses in giving their testimony.

If the motion be made at the end of the plaintiff's evidence by the defendant, or at the end of the defendant's evidence by the plaintiff, and not renewed at the conclusion of the entire evidence, it is waived. This is true because it may happen that the evidence introduced subsequent to the making of the motion will supply a link which was missing when the motion was first made.[33] While the point has not been adjudicated in Tennessee, in a number of jurisdictions it is held that the motion is not waived by failure to renew after the introduction of evidence, provided no evidence is in-

[31] King v. Dunlap, 4 C. C. A. Tenn 579.
[32] Red Boiling Water Co. v. McEwen, supra.
[33] Nashville Railway & Light Co. v. Henderson, supra.

troduced upon the issue as to which the motion for directed verdict was made.[34]

The party against whom a motion for directed verdict is made being entitled to the benefit of any evidence introduced subsequent to the overruling of the motion when first made, it follows that on appeal, if a motion for directed verdict was made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all evidence, it will not be sustained if the plaintiff was entitled to go to the jury at the conclusion of the entire evidence, even though he was not entitled to go to the jury at the conclusion of his evidence and the trial judge was in error in not then directing a verdict.[35] If the defendant desires to rest simply upon the weakness of the plaintiff's case and fears that the own evidence will supply some vital missing link, he must hazard his fortune by resting at the conclusion of the plaintiff's evidence. This rule sometimes operates disadvantageously to the one party or the other. Trial judges, acting, no doubt, in what they conceive to be the interest of justice, sometimes overrule motions for directed verdicts made at the conclusion of the plaintiff's evidence on the theory that, while perhaps there is some element missing in the plaintiff's case, this will be supplied by the defendant's evidence and the result of the direction of a verdict at the conclusion of the plaintiff's evidence would be a miscarriage of justice. Such action is inconsistent with the purpose and practice of directed verdicts. If one is entitled to a directed verdict it is because there is some binding rule of law which disentitles one's adversary to prevail. The verdict is given or refused, therefore, as a matter of absolute right and not as a matter of discretion.[36] If therefore the plaintiff's case is fatally weak when he rests, a verdict should be directed on defendant's motion and defendant not put to the hazard of possibly supplying some

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[34] **Dimuria v. Seattle Transfer Co.** 50 Wash. 633, 22 L. R. A. (N. S.) 471 (1908); **Johnson v. Roach**, 83 App. Div. 351, 82 N. Y. Sup. 203, (1903); **Lydia Cotton Mills v. Prairie Cotton Co.**, 84 C. C. A. 129, 156 Fed. 225 (1907).

[35] **Lafollette Coal & Ice Co. v. Bennett**, 8 C. C. A. Tenn. 210 (affd. Sup. Ct. 1917).

[36] **Knoxville Traction Co. v. Brown**, supra; **Norman, Adm. v. Southern Railway**, 119 Tenn. 401 (1907).

missing element and thus losing in the appellate court the right to rely upon the weakness of the plaintiff's case, as it existed when the plaintiff rested, or the defendant should only be allowed to make the motion at the close of the entire evidence.

A motion for directed verdict tests the sufficiency of the evidence and not the sufficiency of the pleadings. Therefore the trial judge is not precluded by his action in ovrruling a demurrer to a declaration or to one of its counts, from later directing a verdict as to that count or the entire case.[37]

Motions for a directed verdict being made during the course of the trial, and requiring a discussion of the evidence, sometimes participated in not only by counsel, but by the court, and often provoking from the court an expression of his views upon the evidence, it is manifest that if this discussion takes place in the presence of the jury, either the freedom of expression on the part of the judge will be greatly hampered, or there will be present the danger of the jury inferring from the statements made by the court, his views upon the evidence. The Court of Civil Appeals in a case, in which the court somewhat freely expressed himself as to the evidence during the argument of the motion for a directed verdict in the presence of the jury, held that in the particular case it was error for the court to refuse to excuse the jury during the argument of the motion, when the request was made by counsel.[38] While the reversal in that case was to some extent based upon the fact that the colloquy between the trial judge and counsel practically amounted to an expression of the trial judge's opinion upon the evidence in the presence of the jury, yet it is, no doubt, the better practice in all cases for the trial judge, on request of counsel. to excuse the jury during the argument of the motion, although there may be cases where the argument and ruling of the judge are of such nature that it would be harmless error, if error at all, for the motion to be made and passed upon in the presence of the jury.

[37] North Memphis Savings Bank v. Union Bridge & Construction Co., 138 Tenn. 161 (1917); Chavin v. Mayor and City Council of Nashville, 1 C. C. A. Tenn. 317.

[38] Pittsburg Plate Glass Co. v. Cannon, 5 Tenn. C. C. A. 51 (Affd. by Sup. Ct. 1915).

One of the advantages of the motion for a directed verdict is the ease with which it may be made and passed upon. While there is no objection to making it in writing, or in the form of a request for special instruction, yet the common practice, which has been approved by the Supreme Court, is to make it orally without the necessity of having the evidence transcribed, formulated and filed, as in the case of a demurrer to the evidence.[39] An argumentative statement of the grounds of the motion is not necessary, but where distinct questions of law are presented, it is better that they should be stated separately in order that they may be distinguished in the motion for new trial and on appeal. The trial judge may, in a proper case, on his own motion, direct a verdict for the one party or the other.[40]

The ease with which it may be made is only one of the advantages of the motion for directed verdict over a demurrer to the evidence. A much greater advantage flows from the difference in effect of the two methods. In moving for a directed verdict a party waives no objections or exceptions which he may have made during the course of the trial and retains the right to rely upon them in addition to relying upon his motion for a directed verdict.[41] When this question was raised it was urged upon the court that the motion for a directed verdict was analogous to a demurrer to the evidence. and should, therefore, carry with it the same burden. The court had held that a demurrer to the evidence did waive all such errors.[42] Mr. Justice Neil pointed out the technical distinction between a demurrer to the evidence and a motion for a directed verdict, the one being in the nature of a pleading, and the other belonging to the class of subjects necessary to be incorporated in a bill of exceptions, along with other matters not of record, but based his decision upon the

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[39] **King v. Cox**, 126 Tenn. 553 (1912); **City Ice Co. v. Black**, 136 Tenn. 391 (1916).

[40] **King v. Cox**, **supra.** Technically the jury should under the direction of the trial judge go through the form of writing the verdict but the omission of this would be harmless in Tennessee. Ibid. **Duluth Chamber of Commerce v. Knowlton**, 24 Minn. 229, 44 N. W. 229 (1889).

[41] Ibid.

[42] **Southern Ry. v. Leinart**, 107 Tenn. 635 (1891); **Coleman v. Bennett**, 111 Tenn. 705 (1902).

broad ground that the "practice of directing verdicts, or giving peremptory instructions to juries is recognized as a distinct advance of demurring to the evidence," and stated that the court deemed "it unwise to hamper this practice with the rules which restricted that system and made it so unwieldy in use, and so dangerous to parties who sought to apply it.[43] This statement voices the broad and progressive spirit with which the court has dealt with this entire subject in its endeavor to evolve a practice which would expedite the disposal of litigation without being hampered with undue burdens.

The prescience of Mr. Justice Wilkes in **Tyrus v. Railroad** indicated this development of the rule when he stated that on appeal the court would be enabled to dispose of the case finally, and thereby save to the parties and the state the delay and expense of an additional trial "in the absence of any reversible error in rulings upon evidence or otherwise." This holding, that the making of such a motion does not waive exceptions and objections, and does prevent the jury from passing upon the case if the motion is overruled,[44] fully justifies the statement of Mr. Justice Wilkes in Greenlaw v. Railroad, that the practice is preferable to that of demurring to the evidence, because "in its practical application it is more simple, direct, and easier understood and better calculated to do justice and arrive at a correct result." It also emphasizes the original statement of the court, in sanctioning the practice of demurring to the evidence, that "the practice is cumbersome and antiquated. In the nature of things it can seldom be successfully invoked."[45]

Not only in refusing to follow the artificial rules that hedge the use of a demurrer to the evidence, but in the decision of every question presented to it concerning the practice, the Supreme Court has exhibited an attitude characterized by the desire to limit the use of the motion for a directed verdict to the one function of testing the sufficiency of the evidence to sustain a verdict. In no instance has it allowed the interposition of such motion to limit or restrict the right of either

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[43] **King v. Cox, supra.**

[44] **Brackin v. McGannon,** 137 Tenn. 207 (1916); **Sprankle v. Meyerick,** 4 C. C. A. Tenn 515.

[45] **Hopkins v. Railroad, supra.**

party in any other respect. When the parties have rested and a motion for a directed verdict has been made it is still within the discretion of the trial judge to allow either party to reopen the case and adduce further evidence to as full an extent as if the motion had not been made.[46] Not only is the making of a motion for a directed verdict and an intimation by the judge that it will be sustained insufficient to disentitle the plaintiff to take a voluntary nonsuit,[47] but where the motion is made in the absence of the jury and actually sustained by the trial judge, the plaintiff may, under our statute giving him the right to take a nonsuit "at any time before the jury retires,"[48] have his motion for a nonsuit granted before the jury is actually directed by the judge to return its verdict.[49] This right is, however, lost when there has been a trial and the defendant has filed his wayside bill of exceptions preserving the question of his right to a directed verdict.[50]

The wisdom of the court in refusing to give to the motion any other effect than that of testing the sufficiency of the evidence is best illustrated by its decision as to the consequence of both parties moving for a directed verdict.[51] Federal courts, including the Supreme Court of the United States, by a process of artificial reasoning, had concluded that the moving for peremptory instructions by both plaintiff and defendant had the effect of constituting an agreement to submit to the decision of the judge instead of the jury all questions of fact.[52] The only way to avoid this result under such circumstances was for one of the parties to obtain leave to withdraw his motion or to request specific instructions to the jury in the event the motion for a directed

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[46] **Dick v. Tennessee Power Co.** 6 C. C. A. Tenn. 599.

[47] **Brackin v. McGannon, supra; Sprankle v. Meyerick, supra.**

[48] Sec. 2964 Code 1858, Shannon's Code, sec. 4689.

[49] **Darby v. Pidgeon Thomas Iron Co.**, 232 S. W. 75 (Supreme Court of Tennessee, June 24, 1921). This case suggests the one possible advantage to a defendant in demurring to the evidence instead of moving for a directed verdict. After joining in the demurrer the plaintiff cannot as a matter of right take a nonsuit although it is possibly discretionary with the court to permit him to do so in exceptional cases. **N. C. & St. L. R. R. Co. v. Sansom**, 113 Tenn. 683 (1902); Sprankle v. Meyerick, 4 C. C. A. Tenn. 515.

[50] **Barnes v. Noel**, 131 Tenn. 126 (1914).

[51] **Virginia-Tennessee Hardware Co. v. Hodges**, 126 Tenn. 370 (1912).

[52] **Buetell v. Magone**, 157 U. S. 154, 39 L. 654 (1895).

verdict was overruled.[53] The adoption of this rule was urged upon both the Court of Civil Appeals and the Supreme Court. The Court of Civil Appeals in three reported cases declared this to be the correct practice.[54] In each of these cases a petition for certiorari was denied and it seemed as if the Supreme Court had at least impliedly approved this practice. It later appeared, however, that the petitions must have been denied upon some other ground, for, in its first reported opinion dealing with the subject, the Supreme Court pointed out that it was illogical to say that because both parties moved for a directed verdict on the theory that there was no dispute about the evidence, or the inferences to be drawn from it, they should therefore be held to have agreed that there was a conflict in the evidence and that this conflict should be settled by the decision of the judge instead of the verdict of the jury.[55] It declined to adopt the Federal rule, not only because the reasoning supporting it was unsatisfactory, but because of the more fundamental reason that it felt that a different rule was more in line with modern practice. Mr. Chief Justice Niel said:

> "We are aware that the views we entertain are at variance with a large number of authorities, but in adopting a practice for our State on the point in question, we are desirous of securing one as simple and easy of application as possible and one that will at the same time preserve wholly unimpaired the right of trial by jury.
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> "On points of practice which are wholly new in this State, this court, in establishing the practice to be followed here, does not feel itself bound to follow the precedents of other States, but exercises the unquestionable right of choosing what may seem to it the best practice, that most conducive to attainment of justice."[56]

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[53] Empire State Catlle Co. v. A. T. & S. F. R. Co., 210 U. S. 852, 52 L. Ed. 931 (1908);
Minahan v. Grand Trunk, 138 Fed. 37, 70 C. C. A. 463 (1905); McCormack v. National City Bank, 142 Fed. 132, 73 C. C. A. 350 (1906). American National Bank of Nashville v. Miller, 185 Fed. 338, 107 C. C. A. 456 Affirmed 229 U. S. 517, 57 L. Ed. 1310. (1911).

[54] Ry. Co. v. Crutcher, 1 Tenn. C. C. A. 231; Aizenshtat v. Mayor, etc., 1 Tenn. C. C. A. 805; Schwartz v. Hearn, 2 Tenn. C. C. A. 666.

[55] Virginia-Tenn. Hardware Co. v. Hodges, supra; King v. Cox, supra.

[56] Ibid.

The court was not only courageous but correct in refusing to be shackeled by precedent and adopting the enlightened rule that concurrent motions for a directed verdict do not substitute the judge for the jury as a trier of fact, but only require the judge to direct a verdict for that party whose contention he finds sustained by undisputed evidence and necessary inferences, or, if he finds the evidence in dispute or different inferences allowable, to overrule both motions and submit the case to the jury.

If the trial judge refuses to direct a verdict when one of the parties is entitled to such a direction, his action must of course be challenged by motion for new trial, as this is the only method of presenting to the court errors committed on the trial of the case which must be made to appear by bill of exceptions.[57] It is not necessary, however, that the party making the motion should have entered a formal exception to the action of the trial judge in denying it.[58] In passing upon the motion for new trial, if the trial judge concludes that he erred in refusing to direct a verdict, it is "his duty to enter an order correcting the verdict rendered to conform to the undisputed evidence" and to render judgment for defendant and dismiss the case.[59]

There has been some discussion among the bar as to the proper practice when seeking this action from the trial judge. It seems now settled that all that is necessary is a motion for new trial with error assigned on the action of the trial judge in refusing to direct a verdict. "The office of a motion for a new trial is not alone to secure another hearing, but to present the errors complained of for correction, if possible, without another hearing."[60] It is good practice and perhaps advisable to include in the motion for new trial a motion for a new trial of the motion for a directed verdict, and that the court now sustain the motion and dismiss the case.

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[57] **Railroad v. Johnson**, 114 Tenn. 632 (1905); **Seymour v. Railroad**, 117 Tenn. 98 (1906); **Oliver Manufacturing Co. v. Slimp**, 139 Tenn. 297 (1917); **King v. Cox**, supra.

[58] **Cotrim Lumber Co. v. Elkins** (decided by Supreme Court of Tennessee, December 17, 1921, but not yet reported.)

[59] **Bostick v. Thomas**, 137 Tenn. 99 (1916).

[60] **Barnes v. Noel**, supra; **Hamburger v. I. C. R. R. Co.**, 138 Tenn. 123 (1917).

It is not proper to seek this action on the part of the trial judge by a motion **non obstante veredicto,** or a motion in arrest of judgment. The office of a motion **non obstante veredicto** is to obtain a judgment for the plaintiff on pleadings which are insufficient as a defense to the action.[61] A motion in arrest of judgment serves the same purpose for the defendant.[62]

The defendant or the plaintiff may require the reconsideration of the action of the trial judge on a motion for directed verdict, not only when a verdict has been rendered, but when there has been a mistrial.[63] In the event the trial judge declines to reconsider his action in refusing to direct a verdict, the question may be preserved by filing a wayside bill of exception, even though a new trial without a dismissal is granted, and may be brought to the attention of the appellate court by appeal in error after the final judgment, or by filing the record for writ of error.[64] In the event the trial judge does reconsider his action and does direct a verdict for the defendant after there has been a verdict by the jury for the plaintiff, it is then necessary for the plaintiff whose case has been dismissed to move for a new trial as a condition precedent to an appeal in error.[65]

As the trial judge dismisses a case when, on the motion for new trial, he concludes that he was in error in failing to direct a verdict, so it is now the settled practice for the appellate court to dismiss the case when it holds that the trial judge should have sustained the motion for a directed verdict.[66] This is evidently what Mr. Justice Wilkes had in mind in **Tyrus v. Railroad,** when he said that "on motion properly made in the court below for a peremptory instruction, and an improper refusal of it by the trial judge, this court would

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[61] **Neil v. Metropolitan Casualty Co. of N. Y.,** 135 Tenn. 28 (1916); **Chunn v. Memphis Flooring Co.,** 7 C. C. A. Tenn. 532.

[62] **Hamburger v. I. C. R. R. Co., supra.**

[63] **Oliver Mfg. Co. v. Slimp, supra.**

[64] **Barnes v. Noel, supra; Oliver Mfg. Co. v. Slimp supra.**

[65] **Bostick v. Thomas, supra.**

[66] **Mobile & Ohio R. R. Co. v. Brownsville Livery & Live Stock Co.,** 123 Tenn. 298 (1910); **King v. Cox, supra.** There can not, however, be a dismissal either by the Court of Civil Appeals or the Supreme Court of any case tried before a jury without giving the parties an opportunity to be heard through their counsel by oral argument in the appellate court. Chapter25Acts of Tennessee 1911. See also **Memphis St. Ry. Co. v. Roe,** 118 Tenn. 603 (1907), and **Railroad v. Ray,** 124 Tenn. 16 (1910).

be enabled to dispose of the case finally, and thereby save the State the delay and expense of an additional trial." This practice was adopted in Tennessee without any elaborate discussion and it has never been suggested that it violates our constitutional provision "that the right of trial by jury shall remain inviolate."[67]

In the federal court, however, the trial judge has not the power to set aside a verdict rendered by a jury in favor of a plaintiff and enter a judgment for defendant, even though he should have directed a verdict for the defendant on the trial;[68] nor can the circuit court of appeals in a case where it concludes that a trial judge was in error in not directing a verdict for the defendant dismiss the case, but it must remand it for a new trial, the Supreme Court of the United States holding that a dismissal would violate the Seventh Amendment to the Constitution of the United States which declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and if tried by a jury, shall not be otherwise re-examined in any court of the United States, than according to the rules of the common law.[69]

While possibly the federal and state practice may be distinguished on the ground of the difference in the constitutional provisions, yet it is fortunate that the Supreme Court of Tennessee did not adopt the more unwieldy practice which the Supreme Court of the United States holds the Federal Constitution requires.

In another respect the Tennessee rule is different from that which prevails in the federal courts. In the federal courts, a failure to move for a directed verdict is a waiver

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[67] Constitution of Tennessee of 1870, Art. 1, sec. 6.

[68] **Baylis v. Travelers Insurance Co.**, 113 U. S. 316, 28 L. Ed. 989, 1885

[69] **Slocum v. New York Life Ins. Co.**, 228 U. S. 364, 57 L. Ed. 879 (1912). Justice Hughes, Holmes, Pitney and Lurton dissenting.

Quare: Inasmuch as the Supreme Court of the United States holds the jury to be an integral part of the court in such cases is it not necessary for the jury to go through the form of writing the verdict even where the motion for a directed verdict is sustained? If the jury refuses to write the verdict when directed should the jurors be punished for contempt or a mistrial ordered and a more amenable jury empaneled? For discussion of this subject see **Cahill v. Chicago, etc., R. R. Co.**, 74 Fed. 285, 20 C. C. A. 184 (1896).

of any right to question on appeal the sufficiency of the evidence to support the verdict;[70] under the Tennessee practice the same question may be made by assignment of error "there is no evidence to support the verdict," and on this assignment of error being sustained the case will be dismissed in the appellate court, notwithstanding failure to move for a directed verdict.[71]

While the practice is well settled as to what action the appellate court will take when it holds that the trial judge was in error in refusing to direct a verdict, either on the trial, or on consideration of the motion for new trial, there is considerable uncertainty as to the course to be pursued, when the appellate court finds that the trial judge was in error in giving a directed verdict on consideration of the motion for new trial and after the verdict has been rendered in favor of the plaintiff. Under such circumstances, shall the verdict in favor of the plaintiff be restored, or shall the case be reversed and remanded for a new trial? The question has been pre-

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[70] **Hartford, etc., Inc. Co. v. Unsell,** 144 U. S. 439; 36 L. Ed 496 (1892); **Means v. Bank,** 146 U. S. 620-630; 36 L. Ed. 1107 (1892): **Hansenv. Boyd,** 161 U. S. 397, 40 L. Ed. 756, (1886); **Mercantile Tr. Co. v. Hensey** 205 U. S. 298; 51 L. Ed. 811 (1907). **Sun Publishing Co. v. Lake Erie Asphalt Block Co.,** 157 Fed. 80; 84 C. C. A. 584 (6th Cir. 1907). **Village of Alexandria v. Stabler,** 50 Fed. 689 (C. C. A. 8th Cir. 1892). **Western Coal Co. v. Ingraham,** 70 Fed. 219 (C. C. A. 8th Cir. (1895). **Crockett v. Miller,** 112 Fed. 729 (C. C. A. 8th Cir. 1901). **Feese v. Kemplay,** 118 Fed. 428 (C. C. A. 8th Cir. 1902). **Tamblyn v. Johnston,** 126 Fed 267 (1903). **McDonnell v. U. S.** 133 Fed. 293 (C. C. A. 9th Cir. 1904). **Bidwell v. Geo. B. Douglas,** 183 Fed. 93 (1910).

[71] **Southern Ry. Co. v. Lewis & Adcock Co.,** 139 Tenn. 37 (1917), holding that an assignment of error that the trial judge erred in overruling a motion for a directed verdict is equivalent to an assignment of error "there is no evidence to support the verdict." **Woolworth v. Conners,** 142 Tenn. 678 (1919), holding conversely that an assignment of error "there is no evidence to support the verdict" is equivalent to assigning error on the refusal of the trial judge to direct a verdict. In this case a motion for a directed verdict was made and overruled, but this was not assigned as error in the motion for new trial, and hence could not be taken advantage of upon appeal. The cause was,however, dismissed upon the other assignment being sustained. The Supreme Court at one time intimated that while a case would be dismissed when it sustained an assignment of error, challenging the action of the trial judge in overruling defendant's motion for a directed verdict, it would be reversed and remanded for a new trial, when no such motion was made and the assignment of error "no evidence to support the verdict" was sustained. **Nashville Ry. & Light Co. v. Henderson, supra...** The assignment "no evidence to support the verdict" is unknown in the federal practice. **Meers and Dayton v. Childers,** 228 Fed. 640 (C. C. A. 6th Cir. 1916).

sented to both the Court of Civil Appeals and the Supreme Court. In no one of these cases was the verdict restored, although in both cases decided by the Court of Civil Appeals, and in one of the cases decided by the Supreme Court it was held that the trial judge was in error in sustaining the motion for a directed verdict on consideration of the motion for new trial and in dismissing the case. In each instance, however, the refusal to reinstate the verdict was based upon the ground that the defendant had the right to have the trial judge consider not only that ground of his motion for new trial which challenged the action of the trial judge in overruling the motion for directed verdict, but had also the right to require him to weigh the evidence and pass upon the other assignments of error. The reinstatement of the verdict would deprive the defendant of this right, and especially of his right to have the evidence weighed by the trial judge, a question with which the appellate court has no concern. In one of the decisions, therefore, the case was remanded with direction to the trial judge to pass upon the other grounds of the motion for new trial.[73] A case can be conceived, however, where there should be no difficulty about reinstating the verdict. It might well be that the defendant's only assignment of error is his claim for a directed verdict. If this claim is allowed by the trial judge after the jury has returned a verdict in favor of the plaintiff and is disallowed by the appellate court, there seems to be no reason why the verdict should not be restored. The Court of Civil Appeals has intimated that in this and similar cases the verdict should be reinstated.[74]

This question arose because the action of some of the trial judges who were of opinion that the defendant was entitled to a directed verdict, but who thought that the motion should be overruled, the jury allowed to return a verdict, and that, if the verdict was in favor of the plaintiff, the motion

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[72] **Black v. Loan Mountain Lumber Co., 7 C. C. A. Tenn 151 (Affd. by Supt. Ct.); Chunn v. Memphis Flooring Co., supra; Hamburger v. Ill. Central R. R. Co., supra; Hurt v. Y. & M. v. R. R. Co. 140 Tenn. 623 (1918).**

[73] **Chunn vs. Memphis Flooring Co., supra; Black v. Loan Mountain Lbr. Co., supra.**

[74] **Chunn v. Memphis Flooring Co., supra; Black v. Loan Mountain Lbr. Co., supra.**

for a directed verdict should then be sustained and the suit dismissed. Their thought was that in such cases, if on appeal it was held they were in error in directing a verdict for the defendant, the verdict in favor of the plaintiff could be restored and the necessity of a new trial avoided. The fallacy of this reasoning lies in the fact that, if the defendant is entitled to a directed veridct at either the close of the plaintiff's proof or at the close of the entire evidence, he is entitled to it as a matter of law, and not of discretion, and the trial judge has no right to refuse the motion and experiment with the jury. The practice of restoring the verdict in proper cases, where the trial judge erroneously dismisses the case after a verdict in favor of the plaintiff, and because he has been convinced he was in error in not sustaining the motion during the trial, has much to commend it and will greatly expedite litigation.

The party moving for a directed verdict may not only question the action of the trial judge in refusing to sustain his motion and dismiss the case, although a new trial may be accorded him on other grounds, but he may question the action of the Court of Civil Appeals in the same manner. If that Court sustains some of his assignments of error and reverses and remands the case instead of sustaining his motion for a directed verdict and dismissing it, he may assign error upon this action, but can only do so by himself filing a petition for certiorari; and if in the Court of Civil Appeals the defendant claims that he was entitled to a directed verdict upon two grounds, and one of these grounds is sustained and the case dismissed, and the other ground is overruled, he can only challenge the action of the court in overruling the other ground, by himself filing a petition for certiorari; he cannot again raise that question merely because his adversary has filed a petition for certiorari challenging the decision of the Court of Civil Appeals in reversing and dismissing the case.[76] The disposition of the case is not only accelerated when the appel late court holds that the defendant was entitled to a directed verdict, but also when the plaintiff is held so entitled, for in

[75] Cincinnati, etc., R. R. v. Brock, 132 Tenn. 477 (1915).
[76] Tri-State Fair v. Rowten, 140 Tenn. 304 (1918).

such a case there should be a remand for the sole purpose of assessing damages.[77]

The practice of directed verdicts—its logic and simplicity, its lack of hampering technicalities, and the steadiness with which it has been limited to the one office of testing the sufficiency of the evidence—is in refreshing contrast with the mroass of statutes and decisions on similar subjects which await the feet of the unwary practitioner in some of the so-called "code states." It furnishes a striking argument in support of that school of thought which insists that matters of practice and procedure should be entrusted not to the legislature but to the court of last resort as a rule making body.[78]

As admirable as has been the result achieved by the Supreme Court, it would not have been possible had not the trial judges enforced the practice before it had been expressly adopted by the reviewing court. In many matters of practice the attitude of some of the trial judges is more conservative than that of either of the appellate courts. This lack of liberality retards progress because it fails to afford to the Supreme Court an opportunity to set the seal of its approval upon desirable improvements in practice.[79] The more timorous of the circuit judges should feel encouraged by the attitude of the Court upon this and other matters of practice to feel, when a novel principle of procedure is pressed upon them, that, if it is not forbidden by positive law, is consonant with enlightened views, and is conducive to the expeditious administration of justice, it will receive the sanction of the Supreme Court. although it may be unsupported by precedent in Tennessee.

WALTER P. ARMSTRONG, Memphis, Tenn.

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[77] **Perkins v. Brown,** 132 Tenn. 294, (1915).

[78] Another instance is the practive requiring a plaintiff in a personal injury case to submit to a physical examination on penalty of having his suit dismissed. **Williams v. Chattanooga Iron Wks.** 131 Tenn. 683 (1915).

[79] Another excellent practice which has been tentatively tried by some of the circuit judges is that of submitting issues to the jury as in the chancery court. See **Turney v. Mobile & Ohio R. R. Co.** 3 Tenn. C. C. A. 628, (Writ of certiorari denied by Supreme Court).

TENNESSEE LAW REVIEW

THE TENNESSEE LAW REVIEW.—The Tennessee Law Review has long existed in the minds of those anxious to see the College of Law equipped properly to serve the Bench and Bar of the State. Incidentally, great benefit must accrue to the College itself from the issuance of such a publication. In this first number it is fitting to set forth the purposes of the Law Review and of the organization producing it.

The College of Law of the University of Tennessee, like all other departments of the State University, has as its ideal; that it shall render the maximum of service to the people of Tennessee, and especially to the legal profession. There are the three well defined heads under which its efforts are to be grouped: (1) resident teaching, (2) research, and (3) extension service. Resident teaching has thus far been the chief activity, but now, thru the genorosity of a member of the Board of Trustees, Mr. T. Asbury Wright, of Knoxville, Tennessee, the publication of this periodical has been made possible, so that henceforth this College can, through such extension service, carry to the lawyers of the State the benefit of research work done here and elsewhere by students, faculty and members of the profession. It is believed that in this way a great step forward is being taken in making the College of Law of real service to the Bar of Tennessee.

Leading articles on timely legal subjects by lawyers and judges of Tennessee and of other states will make up the body of each issue. Notes and comments on important recent cases, based upon careful investigations and research, will be published. Later, a department devoted to reviews of recent legal

publications will be added. It is exceedingly gratifying also to announce that this Review has been designated the official publication of the Tennessee Bar Association. Each issue will contain a department edited by the Association and devoted to its activities. In this manner, members of the State Bar Association will be kept in close touch with the affairs of their organization.

Everyone interested in the progress of legal education will share in the deep gratitude felt for the generosity of Mr. Wright in making possible the publishing of this periodical. He is too well known to our readers to need introduction. As a member of the Knoxville Bar he has ever stood for the highest ideals of the profession; as a member of the Board of Trustees of the University he has shown an unfailing interest in the upbuilding of the institution.

SUBSCRIPTIONS,—The first issue of The Tennessee Law Review will be forwarded to every lawyer in the State whose name and address is available. Thereafter, it will be sent only to those who signify their desire to have their names continued on the mailing list and who remit the nominal fee of $1.00 per annum. This charge, of course, in no wise represents the cost of issuing the Review; it but little more than covers the cost of mailing and other incidental expenses. There is no desire to burden any lawyer with another legal periodical and accordingly this one will not be sent to him unless he has taken the trouble to express his wish in concrete form that it shall be sent.

Until further notice the Tennessee Law Review will be published four times a year, appearing during the months of November, January, March and May.

THE NEW YEAR,—The College of Law opened its thirty-third session with the opening of the University on September 18, 1922. The first two days were devoted to the registration of students, and lectures began promptly on Wednesday, September 20, 1922. Thirty-two new students were enrolled; eighteen students were enrolled in the second year class and nine in the third year class. The total enrollment, therefore, is fifty-nine. This total is considerably reduced by the un-

usually small Senior Class, which, however, was the first class to enter after the late war when the rule requiring one year of preliminary college work was put in force. From the size of the present entering class, which is the largest in the history of the College, it is apparent that the increased requirements for entrance are an incentive rather than a deterrence.

Old students and members of the Faculty were saddened by the absence of that face which for so many years welcomed young men on their return to their studies here. Dean Turner's place on this Faculty can never be filled and his memory will ever be cherished in the College, as well as in the hearts of hundreds of students who during his thirty years of active service sat at his feet and learned the love of learning.

Mr. Robert M. Jones, a member of the Knoxville Bar. is now lecturing in some of the courses formerly carried by Dean Turner. The remainder of the Faculty continues unchanged.

THE EDITORIAL BOARD,—The editing of the Review will be done by a student editorial board, at present composed of four third year students and two second year students. Members of the Law Faculty will serve in an advisory capacity. The student editors are selected on the basis of scholarship and general ability. Most of the case notes will be written by the editors.

A NEW PRIZE,—Announcement is made of the offer by Mr. C. Raleigh Harrison of a gold medal to be awarded annually to that member of the graduating class in the College of Law who stands highest in scholarship. Mr. Harrison was graduated from this College with the Class of 1901 and is a prominent and successful practitioner at the Knoxville Bar. This prize will prove a valuable incentive to scholarship and will constitute a fitting reward for excellence in class room work, as the Hu L. McClung medal has been for proficiency in practice before the Moot Court. The College of Law expresses its gratitude to Mr. Harrison for this generous gift and for his continued interest in the progress of the College.

TENNESSEE STATE BAR ASSOCIATION

ORGANIZED, 1881

OFFICERS, 1922-1923

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Memphis

By action taken by the Association at its Annual meeting in Knoxville in June, 1921, the Tennessee Law Review was adopted as the official organ of the Association. This department is edited by the Secretary of the Association. All communications and items for publication should be forwarded to the Secretary, whose address is Bank of Commerce, 4 Trust Bldg., Memphis, Tennessee.

The Forty-First Annual Meeting of the Bar Association of Tennessee held in Memphis on May 30th and 31st, 1922, was the most important from the standpoint of attendance, interest, and accomplishments that the organization has had during its existence. The program was elaborate, and the plans made for the future were most extensive.

On the program were Hon. William L. Frierson of Chattanooga, former Solicitor General of the United States, who delivered a splendid address on "The Impeachment and Trial of Andrew Johnson;" Judge Clarence N. Goodwin, of Chicago, Chairman of the National Conference of Bar Associations, who spoke on "The Government of the Bar;" Hon. J. A. Susong of Greenville, Tennessee, who delivered an interesting address on "The Passing of a Picturesque Form of Litigation;" and Hon. W. R. Landrum of Trenton, Tennessee, who read a paper on "Legal Reforms." The annual address of the President, Elias Gates of Memphis, was greatly enjoyed and was very beneficial to the Association and the Bar generally. All of these addresses will appear in the published proceedings, which will be issued to members in December.

The Association went on record as favoring the plan of Incorporation of the Bar as outlined by Judge Goodwin, and adopted the report of a special committee appointed on Legal Education and Admission to the Bar. This report was read by Hon. Frank M. Bass of Nashville, and, while not conforming entirely to the action of the Washington Conference on Legal Education, recommended to the Tennessee Legislature the passage of acts serving to improving the requirements for admission to the Bar in this State.

A very comprehensive report on Judicial Procedure and Reform, dealing primarily with "The Unlawful Practice of Law," was read by Hon. Norman Farrell of Nashville, and, following the submission of this report, the President was directed to appoint a special legislative committee to further the recommendations made in the report. The report of Hon. W. L. Granberry, Chairman of the Committee on Judicial Administration and Remedical Procedure, was particularly interesting in that it brought up for consideration the present conjested condition of the dockets of the Appellate Courts in Tennessee. There was considerable discussion of this subject,

with the result that the Committee was directed to continue its work in this direction.

The Association went on record as favoring a vigorous campaign for the purpose of removing from the profession in the State all those guilty of unethical conduct, and an arrangement was made whereby funds will be available for the prosecution of all proceedings having as their aim the elimination of undesirable members of the Bar. A strong committee on Grievances was named, with Judge H. D. Minor of Memphis as Chairman.

The social features of the meeting included the annual dinner, an automobile ride, two luncheons, and a visit to the country home of Colonel J. W. Canada, one of the leading members of the Association.

Thomas H. Malone, of Nashville, was elected President of the Association; Frank M. Bass, of Nashville, D. Sullins Stewart, of Cleveland, and John F. Hall, of Lexington, were elected Vice-Presidents; Walter Chandler, of Memphis, was chosen Secretary, and W. L. Owen, of Covington, was made Treasurer, the offices of Secretary and Treasurer being divided by vote of the Association.

Among the plans for the coming year are the issuance of bulletins to the members for the purpose of keeping them in touch with the work of the Association, the preparation of a directory of all Tennessee lawyers showing those belonging to the Association, and the active furtherance of the recommendations of the various committees at the Memphis meeting. The Association has a membership of approximately five hundred, and there are more than two thousand lawyers in the State. A larger membership in the Association is desired; and, if a greater number of lawyers will support the work of the Association, the institution can be made of much value and benefit to the profession and the laaity of the State.