IN THE

Supreme Court of Tennessee

At Knoxville

September Term, 1925

JOHN THOMAS SCOPES
Plaintiff in Error

vs.

STATE OF TENNESSEE
Defendant in Error

NO. 2 RHEA COUNTY (CRIMINAL) DOCKET

PRELIMINARY MOTION TO STRIKE OUT THE SO-CALLED BILL OF EXCEPTIONS

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BAIRD-WARD—NASHVILLE

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NO. 2 RHEA COUNTY (CRIMINAL) DOCKET

May it Please your Honors:

In this case the State of Tennessee, defendant in error, presents the following:

PRELIMINARY MOTION TO STRIKE OUT THE SO-CALLED BILL OF EXCEPTIONS

Now comes the State of Tennessee, defendant in error, and preliminarily moves the Court to strike from the transcript of the record, and from the files of this Court, the so-called "Bill of Exceptions" and to tax plaintiff in error with

the cost of the inclusion of same in the transcript —*because* said purported "Bill of Exceptions" was not signed and filed at the trial term, nor within the time fixed and allowed by the order of the trial court regularly entered upon the minutes of the Court at the trial term; and for grounds of said motion to strike, the defendant in error now more particularly states and shows as hereinafter set out.

What the Record Discloses

(1) Plaintiff in error Scopes was indicted, tried and convicted, at a special term of the Circuit Court of Rhea County, called and held at Dayton, Tenn., and beginning on July 10, 1925, for violating Chapter 27 of the Public Acts of Tennessee of 1925, commonly referred to as the Anti-Evolution Act. (Trans., Vol. 1, pp. 1, 2; 41.)

(2) After indictment said Scopes, as defendant in the Court below, on July 13, 1925, made and filed a motion to quash said indictment upon the alleged grounds that the Act which was the basis of the indictment, as well as the indictment itself, violated numerous provisions of the Constitution of this State and the Constitution of the United States, as set out and assigned in said motion to quash (Trans., Vol. 1, pp. 3-7); and later, by a demurrer to the indictment, filed

on said July 13, 1925, said Scopes, against the validity of said Act and his indictment thereunder, made and presented in the same language the identical constitutional objections which had been urged in the motion to quash (Trans., Vol. 1, pp. 8-12); and the trial judge overruled both said motion to quash and said demurrer and for the same reasons—all of which were set out in the written opinion of the trial judge entered at large upon the minutes in the Court below, as the transcript of the technical record shows. (Trans., Vol. 1, pp. 13 to 30, 31.)

(3) Thereafter, on July 21, 1925, as shown by the minutes of the Court below which are set out in the transcript of the technical record, said Scopes, upon the plea of not guilty, was regularly tried and found guilty of the offense charged in said indictment, by the verdict of a jury, and the Court below entered judgment on the verdict (Trans., Vol. 1, p. 41); and thereafter on the same day said Scopes made a motion for a new trial upon numerous grounds assigned in said motion, which appears spread at large upon the minutes of the Court, and this motion for a new trial, after being heard and considered by the Court, was overruled; and to this action of the Court the defendant excepted and prayed an appeal to the next term of the Supreme Court at Knoxville, Tenn., which prayer for appeal the

Court granted upon defendant entering into a bond with good and solvent security to be conditioned as recited in said order of the Court; and the minutes of the Court for said day of July 21, 1925, the *last day* of said special term, after showing the verdict of guilty, the judgment of the Court below thereon, the motion for a new trial made upon numerous recited grounds, the action of the Court in overruling said motion, the prayer for and the granting of said appeal, then concludes with the following final words:

> "Upon motion the Court is pleased to grant defendant thirty (30) days from July 21, 1925, in which to prepare, perfect and file his bill of exceptions.
>
> "Thereupon Court adjourned until Court in course."
>
> "J. T. RAULSTON, *Judge.*"
> (Trans., Vol. 1, p. 44.)

(4) On the same day, as the record shows, the said Scopes regularly made and executed his appeal bond as required by the order of the Court last above noticed. (Trans., Vol. 1, p. 45.)

(5) All the above appears from the technical record consisting of the minutes of the trial Court, rightfully and lawfully a part of the transcript of the record in this Court without having to be incorporated in any bill of exceptions; and the words of the *final order* of the

Court below, entered at the conclusion of the minutes of the final day of the term and immediately before the adjournment until Court in course, and which expressly granted said Scopes only *thirty days* from *July 21, 1925*, in which to prepare, perfect and file his bill of exceptions —constitute the *only action* and *order* of the trial Court entered upon the minutes of the term undertaking affirmatively to grant to said Scopes *any time* beyond the adjournment of the term within which he could prepare, perfect and file his bill of exceptions; and all the above appears in the first volume of the record in this Court, which contains the transcript of the technical record in the Court below; and said entire first volume of the record in this Court is only 46 pages in length.

(6) The so-called and purported "Bill of Exceptions" appearing in the other three large volumes of the record in this Court—(constituting together 833 pages, and undertaking to set out and contain certain testimony alleged to have been introduced and offered, and other alleged proceedings in the trial Court, which are no part of the record in this Court unless presented by a proper and lawful bill of exceptions)—was not signed by the trial judge until *September 14, 1925*, nor filed in the Court below until *Sep-*

tember 16, 1925, as plainly appears on the final page of said alleged bill of exceptions.

(Trans., Vol. IV, p. 832.)

(7) Upon next to the last page of the so-called "Bill of Exceptions," as copied in the transcript of the record in this Court, there appear the following words:

> "Upon motion the Court is pleased to grant defendant sixty (60) days from July 21, 1925, in which to prepare, perfect, and file his bill of exceptions."
>
> (Trans., Vol. IV, p. 831.)

It appears that the language last above quoted as originally *typewritten* in the transcript stated "thirty (30) days" from July 21, 1925, in which to perfect and file the bill of exceptions; and that a pen stroke in ink has been run through the typewritten word "thirty" and the word "sixty" has been written with pen and ink above; and that an ink stroke has been run through the figures "30" and the figures "60" have been written in ink above.

Regardless of *who* thus struck out the "thirty" days and wrote the "sixty" above the "thirty," and regardless of the *time* when this alteration was made, and regardless of the *purpose* for which this alteration was made—the same is *utterly immaterial*—because *any*

time granted beyond the adjournment of the term for the preparation and filing of the bill of exceptions, must be by order regularly entered on the minutes during the term of Court —as your Honors have repeatedly expressly ruled in the past. And, as has been already stated and shown, the *only order* entered upon the minutes during the term of the Court below, *allowed* only *thirty days* from July 21, 1925, in which to perfect and file the bill of exceptions (Trans., Vol. IV, p. 44)—and this thirty days elapsed with the expiration of August 20, 1925, while the so-called bill of exceptions was not signed by the trial judge until September 14, 1925, following, and was not filed in the lower Court until September 16, 1925, following. (Trans., Vol. IV, p. 832.)

Whether the alteration of the "thirty" days to "sixty" days appearing on page 831 of Vol. IV of the transcript was made before or after the signing of the alleged bill of exceptions by the trial judge, *it is perfectly manifest* from a statement written and signed by the trial judge, directly under his signature to the bill of exceptions, that the trial judge signed the bill of exceptions with the complete understanding that his signature thereto came too late and would not operate to accredit any bill of exceptions for lawful filing in the Court below.

This signed statement of the trial judge, appearing directly under his signature to the purported "Bill of Exceptions," is as follows:

> "The above Bill of Exceptions came to me on this September the 14th, (same day signed and forwarded to E. B. Ewing, clerk at Dayton) *hence there is no delay chargeable to me.*"
>
> "(Signed) *J. T. Raulston, Judge.*"

(See perfected certificate signed by E. B. Ewing, Clerk, under the seal of the Court below, appearing on separate sheet of paper attached after the back cover of Vol. I of the Transcript; and also see Trans., Vol. IV, p. 832.)

From the above it appears *perfectly plain* that the trial judge realized that this purported "Bill of Exceptions" was presented to him for signature long after the expiration of the thirty days, which was all that had been allowed by the order of the Court lawfully entered upon the minutes during the term; and that the trial judge realized that his signature to the bill of exceptions could not operate to accredit same for use in filing; and that the *delay* was not *chargeable* to him.

If the trial judge had not thoroughly understood all the above then the writing and signing by him of the above statement would have been without sense or reason. If *60* days from July

21, 1925, had ever been lawfully granted and allowed, then there had been no "delay" when the bill of exceptions came to the trial judge for signature on September 14, 1925, which would have been *within sixty days* from July 21, 1925, so that no "delay" would have been "chargeable" to the trial judge or anyone else—if *sixty days* had ever been lawfully allowed at all.

And of course it was plainly impressed upon the memory of the trial judge that he had allowed only thirty days from July 21, 1925 for the perfecting and filing of the bill of exceptions, as the order regularly and lawfully entered on the minutes states—*because* an examination of the so-called "Bill of Exceptions" will show that *four separate times* the trial judge plainly informed counsel for defendant in the Court below that only thirty days from July 21, 1925 (the last day of the special term) would be allowed the defendant Scopes to prepare, perfect and file his bill of exceptions; and the trial judge stated why he would not allow any more than this thirty days, and why such time would be sufficient in view of the fact that counsel for defendant had been furnished a daily transcript of the proceedings as same had transpired.

(Trans., Vol. IV, pp. 818, 820.)

(8) There were numerous counsel for said Scopes in the Court below, some residing beyond

our State and some within its borders; and it cannot be made the basis of even a pretended claim of hardship if your Honors promptly sustain this motion to strike out the purported bill of exceptions, and thus administer against this defendant and his numerous counsel the settled law and rule of practice long established by the decisions of this Court.

Particularly is this true when it appears, as already stated, that the trial judge *four times* told the legal counsel of said Scopes that only thirty days from July 21, 1925, would be allowed within which to perfect and file their bill of exceptions; and then it is of course true that ignorance of the law will excuse no man,—be he layman or lawyer, resident or non-resident. So it is manifest that no legitimate pretense of even an *ad hominum* complaint against administering the well settled law of this State can be fairly made or urged by anyone if the so-called bill of exceptions be stricken out. Neither a trial nor an appellate Court can be onerated with any duty to act as the legal guardian of any litigant or counsel.

That a would-be appellant and his counsel are onerated with the duty to see that the desired bill of exceptions is perfected and signed by the trial judge and filed within the fixed and definite time lawfully allowed by a minute entry made

during the trial term of the trial Court,—is a rule that is so fundamental and universally understood by everyone that the enforcement of such rule can involve no hardship; and particularly is this true in the instant case, wherein no misunderstanding upon the part of intelligent counsel could have occurred. But even if hardship were involved in the enforcement of the rule requiring the striking out of this alleged "Bill of Exceptions," because signed and filed too late, —your Honors have expressly ruled, as we shall later show, that this Court is *without any power* to look to or consider this so-called "Bill of Exceptions" for any purpose whatever.

(9) Independently of all the above, this alleged "Bill of Exceptions" presents and contains *another* very fundamental defect which would operate to destroy its force and function, even if it had been signed and filed within the time allowed in the Court below,—so that the sustaining by your Honors of this motion to strike out said alleged bill of exceptions because not filed within the time allowed, will deprive said Scopes of no substantial benefit or right which he otherwise might have in this Court. This *additional* fundamental defect in this so-called "Bill of Exceptions" is that it is nowhere stated in specific words therein that it contains *all of the evidence*, nor is it therein made affirmatively to appear in

any way, that it contains all *of the evidence* that was before the court and jury in the court below. This being true, it follows, from a long settled rule of practice in this State, that your Honors must conclusively presume that the verdict of guilty in the Court below was sustained by proper and sufficient evidence, and that said Scopes can not be heard in this Court to make any insistence to the contrary,—as the decisions of this Court to be later cited in the accompanying brief will plainly show and establish.

(10) With the so-called and purported "Bill of Exceptions" stricken out because not signed and filed within the time allowed by the order of the trial judge entered upon the minutes during the term,—there will remain for consideration in this Court the technical record consisting of the indictment, the motion to quash and the demurrer, the action of the Court thereon, the verdict of guilty and the judgment of the Court thereon, the overruling of the motion for a new trial, and the prayer for and the granting of the appeal and the appeal bond; and thus there will remain, for review, on the technical record in this Court, all the alleged constitutional questions and objections, if otherwise properly made and preserved, which said Scopes sought to present by the motion to quash and the demurrer to the indictment in the Court below. These con-

stitute all of the questions *really existing and belonging* in the case, since the alleged bill of exceptions utterly fails to show affirmatively that it contains all of the evidence introduced before the court and jury,—thus preventing said Scopes, even if the "Bill of Exceptions" were properly a part of the record, from being able to be heard with any insistence in this Court that the verdict of guilty was not fully sustained by evidence in the Court below.

(11) The unlawful and void so-called "Bill of Exceptions" against which this motion to strike is leveled is contained in three large volumes of the transcript containing, as already stated, 833 pages. The State of Tennessee believes it to be the proper practice to present and ask your Honors to pass upon this motion to strike, *preliminarily*, and before the appellant is required to file any Assignment of Errors and Brief in this Court.

Unless this motion to strike be presented and passed upon by your Honors as a *preliminary* matter, the practice questions made and presented by said motion would otherwise have to be briefed and presented at the hearing upon the legal merits of this appeal; and thus numerous, but very unsubstantial, questions alleged by said Scopes to arise on and be presented by the so-called "Bill of Exceptions" would have to be

laboriously and unnecessarily presented and briefed by appellant and replied to by the State of Tennessee,—when all this labor and effort can be avoided if this motion to strike out said unlawful and void "Bill of Exceptions" is held by your Honors to be well taken and sustained at the threshhold and as a *preliminary step* in the proper and orderly disposition of this appeal.

For these reasons, the State of Tennessee respectfully submits as the proper and well settled practice, that your Honors should dispose of this *preliminary motion* to strike out said so-called "Bill of Exceptions", before the appellant Scopes is required to file any assignments of error and brief or the State is required to prepare any brief in response or reply thereto.

Conclusion

For all the reasons hereinbefore stated and shown the State of Tennessee moves and urges your Honors, preliminarily, to order the unlawful and void so-called "Bill of Exceptions" to be stricken from the record in this case and the files of this Court; that Plaintiff in Error Scopes be taxed with the costs of the inclusion of same in the transcript; that prompt notice of the making and filing of this motion to strike be given to op-

posite counsel under Rule 26 of this Court; and that an early date be fixed by which the appellant, under Rule 27 of this Court, shall be required to file by brief such response, if any, as he may desire or be advised that it is proper for him to attempt to make to this motion.

Following this motion is a brief of points and authorities filed in support thereof.

Respectfully submitted,

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BRIEF

May it please your Honors:

In support of the foregoing motion of the State of Tennessee to strike from the record in this case and the files of this Court the alleged and purported "Bill of Exceptions," we will now submit a short brief dealing with the controlling applicatory principles of law and the authorities in support thereof.

I.

This Court has followed the practice of striking out, upon Preliminary Motion, matters appearing in the transcript of the record which are not properly and legally parts of the record in this Court.

Striking out, upon Preliminary Motion, parts and portions of the transcript of the record in this Court which cannot be regarded as properly and legally constituting any part of the record in this Court,—is a practice which, of course, is logical and saves time and effort, and tends to bring the case in this Court down to the real questions involved and proper to be briefed and presented at the later hearing of the appeal upon its merits.

Such practice of striking out, upon proper preliminary motion, matters which are not properly and legally any part of the transcript of the record, has been followed and applied in this Court.

Hickerson v. *State*, 141 Tenn., (14 Thompson), 502;
Justus v. *State*, 130 Tenn., (3 Thompson), 540.

In the *Hickerson* case, *supra*, a "preliminary motion" made by the State to strike the Bill of Exceptions from the transcript was sustained by this Court. In the course of the opinion in said case this Court, speaking through Mr. Justice Green, said:

> "A *preliminary motion* is made by the State to strike the bill of exceptions from the transcript. This motion must be granted as to that portion of the bill of exceptions containing the evidence heard upon the trial of the case. The bill of exceptions was not signed and filed at the trial term, nor within sixty days thereafter. And consequently so much of the bill of exceptions as contained proceedings at the trial term must go out." (141 Tenn., 503.)

And the opinion in the above case concluded with the direction that Plaintiff in Error be taxed with the costs of incorporating in the record all that portion of the Bill of Exceptions relating to the proceedings at the trial term be-

low, and which had not been signed and filed within the time allowed by law therefor.

In the *Justus* case, *supra*, a previous order continuing the hearing of the appeal until the next regular term of this Court, was set aside upon motions made by the State and the Plaintiff in Error, in order that certain *preliminary* motions offered by the parties, respectively, might be considered and disposed of at the then present term of this Court. In the course of the opinion in said case this Court sustained a preliminary motion made on behalf of the State to strike from the files of the Court a certain supplemental transcript which had been filed in this Court, and which could not represent any lawful and valid part of the record in this Court; and in this connection this Court said:

> "1. The motion made on behalf of the State to strike from the files of this court the supplemental transcript filed herein by the plaintiff in error on October 13, 1914, must be sustained. The supplemental transcript purports to contain a record of certain proceedings in this cause had at the October term 1914, of the Circuit Court of Sevier County. At that time this cause was pending on appeal in this court, and the Circuit Court had no jurisdiction to make any order therein. *Woodson* v. *State*, 2 Shan. Case, 84; *Staggs* v. *State*, 3 Humph., 372."
>
> (130 Tenn., 542.)

The above will be sufficient, we submit, to es-

tablish the propriety of the practice now being followed by the State in the instant case of presenting for preliminary action by your Honors the motion to strike from the record and files of this Court the unlawful and void purported "Bill of Exceptions" herein.

II.

The purported Bill of Exceptions should be ordered stricken from the transcript of the record in this case, because same was not filed until after the trial term of the Court below had finally expired and adjourned, and until after the time allowed by the order of the Court, entered upon the minutes of the trial term, had expired.

The facts and the state of the record, upon which the present motion of the State to strike this purported Bill of Exceptions is grounded, have already been fully stated and shown, with proper references to the pages of the transcript, in our foregoing motion to strike.

In our foregoing motion to strike out this purported Bill of Exceptions we have shown that in the *final order* entered upon the minutes at the trial term, and immediately before the words of said order directing an adjournment of the term until court in course, the Plaintiff in Error, Scopes, was affirmatively granted only *thirty*

days from July 21, 1925, in which to prepare, perfect and file his Bill of Exceptions (Trans., Vol. I, p. 44). The purported Bill of Exceptions affirmatively shows that it was not signed by the trial judge until September 14, following, and was not marked "filed" by the Clerk of the Circuit Court of Rhea County until September 16, following (Trans., Vol. IV, p. 832). The above being true, it follows from the statutes of this State and the well settled rule of practice announced in the previous decisions of this Court, that said purported Bill of Exceptions cannot be looked to by this Court for any purpose, is no proper and valid part of the record in this case, and should consequently be stricken out, and the Plaintiff in Error taxed with the costs of incorporating said alleged Bill of Exceptions in the transcript of the record.

In addition to the authorities cited under the first head of this brief, the following decisions of this Court will be found clearly to establish the proposition last above stated:

Dunn v. *State*, 127 Tenn., (19 Cates), 267, and authorities therein cited;

Justus v. *State*, 130 Tenn. (3 Thompson) 540;

National Refining Co. v. *Littlefield*, 142 Tenn., (15 Thompson), 689, and authorities therein cited;

Rhinehart v. *State*, 122 Tenn., (14 Cates), 698.

The *Rhinehart* case (122 Tenn., 698) was a conviction for murder in the first degree. In the course of the opinion in said case, this Court, speaking through Mr. Justice Beard, pointed out the rule prevailing in this State before the passage of any statute changing said rule, in these words:

> "It was the long settled law of this State that a bill of exceptions filed after the close of the term at which the case was tried came too late and could not be considered a part of the record. *McGavock* v. *Puryear*, 6 Cold., 34; *Clark* v. *Lary*, 3 Sneed, 77; *Jones* v. *Burch*, 3 Lea, 747; *Sims* v. *State*, 4 Lea, 359; *Patterson* v. *Patterson*, 89 Tenn., 151, 14 S. W., 485; *Ballard* v. *Railroad*, 94 Tenn., 205, 28 S. W., 1008; *Bettis* v. *State* 103 Tenn., 52 S. W., 1071."
>
> (122 Tenn., 700.)

In said case this Court then pointed out how the above quoted rule had been modified by Chapter 275 of the Session Acts of 1899, by the first section of which it was provided that in all cases of appeal from trial courts to the Supreme Court "the judge or chancellor may in his discretion allow the parties time in which to prepare a bill of exceptions, not to exceed thirty days after the adjournment" (122 Tenn., 701, 702).

In the above case it appearing from the record that the portion of the transcript "purporting to be a Bill of Exception" was not filed in the Court

below until after the close of the trial term and until after the expiration of the time allowed by the order of the Court for the filing of the Bill of Exceptions,—this Court held that the portion of the transcript styled "a Bill of Exceptions" could not properly be treated, or looked to, as any part of the record at all, and squarely held that there was "no bill of exceptions in the record" (122 Tenn., 703).

In the case of *Dunn* v. *State*, (127 Tenn., 267), cited *supra*, this Court speaking through Mr. Justice Neil, squarely held that a paper appearing in the transcript of the record and relied upon as a Bill of Exceptions, could not be looked to by this Court for any purpose, because said alleged Bill of Exceptions was not filed until after the adjournment of the term of the trial court below, which had failed to enter on the minutes during the trial term an affirmative order granting time, under the statute, for the filing of a Bill of Exceptions after the adjournment of the trial term. In the course of the opinion in said case Chief Justice Neil, speaking for this Court, reviewed many previous decisions of this Court, and clearly laid down the correct practice, as follows:

> "The bill of exceptions must be made up and signed at the trial term (*McGavock* v. *Puryear*, 6 Cold., 34, and cases cited; *Sims* v. *State*, 4 Lea, 357, 359; *State* v. *Brock-*

well, 16 Lea, 683, 685; and see cases cited in note 14 to Shan. Code, sec. 4693), or within such time during the term as may be prescribed by the Court by special order in the particular case or by general order regulating the subject (*Hinton* v. *Insurance Co.*, 110 Tenn., 113, 72 S.W., 118; *Patterson* v. *Patterson*, 89 Tenn., 151, 154, 14 S. W., 485), or within such time after the adjournment of the term, not exceeding thirty days, as the judge may grant under authority of the statute on that subject (*Bettis* v. *State*, 103 Tenn., 339, 52 S.W., 1071; *Rhinehart* v. *State*, 122 Tenn., 698, 127 S.W., 445). Likewise the judge, by adjourning from day to day as usual, or to a day certain before final adjournment, may extend the term, when a case is on trial and uncompleted when the regular time for adjournment of the court by law arrives, and in such a case may, as incident thereto, act on a motion for new trial, and sign a bill of exceptions before he closes the term (*Street Railroad & Telegraph Companies* v. *Simmons*, 107 Tenn., 392, 64 S. W., 705; *Ray* v. *State*, 108 Tenn., 283, 67 S. W., 553; Acts of 1899, ch. 40; Shan. Code, secs. 6056, 6057; Acts of 1835-36, ch. 5 sec. 4); but he cannot sign such bill of exceptions after he has formally adjourned the term of the court (*Rhinehart* v. *State*, 122 Tenn., 698, 127 S. W., 445), unless *within the term, by order on the minutes, time be granted, not exceeding thirty days from the date of adjournment, for the making and filing of a bill of exceptions.*"

(127 Tenn., 276, 277.)

The above case was decided before the pas-

sage of Chapter 49 of the Public Acts of 1917, and while Chapter 275 of the Acts of 1899 was in force. By said Chapter 275 of the Acts of 1899 the Circuit and Chancery Courts were empowered to allow time in which to prepare and file the bill of exceptions after the adjournment of the trial term, but not to exceed "thirty days" from and after such adjournment. By said Chapter 49 of the Acts of 1917, said Act of 1899 was amended so as to empower the trial judge to allow "sixty days" after the adjournment of the trial term in which to prepare and file a bill of exceptions.

And later in the opinion of this Court in said *Dunn* case last above quoted, the practice as to when bills of exceptions may be lawfully filed, was again laid down and re-stated with great care and precision by this Court, as follows:

> "The periods, then, during which a bill of exceptions may be lawfully filed, are these: (1) During the whole of the ordinary term of the Court at which the cause is tried, if there be no order of that Court fixing a shorter period within the term; (2) during such special period fixed by the Court within the ordinary term if there be any such period fixed; (3) during any period not exceeding thirty days after the adjornment, *which the judge may grant on his minutes prior to adjournment;* (4) during any extension of the term, while such extension is still running and not adjourned

> to Court in course; (5) or within thirty days after the final adjournment supervening the extension, *if such time be granted by the judge by order on his minutes before final adjournment.*
>
> In the absence of a bill of exceptions the Court must conclusively presume that the evidence justified the verdict of the jury. *Bundren* v. *State*, 109 Tenn., 225, 70 S. W., 368." (127 Tenn., 276, 277.)

In the case of *Justus* v. *State* (130 Tenn., 540), this Court, speaking through Mr. Justice Faw, squarely held that this Court could not look to the part of the transcript purporting to be a bill of exceptions because same had not been marked "filed" within the time fixed by the final order which had been entered on the minutes of the trial term in the Court below. Upon this sharp point this Court reaffirmed the rule announced in the *Dunn* case, and used the following language:

> "The original transcript of the *technical record* filed in this Court shows on its face that the *final order* in question was made on June 5, 1914, and that *twenty days'* time was granted to plaintiff in error to file a bill of exceptions. We cannot look to that part of the transcript which purports to be a bill of exceptions, because it is marked "filed" by the clerk of the Circuit Court on July 6, 1914, and *the record*, as it now stands, shows *affirmatively* that there was *no authority* to file a bill of ex-

> ceptions *at that time*, and it is *therefore* not a part of the record. *Dunn* v. *State*, 127 Tenn., 267, 154 S. W., 969."
>
> (130 Tenn., 545.)

In the case at bar the alteration in the purported "Bill of Exceptions" whereby the "thirty days" was made to read "sixty days" (Trans., Vol. IV, p. 831) was either made at the time the trial judge signed said purported "Bill of Exceptions" or was made thereafter. In other words, the interlineation of the word "sixty" instead of the word "thirty" cannot speak of any time *prior* to the signing of said alleged "Bill of Exceptions" by the trial judge on September 14, 1925. At this time the term of Court at which said Scopes had been tried and convicted had long since expired by adjournment on July 21, 1925, until Court in course; and when the trial judge on September 14, 1925, signed this alleged "Bill of Exceptions," which contains this interlined "sixty" days, this case was then pending on appeal in this Court, with no jurisdiction in the Court below to make or alter the final order of July 21, 1925, which had allowed only thirty days for the filing of the bill of exceptions.

The term of the trial Court expired on July 21, 1925 (Trans., Vol. I, p. 44), and said Scopes on that day had signed his appeal bond (Trans., Vol. IV, p. 45), and, of course, thereafter, and

on September 14, 1925, when the trial judge signed the alleged "Bill of Exceptions," there was no power in the Court below to make any order in this case, then standing on appeal to this Court, which could alter or extend the thirty-day period allowed for the filing of the bill of exceptions in the final order entered on the minutes of the trial Court during the term and immediately before the final adjournment of said term.

Dealing with an altogether similar situation, this Court in the case of *Justus* v. *State* (130 Tenn., 540), already hereinbefore quoted, said:

> "The motion made on behalf of the State to strike from the files of this Court the supplemental transcript filed herein by the plaintiff in error on October 13, 1914, must be sustained. The supplemental transcript purports to contain a record of certain proceedings in this cause had at the October term, 1914, of the Circuit Court of Sevier County. At that time this cause was pending on appeal in this Court, and the Circuit Court had no *jurisdiction* to make *any order* therein. *Woodson* v. *State*, 2 Shan. Case, 84; *Staggs* v. *State*, 3 Humph., 372."
> (130 Tenn., 542.)

From the above quotations from the opinions of this Court in the *Dunn* case and the *Justus* case, and from a quotation we will later make from the opinion of this Court in *National Re-*

fining Co. v. *Littlefield* (142 Tenn., 693)—it is entirely well settled that for a bill of exceptions to be validly signed and filed, after the expiration of the trial term, it would have to be so signed and filed not only within the period of time allowed by the statute, but *also* within the period of time affirmatively fixed by the order of the trial judge *entered on the minutes* during the trial term. In the instant case the alleged "Bill of Exceptions" *admittedly* was not filed within the thirty days allowed by the trial judge by the order entered upon the minutes of the Court during the last day of the term, and by the clause of the order immediately preceding the words of the order adjourning the Court until Court in course (Trans., Vol. I, p. 44).

And in the instant case, regardless of *who* may have stricken out the words "thirty days" and interlined in ink the words "sixty days" on next to the last page of the purported "Bill of Exceptions" (Trans., Vol. IV, p. 831), and regardless of the *purpose* for which this was done, and regardless of whether this interlineation of "sixty days" was there written before or after the signing of the purported "Bill of Exceptions" by the trial judge on September 14, 1925, this alteration or interlineation could not have any effect in extending the thirty-day period allowed by the trial judge by the order entered on

the minutes during the trial term for the filing of the bill of exceptions,—because there was *no order* entered upon the minutes *during* the trial term allowing any such "sixty days," or any other time beyond thirty days from July 21, 1925, which thirty-day period so allowed *expired* with the conclusion of August 20, 1925, some twenty-five days *prior* to the signing of the bill of exceptions by the trial judge and twenty-seven days *prior* to the filing of said alleged "Bill of Exceptions" in the Court below on September 16, 1925.

Of course, the time allowed by an order entered on the minutes during the trial term for the filing of a bill of exceptions after the adjournment of the trial term, and within the period of time permitted by the statute, cannot be extended by any attempted order or statement contained in the bill of exceptions *itself*, which is signed and filed after the expiration of the trial term and after the expiration of the period of time allowed for the signing and filing of the bill of exceptions by the order entered on the minutes during the term.

And as showing that it is the well settled rule of this Court that a bill of exceptions which is void and invalid because not signed and filed within the time allowed by the order entered

upon the minutes during the trial term, cannot be looked to by this Court for any purpose whatsoever, we now further quote from the language of the opinion of this Court, speaking through Chief Justice Neil, in the *Dunn* case, *supra*, as follows:

> "Counsel asked on the hearing, if the Court should be of the opinion that the bill of exceptions was fatally defective, then that we should nevertheless *examine* such paper for the purpose of ascertaining the guilt or innocence of the prisoner. The counsel referred to some cases in which the Court, after holding the bill of exceptions *bad*, nevertheless referred to it, and stated that the members of the Court felt the more satisfied with the result because after such examination they were convinced of the guilt of the prisoner or the justice of the result reached by them. There are such cases, but *we think the practice a bad one.* If the Court, on reading such defective paper, should believe that the evidence did not justify the verdict, still it could not *act* on that paper, because *not properly before it.* Again, if on looking to it the Court should believe that the jury reached a correct result, and should so state, this would perhaps prejudice the prisoner's application for executive clemency. We believe the *better practice* is to act on the sound principle that, if a paper is *not part of the record*, it cannot be looked to *for any purpose.* If the prisoner has been deprived of his bill of exceptions through mistake of law on the part of his attorneys as to the time for preparing and filing such bill, there is *left* to

> him *only an application to the governor*, who may or may not read such paper as he may deem proper; that officer not being bound by the *rules above established* and *necessary* for the conduct of the business of the Court. It is within his power to wholly pardon or to so reduce the sentence to meet what he may deem the justice of the cause requires." (127 Tenn., 277, 278.)

And in the case of *National Refining Co.* v. *Littlefield* (142 Tenn., 689), cited *supra*, this Court, speaking through Mr. Justice McKinney, again reaffirmed the rule announced in *Dunn* v. *State*, *supra*, and held that the bill of exceptions must be filed during the trial term, or within such additional time, not exceeding sixty days, as the trial Court may grant under the authority of Chapter 49 of the Public Acts of 1917, by *an order entered upon the minutes during the trial term;* and in that case it was also held that Chapter 40 of the Acts of 1899, in regard to extending and continuing the term of court over into the next succeeding term when there would not otherwise be time to conclude the trial of a pending case,—did not and could not operate to change the previous rule laid down by this Court in *Dunn* v. *State*, 127 Tenn., 267, hereinbefore cited and quoted at such length; and by this rule a trial judge cannot sign a bill of exceptions after he has formally adjourned the trial term of the Court—

> "unless *within the term, by order on the minutes*, time be granted, not exceeding thirty days from the date of adjournment, for the making and filing of a bill of exceptions." (142 Tenn., 693.)

Of course, it is now true that sixty days may be granted, under Chapter 49 of the Acts of 1917, for the preparation and filing of the bill of exceptions after adjournment of the trial term, —but the bill of exceptions must always be prepared and filed, of course, within the extended time beyond the term, and which has been affirmatively *fixed* and *allowed* by an *order entered upon the minutes during the trial term.*

Without any further extending our notice of the decisions of this Court, we submit that what we have already stated will be ample to show that, under the well settled rule of practice prevailing in this State, the so-called "Bill of Exceptions" in the case at bar is *invalid* and *void*, and must be stricken out in response to our foregoing motion, because it clearly and admittedly appears that same was filed after the expiration of the trial term and long after the thirty-day period allowed by the order entered upon the minutes during the trial term.

III.

Even if the so-called "Bill of Exceptions" appearing in the transcript in the instant case had been filed within the time fixed and allowed by the order entered upon the minutes, so as to be a valid Bill of Exceptions, this Court would still be compelled conclusively to presume that the verdict of guilty announced by the jury in the Court below was sustained by proper and sufficient evidence.

The above proposition is true in this case, because the said "Bill of Exceptions" nowhere contains any specific statement that the evidence therein presented was all of the evidence, nor does it otherwise affirmatively appear that all the evidence presented to the Court and jury is contained and presented in the so-called "Bill of Exceptions." In the absence of such specific statement or affirmative showing it is well settled, of course, by the decisions of this Court, that your Honors must conclusively *presume* that the verdict of guilty in the Court below was warranted and sustained by the evidence.

Ransom v. *State*, 116 Tenn., (8 Cates), 355;

Lowry v. *Southern R. Co.*, 117 Tenn., (9 Cates), 507, 523;

Thomas v. *State*, 109 Tenn., (1 Cates), 684, 688;
Dodd & Son v. *Nashville, etc., R. Co.*, 120 Tenn., (12 Cates), 440;
Brower v. *Watson*, 146 Tenn., (19 Thompson), 626, 633, 634.

The above well settled rule to the effect that this Court must presume that there was sufficient evidence to sustain the verdict and judgment in the lower court, when the Bill of Exceptions fails affirmatively to show that it contains all of the evidence, brings about exactly the same result as the well settled rule to the effect that, where there is no Bill of Exceptions at all, the Court will presume that there was sufficient evidence to sustain the verdict and judgment rendered thereon in the court below.

State ex rel v. *Col. Tenn. Ind. School*, 144 Tenn., (17 Thompson), 182;
Jackson v. *Bell*, 143 Tenn., (16 Thompson), 452;
Waterhouse v. *Sterchi Bros. Furn. Co.*, 139 Tenn., (12 Thompson), 117.

So the appellant Scopes will not suffer any very material inconvenience if your Honors sustain our motion to strike out the so-called Bill of Exceptions, for the reason that it was not filed within the time allowed by the order entered upon the minutes during the trial term,—*because*, even if said Bill of Exceptions had been properly filed within the time allowed, it con-

tains the additional defect of failing affirmatively to show that it presents and incorporates all of the evidence introduced at the trial.

But, as we have hereinbefore shown, this Court, regardless of hardships and even in the case of a conviction of a felony as great as murder in the first degree, has administered the well settled rule that a purported Bill of Exceptions must be ignored and not looked to for any purpose in this Court, unless it affirmatively appears that it was signed and filed within the time allowed by the order entered upon the minutes at the trial term; and this Court has said that the rigid enforcement of such rule is "necessary for the conduct of the business of the Court" (127 Tenn., 278).

IV.

After the motion of the State to strike out the invalid alleged Bill of Exceptions in this case has been sustained, there will be left in the transcript the technical record, and all questions arising thereon, if otherwise properly made, can be reviewed on this appeal.

The indictment, the motion to quash, and the demurrer to the indictment, the minute entries, including the order overruling the motion to quash, and overruling the demurrer to the indictment, and the order containing the entry of the judgment upon the verdict of guilty and

granting the appeal, all remain in the transcript, because, constituting the technical record, all these things come up regardless of the invalidity of the Bill of Exceptions; and any and all questions which the appellant Scopes desires to present against the constitutionality of Chapter 27 of the Public Acts of 1925, commonly called the Anti-Evolution Act, may be heard and disposed of upon this appeal in this Court, if such questions are otherwise properly made and preserved on the face of the technical record in the court below. This proposition is elementary.

Duane v. *Richardson*, 106 Tenn., (22 Pickle), 80;
Memphis Str. Co. v. *Johnson*, 114 Tenn., (6 Cates), 632;
Allen v. *State*, M. & Y., 294.

So that, even with this purported invalid and void "Bill of Exceptions" stricken out in response to the State's motion, as we respectfully insist must be done, the appellant Scopes may still be heard to present upon this appeal in this Court all substantial questions properly raised and presented on the face of the technical record, and going to the alleged violations of the Constitution of this State and of the United States by the statute and the indictment in question.

For all the reasons hereinbefore shown in our motion to strike out the alleged "Bill of Excep-

tions," and in this brief filed in support of said motion, we earnestly insist that said motion to strike should be sustained by this Court, and that plaintiff in error Scopes be taxed with the costs of incorporating the void "Bill of Exceptions" in the record in this Court.

Respectfully submitted,

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