Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 17

6-1964

Criminal Law and Procedure -- 1963 Tennessee Survey

Robert E. Kendrick

Criminal Law and Procedure —1963 Tennessee Survey

*Robert E. Kendrick**

I. Substantive Criminal Law

A. *Offenses Against the Person*

1. *Homicide.*—A number of years ago the Tennessee Supreme Court adopted the common law principle that one is justified in taking life in defense of his habitation when actually or apparently necessary to repel an attempt by another to enter forcibly or violently under

* Assistant General Counsel, United States Department of Commerce, Washington, D. C.; member, Tennessee Bar. The views expressed herein are those of the author and do not necessarily represent those of the Department of Commerce.

circumstances creating a reasonable apprehension that the assailant's design is imminently to commit a felony therein or to assault or offer personal violence or inflict personal injury on an inmate so that there are reasonable grounds for concluding that life is endangered or great bodily harm is threatened thereby.[1]

Obviously there is a close relationship in the law of homicide between this special defense, "defense of the habitation," and that of self-defense. Thus, deadly force is privileged when necessary, or when it reasonably seems necessary, to repel an unlawful entry into one's habitation attempted for the purpose of killing or inflicting great bodily injury upon the dweller; and the use of such force under those circumstances may be said to be either in self-defense or in defense of the habitation, or both. It is not surprising, therefore, that in the recent decision of *Morrison v. State*,[2] where such circumstances were found to have existed at the time of a homicide, the Tennessee Court talked in terms of both defenses.[3]

Courts and writers in the criminal law field have often divided on the self-defense question of whether one who reasonably believes that he must use deadly force to save himself from death or great bodily harm if he does not retreat is privileged to stand and use such force when an avenue of retreat is open to him; the two positions being referred to as the "no-retreat rule" and the "retreat rule." However, even those jurisdictions which have adopted the minority "retreat rule" agree with the "no-retreat" jurisdictions that when the innocent object of a murderous assault is in his habitation or "castle" at the time, he may resort to deadly force rather than elect an obviously available safe retreat.[4] The court in the *Morrison* case, having found that the defendant was in his habitation when he shot and killed a person assailing the habitation and that such deadly force in defense seemed reasonably necessary, could have rejected the state's contention that the defendant had a duty to retreat rather than stand and defend himself against the assailant by simply invoking the universal rule of no-retreat in defense of the habitation. While citing that rule in overruling the state's argument, however, the court also adopted this statement as "the law": "Thus, if the person assailed is without fault, and in a place where he has a right to be, and put in reasonably apparent danger of losing his life or receiving great bodily harm, he need not retreat, but may stand his ground, repel force by force, and

1. Hudgens v. State, 166 Tenn. 231, 60 S.W.2d 153 (1933). Earlier, less complete formulations of this justification of homicide are found in Winton v. State, 151 Tenn. 177, 268 S.W. 633 (1925), and State v. Foutch, 96 Tenn. 242, 34 S.W. 1 (1896).

2. 371 S.W.2d 441 (Tenn. 1963).

3. *Id.* at 443-45.

4. A good summary on the two positions is set out in PERKINS, CRIMINAL LAW 888-903 (1957).

if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justified."[5] It appears, therefore, that the court classifies Tennessee with the majority "no-retreat rule" jurisdictions as to self-defense generally and does not limit application of the no-retreat rule to defense of the habitation.[6]

It should also be noted that in the *Morrison* case the defendant at the time of the homicide was in a shack at his camp where he trained bird dogs, but it is not clear from the court's opinion whether this was defendant's usual dwelling place.[7] This should be immaterial, however, in view of the tendency of the courts to extend the rule of defense of the habitation to include the defense of one's place of business or his place of refuge.[8]

Flippen v. State,[9] a homicide case, presents interesting problems as to parties and omission to act. The supreme court there affirmed convictions of involuntary manslaughter for the conduct of two individuals in connection with an automobile collision causing the death of a third person. The court noted evidence that at the time of the collision one defendant was the driver, and the other a passenger, of an automobile owned by the first defendant. In passing to the left of another automobile traveling in the same direction in which the deceased (a little boy) was a passenger and his mother the driver, the defendant-driver drove his automobile at an excessive rate of speed and struck the second automobile on left rear corner and knocked it into a lake by the highway. The defendant-passenger looked back after the collision and did not then see the second automobile. The defendant-passenger accompanied the defendant-driver to a garage where the latter left his automobile, which had been considerably damaged from the collision. The deceased drowned in the lake when his mother and a passing motorist were unable to save him. When subsequently located by police, the defendant-passenger said that he had, at the time of contact with the other car, been aware only of brushing up against it or tapping it but had thought nothing of it, and the defendant-driver had said that he had only tapped it and had not thought there was any damage done. While the court also noted

5. 371 S.W.2d at 444, quoting 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 235 (Anderson ed. 1957).

6. As to defense of the habitation, the supreme court had long ago said, "He is not required to retreat or escape from his own premises but may stand his ground, and is not required to give back before he can plead self-defense." State v. Foutch, *supra* note 1, at 247.

7. For example, on the same page of the report, the court speaks of defendant's "home" both as being "located a short distance across the state line in Florence, Alabama," and also as being the shack at the camp in Lawrence County, Tennessee, where the homicide occurred. 371 S.W.2d at 442.

8. 1 WARREN, HOMICIDE § 162 (Supp. 1961).

9. 211 Tenn. 507, 365 S.W.2d 895 (1963).

the defendant-passenger's testimony that on the day of the collision and prior to the collision he, with his brother, had consumed a half pint of liquor, and that he and the defendant-driver had had "a beer," it was not shown that either defendant had been intoxicated at the time of the collision.

The court concluded that the record evidence "clearly" established that "this homicide was not the result of mere misadventure, but directly resulted from a criminal want of care and caution"[10] and that "this conviction for involuntary manslaughter is inescapable."[11] If criminal negligence was established sufficiently to support such a conviction as to the defendant-driver, the basis for sustaining the conviction of the defendant-passenger was not so "clearly" established, the court acknowledging that the record as to the latter's conviction presented it with a "serious question."[12]

Apparently the court found nothing in the record upon which to conclude that the defendant-passenger's conduct was criminal prior to or at the moment of the collision. In that respect, this case is unlike two cases cited by the court. It is thus not like *Eager v. State*,[13] which upheld a conviction of an automobile passenger of involuntary manslaughter upon evidence warranting a finding that the passenger prior to and at the time the deceased was struck by the automobile voluntarily sat by and permitted without protest a person known by him to be intoxicated to operate the vehicle, and in addition, he directed and encouraged the driver in various ways in the commission of the unlawful act of driving while intoxicated. Nor is it in that respect like *Stallard v. State*,[14] in which a passenger's conviction of aiding and abetting in second degree murder was upheld upon record evidence that, prior to and at the time of the collision that resulted in death to an occupant of an approaching automobile, the defendant passenger had promoted and acted as "starter" of a drag race and was sitting beside the driver of one of the two automobiles in the drag race encouraging him to speed at seventy-five miles per hour in the left lane of a two-lane public highway alongside the other automobile

10. 211 Tenn. at 513, 365 S.W.2d at 898. The court affirmed as "a sound expression of the rule of law which controls cases involving criminal negligence with an automobile" the statement that " 'the test appears to be whether or not the driver, violating the highway statute in the particular above considered, does so consciously, or under circumstances which would charge a reasonably prudent person with appreciation of the fact and the anticipation of consequences injurious or fatal to others.' " 211 Tenn. at 509-10, 365 S.W.2d at 896-97, quoting Potter v. State, 174 Tenn. 118, 127, 124 S.W.2d 232, 236 (1939).

11. 211 Tenn. at 514, 365 S.W.2d at 898.

12. *Ibid.*

13. 205 Tenn. 156, 325 S.W.2d 815 (1959); Kendrick, *Criminal Law and Procedure —1960 Tennessee Survey*, 13 VAND. L. REV. 1060 (1960); 27 TENN. L. REV. 417 (1960).

14. 209 Tenn. 13, 348 S.W.2d 489 (1961).

in the race when the two automobiles topped a hill and met the on-coming automobile. In the report of the instant case there is no indication that the defendant-passenger prior to the collision in any way urged the driver-defendant to commit an unlawful or man-endangering act, was aware that he intended to or would commit such act, or consented to the doing of such act. Indeed, the court pointed out that "he had no control over this car as far as this evidence shows and was only a passenger therein."[15]

If the defendant-passenger here was not guilty as an accessory before or at the fact, nor as an aider and abettor or principal in the second degree,[16] of the defendant's unlawful acts up to and including the moment of the collision causing death, on what theory may he be guilty of homicide?

Although not clearly expressed in the report, the court may have reasoned that the defendant-driver could be found to have been criminally negligent both for his positive acts of misconduct (malfeasance or misfeasance)[17] in engaging in excessive speed and reckless driving in the manner in which he passed the other vehicle and also for his negative act[18] (nonfeasance) of leaving the scene of an accident without rendering legally required assistance to occupants of the other vehicle in the collision,[19] and that both the positive and the negative acts were contributing causes of the resulting death. The court evidently reasoned that, although the passenger-defendant was not a participant in the positive acts contributing to the death, his post-collision conduct aided and abetted the driver in commission of the negative act contributing to the death. That is, the considerable damage to the automobile in which they were riding indicated an impact from the collision so severe that both defendants knew or should have known that the occupants of the other vehicle might have been injured and in need of assistance; looking back and not seeing the other automobile put the defendants on notice that it might have been knocked off the highway to the peril of its occupants; and leaving under the circumstances and putting the damaged automobile in a garage warranted a finding that the defendants were bent

15. 211 Tenn. at 514, 365 S.W.2d at 898.

16. "All persons present, aiding and abetting, or ready and consenting to aid and abet, in any such criminal offense, shall be deemed principal offenders, and punished as such." TENN. CODE ANN. § 39-109 (1956).

17. Depending on whether his excessive speed and reckless driving in the way in which he tried to pass the other automobile be viewed as unlawful in themselves (malfeasance) or as gross negligence in the doing of the lawful act of driving (misfeasance). CLARK & MARSHALL, CRIMES 634-35 (6th ed. 1958).

18. On criminal omission to act, see 1 WHARTON, *op. cit. supra* note 5, at §§ 67, 296; Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958).

19. Contrary to TENN. CODE ANN. §§ 59-1001, 59-1003 (1956), *infra* note 29.

on escaping detection and on hiding evidence of their involvement in the collision.

The unintentional killing of another by omission to perform a legal duty owing to him, under circumstances showing gross, inexcusable negligence or failure to exercise reasonable diligence, is manslaughter.[20]

The defendant-driver had a legal duty to stop after a collision of which he was aware and to render assistance. His conduct in omitting to perform such duty in this case could have been found from the evidence to have been at least grossly negligent, if not willful. And, had he stopped, he might have saved the deceased child from drowning,[21] so the omission could be considered as causatory in relation to the death.

The court reasoned that the passenger was an aider and abettor in the driver's grossly negligent or willful failure to fulfill his duty to the occupants of the other vehicle:

> [A]s far as the record shows he did nothing to try to stop Smalling [the driver] and get him to go back and see about the wreck or anything of the kind. He says he looked back over his shoulder after the impact with the other car and did not see it. It then became his duty to warn the driver that something serious must have happened and to go back and assist. He was present and aided in hiding the car in which he was riding as above set forth. A crime had been committed—the violation of § 59-1001, T.C.A. These acts of Flippen [the passenger] clearly were sufficient, if believed by the jury and they evidently were as shown by their verdict, to make an aider and abettor of him. An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime.[22]

If this conduct of the passenger-defendant amounted to aiding and abetting the driver in his criminal omission, then the passenger was also guilty of manslaughter as a principal.[23] However, such conduct does not fit easily into the usual concept of what makes one an aider and abettor: being present and with mens rea either assisting the perpetrator in the commission of the crime, or standing by with intent (known to the perpetrator) to render aid if needed, or commanding, counseling, or otherwise encouraging the perpetrator to commit the crime.[24] The report of the case does not set out facts indicating that the passenger did anything to assist the driver in leaving the scene of the accident or counseled or encouraged him to do so. The fact

20. CLARK & MARSHALL, *op. cit. supra* note 17, at 637.

21. This is not free of doubt factually, however, for the water was so electrically charged from fallen utility wires that the mother and a passing motorist were unable to effect a rescue.

22. 365 S.W.2d at 898-99.

23. TENN. CODE ANN. § 39-109 (1956), *supra* note 16.

24. PERKINS, *op. cit. supra* note 4, at 557-58.

that the passenger failed to tell the driver that he had not seen the other vehicle when he looked back after the collision does not seem to amount to such assistance. The fact that the passenger may have afterwards in time and at some distance in space from the scene of the collision participated in the transaction of putting the driver's damaged vehicle in a garage would have made him only an accessory after the fact[25] and subject to punishment as such,[26] rather than an aider and abettor subject to punishment as a principal offender.[27]

Instead of being in the nature of aiding and abetting the driver's omission to perform a legally imposed duty, the passenger's conduct which the court evidently considered blameworthy seems to consist instead of a failure on his own part to take steps ("duty to warn the driver that something serious must have happened and to go back and assist"[28]). Thus, while the driver's duty to act derives from a statute[29] and his gross negligence in failing to perform it, with fatal effect on another, makes him guilty of manslaughter, the court (although talking in terms of aiding and abetting in the driver's negligence) in effect imposes a court conceived duty on the passenger to act, the negligent failure of which properly to fulfill subjects him to responsibility for manslaughter for a resulting death.

Freeman v. State[30] follows the *Eager*[31] case in holding that actions of the defendant in permitting his automobile to be driven by an intoxicated driver while the defendant knew that it had defective

25. "A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory after the fact." TENN. CODE ANN. § 39-112 (1956).

26. TENN. CODE ANN. § 39-113 (1956). Prior to the modification of this section in the 1932 Code an accessory after the fact was punishable as his principal. Long v. State, 31 Tenn. 287 (1851).

27. TENN. CODE ANN. § 39-109 (1956).

28. 365 S.W.2d at 898.

29. "The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident . . . and in every event shall remain at the scene of the accident until he has fulfilled the requirements of § 59-1003 . . . ." TENN. CODE ANN. § 59-1001(a) (1956). "The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person." TENN. CODE ANN. § 59-1003 (1956).

30. 211 Tenn. 27, 362 S.W.2d 251 (1962).

31. 205 Tenn. 156, 325 S.W.2d 815 (1959).

brakes and sat by the driver making no protest constituted criminal negligence supporting a conviction for involuntary manslaughter.

In *Lester v. State*,[32] a homicide case, it was held that the trial court properly refused to instruct the jury as to insanity on the ground that there was no record evidence indicating insanity, although the defendant had testified that prior to the shooting of deceased he had been rendered unconscious and did not remember anything until after the shooting. Distinguishing insanity and amnesia as being, on the one hand, the incapacity to discriminate between right and wrong, and, on the other, the inability to remember, the court relied on statements in a previous case that "amnesia, in and of itself, is no defense to a criminal charge unless it is shown by competent evidence that the accused 'did not know the nature and quality of his action and that it was wrong'" and that "failure to remember later, when accused, is in itself no proof of the mental condition when crime was performed."[33]

2. *Attempt or Solicitation To Commit Murder.*—The Tennessee statute on attempt to commit a felony provides in pertinent part that "if any person . . . attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years . . . ."[34]

In *Gervin v. State*,[35] the defendant had been convicted of an attempt to commit murder on the basis of an indictment reading in relevant part as follows:

> The Grand Jurors . . . present that Robert George Gervin . . . unlawfully and feloniously did commit and otherwise attempt to commit a felony . . . that is to say, the defendant with intent to feloniously and with malice aforethought commit murder in the first degree, did hire, persuade, try to persuade, and otherwise procure another to attempt to kill and murder another . . . contrary to the statute and against the peace and dignity of the State.

On appeal he assigned as error action of the trial court in overruling his motion to quash the indictment for insufficiency of averments. The supreme court reversed and remanded, holding that the indictment was couched in terms of criminal solicitation and was therefore legally insufficient in averring an attempt to commit a felony under the statute invoked.

The indictment's averment that the defendant "did hire, persuade,

32. 370 S.W.2d 405 (Tenn. 1963).

33. *Id.* at 409, quoting from Thomas v. State, 201 Tenn. 645, 653, 301 S.W.2d 358 (1957). The second quotation is a quotation in turn, from GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 96.01 (3d ed. 1949).

34. TENN. CODE ANN. § 39-603 (1956).

35. 371 S.W.2d 449 (Tenn. 1963).

try to persuade, and otherwise procure another to attempt to kill and murder another" of course alleges only acts of preparation for, and no act of perpetration of, the felony of murder. Inasmuch as a criminal attempt requires as elements both an intent to commit a specific crime and an overt act directed to its commission which goes beyond mere preparation and is apparently suitable to the criminal purpose,[36] the failure of the indictment in the instant case to allege one of the essential ingredients of attempt, an overt act of perpetration,[37] was fatal.

In reaching its decision, the court added that the charges might form the basis of an indictment instead for the misdemeanor of common law solicitation,[38] although it stated that it had found no evidence of solicitation having ever before been punished in Tennessee as an independent crime.[39] In so doing, it correctly set forth the distinction which the weight of American authority recognizes as existing in legal concept between criminal solicitation and criminal attempt, mere solicitation, without more, falling short of attempt.[40] Not only are attempts and solicitations analytically distinct legal concepts, the court pointed out, there are also policy reasons for treating them as independent offenses since solicitations are not so heinous as attempts nor as likely to result in completion of the intended specific

36. 1 WHARTON, *op. cit. supra* note 5, § 71.

37. Dupuy v. State, 204 Tenn. 624, 325 S.W.2d 238 (1959), 28 TENN. L. REV. 414 (1961); Kendrick, *Criminal Law and Procedure–1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1062 (1960); McEwing v. State, 134 Tenn. 649, 185 S.W. 688 (1916).

38. "Common law, criminal solicitation is defined to include any words or devices by which a person is 'requested, urged, advised, counseled, tempted, commanded or otherwise enticed to commit a crime.' Perkins, Criminal Law 505 (1957)." 371 S.W.2d at 450.

"At common law, solicitation to commit a crime, which by statute or common law is a felony, is a substantive crime. 1 Burdick, Law of Crimes, sec. 104 at 116 (1946); Clark and Marshall, Crimes, sec. 4.02 at 194 (6th ed. 1958); 14 Am. Jur. Criminal Law, sec. 117 at 846 (1938); 35 A.L.R. 961; 25 L.R.A. 434 (1894); Model Penal Code, sec. 5.02 comment at 83 (Tent. Draft No. 10, 1960). Furthermore so much of the common law as has not been abrogated or repealed by statute is in full force and effect in Tennessee. Cogburn v. State, 198 Tenn. 431, 281 S.W.2d 38 (1955); Olsen v. Sharpe, 191 Tenn. 503, 235 S.W.2d 11 (1950). Finding no local statute which abrogates the offense of common law solicitation, we must conclude it is an indictable offense in Tennessee. And being an indictable offense, solicitation to commit a felony is treated as a misdemeanor. The King v. Higgins, 2 East. 5, 102 Eng. Rep. 269 (K.B.1801); State v. Avery, 7 Conn. 266 (1828); Begley v. Commonwealth, 22 KLR 1546, 60 W.W. 847 (1901); State v. Cohen, 32 N.J. 1, 158 A.2d 497 (1960); Clark and Marshall, *op. cit. supra*, sec. 4.03 at 196; Perkins, *op. cit. supra* at 506; 22 C.J.S. Criminal Law § 78, at p. 236 (1961)." 371 S.W.2d at 454.

39. 371 S.W.2d at 453.

40. 371 S.W.2d at 450-51, citing 1 WHARTON, *op. cit. supra* note 5, § 81; 1 BURDICK, LAW OF CRIMES § 106 (1946); PERKINS, *op. cit. supra* note 4, at 505, 508; CLARK & MARSHALL, *op. cit. supra* note 17, at 200; MODEL PENAL CODE § 5.02, comment at 86 (Tent. Draft No. 10, 1960); and noting as an exception 1 BISHOP, CRIMINAL LAW §§ 767-68 (9th ed. 1923).

crimes, there not being the same dangerous proximity to successful consummation as is the case with attempts.[41] While acknowledging the fact that "the Tennessee cases in point have not been entirely consistent"[42] and that some of them contain dicta to the effect that solicitation is an attempt, the court expressed the opinion that none of those cases directly held contrary to the position of the instant case (nor indicated that it should take a different position).

Thus, the court, in some respects going beyond what was strictly required for decision, rendered a useful opinion clearing up doubt that may have previously existed in Tennessee criminal law as to the relationship between criminal solicitation and attempt and as to the punishability of solicitation as an independent crime.

B. *Offenses Against Property*

1. *Larceny—Defense of Insanity.*—"Tennessee continues to hold fast to the *M'Naghten*[43] rules in criminal cases where mental disease or defect is pleaded in defense," we said five years ago in commenting on a decision wherein the Tennessee Supreme Court refused to modify its adherence to the right-wrong test even to the extent of supplementing it with the "uncontrollable impulse of the mind" or the "irresistible impulse" test. The further comment was then made that "there should be no doubt now, therefore, that the court as presently constituted will be unpersuaded by legal scholars or psychiatrists to adopt one of the more recent formulations."[44] During the 1963 survey period the court, with only one of the Justices remaining thereon who participated in the decision referred to above, rejected an appeal in *Spurlock v. State*,[45] a larceny case, that it replace the *M'Naghten* right-wrong test with the *Durham*[46] "product" test.[47] In doing so, the court said, "If we should substitute the theory of the special request

41. 371 S.W.2d at 451, citing Curran, *Solicitations: A Substantive Crime*, 17 MINN. L. REV. 499, 503 (1932).

42. 371 S.W.2d at 452, citing Valley v. State, 203 Tenn. 80, 309 S.W.2d 374 (1958); McEwing v. State, 134 Tenn. 649, 652, 185 S.W. 688, 689 (1915); State v. Johnson, 2 Shannon's Cases 539, 541 (1877); Collins v. State, 50 Tenn. 14 (1870).

43. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

44. The case commented on was Ryall v. State, 204 Tenn. 422, 321 S.W.2d 809 (1958). The comments are in Kendrick, *Criminal Law and Procedure—1959 Tennessee Survey*, 12 VAND. L. REV. 1131, 1136-37 (1959), wherein were discussed various proposed insanity tests.

45. 368 S.W.2d 299 (Tenn. 1963).

46. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), 45 A.L.R.2d 1430 (1956).

47. "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." 214 F.2d at 874-75. New Hampshire had long before adopted such a rule. State v. Pike, 49 N.H. 399 (1870).

herein for the law as it now stands in this State, we would be substituting trial by jury for trial by psychiatrists."[48]

It is true that substituting the *Durham* for the *M'Naghten* test would enlarge the role of juries in cases wherein insanity is pleaded as a defense, and would at the same time narrow the role of psychiatrists in such cases. Under the *M'Naghten* procedure these experts of medical science are called on to express judgments in the unscientific realm of right-wrong, whereas under the *Durham* procedure they would testify as to whether an accused had a mental disease or defect at the time of the alleged criminal act, and it would be left to the jury to decide, upon having found that the accused actually had had then a mental disease or defect, whether the act of the accused was the product of such disease or defect. Evidently, the court does not wish to see this kind of enlarged responsibility given to juries in insanity-defense cases.

As to the argument that was made in the *Spurlock* case that the use of the right-wrong test violates the due process clause, the court simply cited the holding of the United States Supreme Court twelve years ago to the contrary, wherein it was said that, "the science of psychiatry has made tremendous strides since that test was laid down in *M'Naghten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law."[49] Whether the science of psychiatry has progressed to such a further extent since this 1952 pronouncement by the Supreme Court as to make the adoption of something other than the *M'Naghten* right-wrong test now "implicit in the concept of ordered liberty"[50] remains to be seen at such time when the question may again come before that high Court.

2. *Robbery.*—The question in *Lamere v. State*,[51] a robbery case, was whether a file and papers which had been placed by clients into the hands of their attorney, who had been engaged to represent them in transferring an estate from one state to another (his fee to be a certain percentage of the estate), could be the subject of larceny by the clients who allegedly at pistol point and without consent of the attorney took the file and papers from his office. Although it observed that "this case presents a novel and new situation in Tennessee and some interesting questions of law,"[52] the court had no apparent difficulty in reaching the decision that a file and papers under such

48. 368 S.W.2d at 301.
49. Leland v. Oregon, 343 U.S. 790, 800-01 (1952).
50. 343 U.S. at 801, quoting from Palko v. Connecticut, 302 U.S. 319, 325 (1937).
51. 370 S.W.2d 466 (Tenn. 1963).
52. *Id.* at 467.

circumstances were subjects of larceny within the terms of the statute making it a felony to steal or take by robbery promissory notes, books of accounts as to goods or money or other things, contracts in force, receipts, written instruments whereby any demand or right or obligation is created or ascertained or extinguished or diminished, and "any other valuable paper writing,"[53] there being no right or possible color of right, the court held, to possession by the clients of the whole file without consent of the attorney prior to the payment of a reasonable charge for his services.

C. *Other Offenses*

1. *Purchasing by Pawnbrokers.*—In *Epstein v. State*,[54] the prohibition in the Pawnbrokers Act that "no pawnbroker, loan broker, or keeper of a loan shall, in the conduct of said business, under any pretense whatever, purchase or buy any personal property whatsoever"[55] was construed as permitting the kinds of persons specified, on the one hand, to buy personal property necessary for maintaining a place of business (mops, light bulbs, etc.) and, as merchants, to purchase merchandise for sale from dealers and traders, but as forbidding them, on the other hand, in their capacities as pawnbrokers, loan brokers, and keepers of loan offices, to purchase the personal property of individuals coming in and attempting to make a pawn. As so construed, the statute was upheld as constitutional.

II. CRIMINAL PROCEDURE

A. *Limitations of Prosecution*

1. *Extradition—Waiver of Jurisdiction.*—It is said to be the general rule that, when an asylum state surrenders by extradition to a demanding state for trial on a criminal charge in the demanding state one who has been convicted of crime but paroled by the asylum state, the asylum state does not thereby permanently waive its right to recommit that person to serve out the remainder of his term on account of his violating the terms or conditions of his parole.[56] Consistent with this principle, *State ex rel. Woods v. Bomar*[57] affirmed a denial of habeas corpus as to a petitioner who, in sequence, had been released on parole from the Tennessee state penitentiary, had violated his parole by going to Ohio (for which a warrant was issued in Ten-

53. TENN. CODE ANN. § 39-4207 (1956). The court cited the holding in Millner v. State, 83 Tenn. 179 (1885) that a railroad ticket was the subject of larceny under the predecessor of this statute. 370 S.W.2d at 467.

54. 211 Tenn. 633, 366 S.W.2d 914 (1963).

55. TENN. CODE ANN. § 45-2216 (1956).

56. 4 WHARTON, *op. cit. supra* note 5, § 1684; Annot., 147 A.L.R. 941, 943-45 (1943). See also Gilchrist v. Overlade, 122 N.E.2d 93 (Ind. 1954).

57. 211 Tenn. 522, 366 S.W.2d 750 (1963).

nessee charging parole violation), had been convicted and imprisoned for a crime in Ohio, had escaped from the Ohio prison to Tennessee, had been apprehended in Tennessee, had been extradited to Ohio where he completed his Ohio prison sentence, had on discharge from the Ohio prison come into custody of Tennessee authorities without extradition, and had been found guilty of the charge of parole violation and thereupon ordered to complete service of his original sentence in the Tennessee penitentiary. The fact that the petitioner was extradited to the demanding state for the purpose of completing a prison term (rather than to stand trial on a criminal charge as specified in the statement of the rule above) did not, properly, prevent the Tennessee court from applying the principle so as to hold that the waiver of jurisdiction by Tennessee to Ohio at the time of the extradition process did not operate to bar permanently Tennessee from proceeding against the petitioner on the parole violation charge.

Significantly, the court in the *Woods* case noted that, since the petitioner came into the hands of Tennessee authorities other than by extradition, it was not faced with the issue of whether the state had had the right to demand his return from Ohio after it had previously honored Ohio's request to return him to that state. However, the court stated as dictum that "where the Governor honoring a requisition from a demanding state against one who at the time also has criminal charges pending against him in this state, such action could violate his constitutional rights."[58] The American jurisdictions which have been presented with this latter problem have divided in their resolution of it,[59] with perhaps a minority taking the position indicated by the dictum of the Tennessee court quoted above.[60]

2. *Jurisdiction.*—The concept of jurisdiction has a strong connection with concepts of sovereignty.[61] The United States Supreme Court has said, "in our federal system the administration of criminal justice is predominantly committed to the care of the States . . . . Broadly speaking, crimes in the United States are what the laws of the

58. 211 Tenn. 556, citing People *ex rel.* Barrett v. Bartley, 383 Ill. 437, 50 N.E.2d 517 (1943).

59. Annot., 147 A.L.R. 941-43 (1943).

60. "Petitioner cites and relies on a line of cases which hold that, where a conviet is in custody under a conviction of a crime, the surrender of him to another sovereign for prosecution or imprisonment operates to preclude further pnnishment for the original conviction [citing People *ex rel.* Barrett v. Bartley, *supra* note 58]. This, however, is the minority view. An examination of those cases shows no sound basis at law or under the Constitution to conclude that a release of a convict by one sovereign for prosecution for another crime or to serve a sentence for which crime the prisoner has already been convicted by another sovereign should constitute a waiver by the releasing sovereign of its rights to exact the full penalty." Heston v. Green, 174 Ohio St. 291, 292, 189 N.E.2d 86, 87 (1963).

61. CLARK & MARSHALL, *op. cit. supra* note 17, at 118.

individual States make them, subject to the limitations of [specified provisions of the Federal Constitution]."[62] In this regard, each state has sovereign authority to forbid forms of behavior and to prescribe the legal consequences following upon such behavior, within its territorial boundaries; its own constitution vests the legislature with authority to enact penal laws and provide punishments, and vests the courts with jurisdiction, or the authority, capacity, and right to act in administering such criminal laws.[63] For a court in a given case to have criminal jurisdiction, that is, the authority for the trial and punishment of a criminal offense,[64] it reasonably follows that, among other requirements, the statutes creating the offense and providing the method of punishment for the offense must have resulted from a proper exercise of the state's sovereignty through a duly constituted legislative body. In this sense, then, it was a jurisdictional matter for petitioners for habeas corpus in two cases decided during the survey period to challenge the validity of the Tennessee legislatures which enacted the statutes under which they were prosecuted and pursuant to which their punishment was set.

In one of these cases, *State ex rel. Smith v. Bomar*,[65] the petitioner contended before the Tennessee Supreme Court that the 1919 General Assembly, which by legislative act reestablished the death penalty in Tennessee for murder in the first degree, was invalid because improperly apportioned; therefore, the act, under which he had been sentenced to death for murder, was likewise invalid. The court rejected this contention on the ground that since 1829 murder in the first degree has been punishable under Tennessee penal laws, except for the period between 1915 (when the death penalty for murder was abolished by act of the General Assembly) and 1919 when the 1915 abolition act was repealed. The court reasoned that if the 1919 General Assembly which reestablished the death penalty for murder was invalid for malapportionment, then the 1915 General Assembly which purported to abolish the death penalty was invalid on the same ground, leaving in effect the death penalty pursuant to previous enactments. The court added that no American court had ever held the acts of a legislature to be invalid simply because of the legislature's failure properly to reapportion itself, and it noted that the United States Supreme Court had recently dismissed for want of a substantial federal question[66] an appeal from a decision of the highest court of another state[67] rejecting such a contention.

62. Rochin v. California, 342 U.S. 165, 168 (1952).
63. CLARK & MARSHALL, *op. cit. supra* note 17, at 119-20.
64. BLACK, LAW DICTIONARY 448 (4th ed. 1957).
65. 368 S.W.2d 748 (Tenn. 1963), *cert. denied*, 376 U.S. 915 (1964).
66. La Rose v. Tahash, 371 U.S. 114 (1962).
67. State *ex rel.* La Rose v. Tahash, 262 Minn. 552, 115 N.W.2d 687 (1962).

In the other of these two cases, the petitioner, who had previously made an unsuccessful attempt in Tennessee state courts to obtain a writ of habeas corpus,[68] petitioned the United States District Court for the Middle District of Tennessee for habeas corpus relief from a state court conviction and sentence of death for the crime of rape. From an adverse decision in the district court, the petitioner appealed to the Court of Appeals for the Sixth Circuit, contending that the failure of the Tennessee legislature since 1901 to reapportion itself as required by the state constitution[69] violates the United States Constitution and that the state's capital punishment laws, codified, amended, and re-enacted since 1901 by an unconstitutionally apportioned legislature, are void. In *Dawson v. Bomar*,[70] the court of appeals affirmed. The court assumed for the purpose of decision that at all times since 1901 the Tennessee legislature had been unconstitutionally malapportioned, but held on the basis of the de facto doctrine[71] and the doctrine of the avoidance of chaos and confusion[72] that the statutes challenged herein would not be declared invalid simply because of their enactment by such a legislature.

The court in the *Dawson* case devoted considerable attention to summarizing, and striking down, the "first impression" argument of petitioner that an exception to the doctrine of the avoidance of chaos and confusion should be made with regard to capital punishment laws:

> The petitioner . . . concedes that statutes passed by an unconstitutionally apportioned legislature are generally constitutional by reason of this doctrine of balancing of equities and avoidance of chaos and confusion, but contends that capital punishment laws should be considered separate and apart from all other laws because of their drastic and unique nature in that they take away human life, because of the special legal considerations and safeguards provided by the courts with respect to capital punishment laws, and because of the irrevokable and irremedial consequences of their enforcement. It is most capably and vigorously urged upon the Court by counsel for petitioner that this isolation or separation of capital punishment laws and the

68. State *ex rel.* Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763, *cert. denied*, 370 U.S. 962 (1962); Kirby, *Constitutional Law—1962 Tennessee Survey*, 16 VAND. L. REV. 649, 667 (1963).

69. TENN. CONST. art. 2, §§ 4, 5, 6.

70. 322 F.2d 445 (6th Cir. 1963), *cert. denied*, 376 U.S. 933 (1964).

71. The court defined the de facto doctrine as that "which recognizes that the legislative offices created by the state constitution were *de jure* and the incumbents, even though elected under an invalid districting act, were at least *de facto* members of the legislature and their acts as valid as the acts of the *de jure* officers." 322 F.2d at 448.

72. The doctrine of avoidance of chaos and confusion was defined as that "which recognizes the common sense principle that courts, upon balancing the equities between the individual complainant and the public at large, will not declare acts of a malapportioned legislature invalid where to do so would create a state of chaos and confusion." *Ibid.*

> striking down of such laws would create no chaos and confusion and is justified upon balancing the equities between society and the petitioner, whose life is at stake.
>
> * * *
>
> For the Court to select any particular category of laws and separate them from other laws for the purpose of applying either the *de facto* doctrine or the doctrine of avoidance of chaos and confusion would in fact circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws. The personal views of members of the court with regard to capital punishment should not be grounds for withdrawing such laws from the operation of established principles of law. The purpose of both the *de facto* doctrine and the doctrine of avoidance of chaos and confusion would be defeated if the judiciary could be called upon to adjudicate respective equities between the public and the complaining party as to any speeific act. Both doctrines must have overall application validating the otherwise valid acts of a malapportioned legislature, with a judicial severance of specific acts and a weighing of equities as to those specific acts precluded, if a government of laws and not of men is to remain the polar star of judicial action.[73]

The decisions in the *Smith* and *Dawson* cases, followed by a denial of certiorari by the United States Supreme Court in both cases, indicate that there is little reason for hope of success for future attempts at upsetting convictions in Tennessee through this sort of jurisdictional challenge.

3. *Venue.*—The Tennessee Constitution guarantees to the accused in a criminal prosecution "a speedy public trial, by an impartial jury in the County in which the crime shall have been committed."[74] In two cases decided by the Tennessee Supreme Court during the survey period, the contention was made that the accused had been denied his right to a trial in the county where the alleged crime was committed.

In *State v. Hoffman,*[75] the defendant, convicted and sentenced in Lake County courts of a violation of the fish and game laws,[76] appealed in error, asserting that the offense, if any, had been committed in Obion County in that certain acts of the General Assembly purporting to establish the boundary line between Lake and Obion Counties so as to place in Lake County the location in question were unconstitutional. The supreme court, however, held that the defendant lacked standing to challenge the constitutionality of the legislative acts, and to that end quoted an 1872 precedent that a defendant's right to a trial in the county wherein the crime was committed is "not such a vested right as authorizes him to require the court to determine whether the boundaries of the county are constitutionally established

73. *Id.* at 447-48.
74. TENN. CONST. art. 1, § 9.
75. 362 S.W.2d 231 (Tenn. 1962).
76. TENN. CODE ANN. § 51-431 (1956).

or not."[77] The court concluded that the boundary line between the two counties, having been established by acts of the legislature which are on their face constitutional, and acquiesced in by the counties for more than sixty-five years, could not be questioned by an individual in a collateral proceeding such as the instant one. Therefore, the defendant was held to have had a trial in the county as organized and established by law wherein the crime allegedly was committed and his contention to the contrary was overruled.

In the other of these two cases, *Lester v. State*,[78] the alleged error was said to lie in the fact that the motion for a new trial was heard in Rhea County rather than in Bledsoe County where the crime was committed and the case tried. Although the court could find no Tennessee precedent directly in point, it referred to a decision[79] holding that the Tennessee Constitution does not require an accused to be present on a hearing of a motion for a new trial because the hearing of such a motion is not a part of the trial, and held that the same principle applied to the question before it—that is, that the trial ends when the verdict has been rendered. Therefore, the fact that the accused in this case had had his trial in the county where the crime was committed was unaffected by the post-verdict motion in another county.

4. *Former Jeopardy.*—It appeared in *Wilkerson v. State*,[80] that the defendant first had robbed a liquor store manager and had locked him in a back room of the store and, second, under threat of violence had taken a billfold from a customer who, subsequent to the robbery of the manager, had entered the store and was present under the assumption that the defendant was a store clerk. The defendant was convicted and sentenced to imprisonment under an indictment charging robbery of the customer. When he was afterwards charged with armed robbery of the store manager, he entered a plea of *autrefois convict* on the grounds that he had formerly been convicted of the same offense and that the prior conviction constituted a bar to further prosecution for that offense. The trial court overruled the plea, the defendant was convicted of the charge, and he appealed, assigning as error, (1) that his contention of double jeopardy in violation of the Federal and State Constitutions should have been sustained because he had previously been convicted of robbery growing out of the same set of circumstances, and (2) that the prosecution of him in separate trials for two offenses of armed robbery growing out of the same circumstances amounted to a denial of due process

77. 362 S.W.2d at 234, quoting from Speck v. State, 66 Tenn. 46, 52 (1872).
78. 370 S.W.2d 405 (Tenn. 1963).
79. Cisco v. State, 160 Tenn. 681, 28 S.W.2d 338 (1930).
80. 211 Tenn. 32, 362 S.W.2d 253 (1962).

guaranteed to him by the fourteenth amendment to the Constitution of the United States.

The supreme court affirmed, concluding that, instead of a single offense, the defendant had in fact committed two separate and distinct crimes, the robbery of the store manager (previously conceived and intended when he entered the store) and the robbery of the customer, done after the consummation of the first robbery, and as an afterthought. After stating its impression that there is "no reported decision in Tennessee exactly on the point raised by this appeal,"[81] the court relied upon statements from legal encyclopedias that the prosecution of an accused for one criminal act does not bar a subsequent prosecution of him for another separate and distinct criminal act even though the acts are closely connected in point of time.[82] The court also pointed out that the defendant's further arguments concerning the applicability of the Federal Constitution had been rejected by the United States Supreme Court in cases substantially similar to the instant one.[83]

B. *Proceedings Preliminary to Trial*

1. *Arrest.*—There was testimony at the trial of *Venable v. State*,[84] that a deputy sheriff, with an attorney general, during a six-weeks' period of surveillance had observed on several occasions a criminal suspect meeting persons known to the deputy sheriff to be in the numbers racket and going to houses known to the deputy sheriff

81. 211 Tenn. at 35. The court, however, evidently overlooked Duke v. State, 197 Tenn. 346, 273 S.W.2d 142 (1954), Scott, *Criminal Law and Procedure—1955 Tennessee Survey*, 8 VAND. L. REV. 992, 1000 (1955). There, the Tennessee Supreme Court affirmed the action of a trial court in overruling a plea of *autrefois convict*, finding that "there were two separate and distinct assaults in this law violation and a conviction for one presents no bar to a conviction for the other." 197 Tenn. at 349, 273 S.W.2d at 143. *Cf.* Broestlen v. State, 186 Tenn. 523, 212 S.W.2d 366 (1948), involving separate assaults on two different individuals on the same occasion, where the court adopted the principle that "'a conviction of an affray by beating one person in public will not however, bar an indictment for assault and battery in striking another at the same time and place.'" 186 Tenn. at 529, 212 S.W.2d at 368.

82. "Where accused robbed two persons at the same time a prosecution for one of such robberies does not prevent a subsequent prosecution for the other." 22 C.J.S., *Criminal Law* § 298 (1940).

"A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had." 15 Am. Jur., *Criminal Law* § 390 (1938).

83. Hoag v. New Jersey, 356 U.S. 464 (1958) (former trial of accused on three separate indictments for robbery of three persons not a bar to subsequent trial for robbing a fourth person on the same occasion—not twice in jeopardy for the same crime nor in violation of the due process clause); Ciucci v. Illinois, 356 U.S. 571 (1958) (three successive trials of accused for murders of his wife and two children not a deprivation of due process, the murders constituting separate crimes although apparently committed at the same time).

84. 362 S.W.2d 222 (Tenn. 1962).

to be places where numbers were being written; that, on the final occasion of these observations, the deputy sheriff, without a warrant, had arrested the suspect after he had come from a "numbers pickup house"; and that the arresting officer had not seen the arrestee commit any offense prior to the arrest. Based on evidence obtained incidental to the arrest, the arrestee was convicted of the statutory felony of professional gambling[85] for engaging in a numbers game. On appeal, the supreme court held the arrest to have been unlawful.

Tennessee Code Annotated section 40-803 provides that an officer may make an arrest without a warrant, among other situations, "(2) when the person has committed a felony, though not in his presence," "(3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it," and "(4) on a charge made, upon reasonable cause, of the commission of a felony by the person arrested."[86] It will be noted that the subsections (3) and (4) include the phrase "reasonable cause," but subsection (2) does not. A literal interpretation of subsection (2) would indicate that an arrest without a warrant is lawful so long as the arrestee has actually committed a felony, there being no express requirement in this subsection of reasonable suspicion or probable cause.[87] As it turned out in the *Venable* case, following the arrest and incidental to it ample evidence was turned up to demonstrate that a felony had in fact been committed by the arrestee, so a literal interpretation of subsection (2) could have been applied by the court to find the arrest in that case to have been lawful, rather than unlawful as it found instead. Although the supreme court in the *Venable* case stated no reason why it did not apply such interpretation to the explicit language of subsection (2),[88] in previous decisions the

85. TENN. CODE ANN. §§ 39-2032, -2033(3) (Supp. 1963).

86. TENN. CODE ANN. § 40-803(2),(3),(4) (1956).

87. Professor Perkins has commented: "This very important provision [subsection (2)] seems to have been overlooked entirely. In cases in which it should receive the chief emphasis it seems not to have been brought to the attention of the court." Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 500, 571 (1949), citing Epps v. State, 185 Tenn. 226, 205 S.W.2d 4 (1947). Professor Perkins' comment was noted by the court in Simmons v. State, 198 Tenn. 587, 598, 281 S.W.2d 487, 491-92 (1955), in which the court seems to interpret subsection (2) as requiring that the arresting officer have some information that the arrestee has committed a felony. See also Earle, *Criminal Law and Procedure—1956 Tennessee Survey*, 9 VAND. L. REV. 980, 983-85 (1956); Note, 24 TENN. L. REV. 258, 259-62 (1956).

88. The court cited only two cases as authority, Epps v. State, 185 Tenn. 226, 205 S.W.2d 4 (1947), 20 TENN. L. REV. 269 (1948), and Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922), 20 A.L.R. 639 (1922), each holding an arrest without a warrant to be unlawful. However, in each of those two cases, the court instead of focusing on subsection (2) dwelt at length instead on the question of whether the arrest was lawful under subsection (1) of TENN. CODE ANN. § 40-803 (1956) providing that an officer may make an arrest without a warrant "for a public offense committed or a breach of the peace threatened in his presence." The two cases hold that for an arrest without a warrant to be lawful under subsection (1) the offense must be committed in the presence of, and be evident, to the arresting officer.

court seemed to read into subsection (2) the requirement of "reasonable cause" as expressed in subsections (3) and (4).[89]

During the survey period, the United States Court of Appeals for the Sixth Circuit decided *United States v. Williams*,[90] involving the Tennessee law of arrest. The appellant, convicted of possession and concealment of whiskey for which taxes had not been paid, contended that certain acts of Knoxville policemen amounted to an arrest when in fact the officers had no authority to arrest him at that time and place, and that consequently a search incident to that arrest was illegal so that evidence obtained thereby should have been suppressed rather than admitted against him. On this point, he further contended that the validity of his arrest was controlled by federal, rather than state, law. However, the court held that in the absence of an applicable federal statute the law of the state where the arrest takes place determines its validity.[91] Looking to Tennessee law, the court then found that the Tennessee Supreme Court had held[92] that two elements are necessary to constitute an arrest: an intention to take a person into custody and the subjection of him to the actual control and will of the one taking him into custody. From evidence that the policemen in this case, assigned to a certain area of the city to investigate all strange cars therein, upon seeing the automobile driven by appellant in the area between 4:30 and 5:00 a.m., had pulled up behind it and turned their spotlight on it and, when it began to move away, had turned their siren on in making ready for pursuit, the court held that no arrest under state law was made at that time and place. The court reached this conclusion on determining that the evidence showed that, before appellant attempted to flee, (1) there was no intention by the officers to take him into custody at the time they pulled in behind him unless additional facts should subsequently develop warranting an arrest, and (2) the officers did not at that point subject appellant to their control.

2. *Search Warrants.*—The Code provides as to the return of search

89. In Thompson v. State, 185 Tenn. 73, 75, 203 S.W.2d 361 (1947), and Dittberner v. State, 155 Tenn. 102, 105, 291 S.W. 839, 840 (1927), after quoting subsections (2), (3), and (4), the court relied upon a statement that "the substance of these provisions is that an officer may lawfully proceed to arrest without a warrant any person when the officer has, with reasonable cause, been led to believe that the person has committed, is committing, or is about to commit a felony." And in Stone v. State, 161 Tenn. 290, 291, 30 S.W.2d 247 (1930), the court said that "sub-sections 2, 3 and 4 . . . provide that an officer may arrest without a warrant when there is reasonable cause to believe that the suspected individual has committed or is in the act of committing a felony."

90. 314 F.2d 795 (6th Cir. 1963).

91. *Id.* at 798, citing United States v. Di Re, 332 U.S. 581, 589 (1948); Miller v. United States, 357 U.S. 301, 305 (1958); United States v. Sykes, 305 F.2d 172 (6th Cir. 1962).

92. Robertson v. State, 184 Tenn. 277, 284, 198 S.W.2d 633, 635 (1947).

warrants that "a search warrant shall be executed and returned to the magistrate by whom it was issued within five (5) days after its date; after which time, unless executed, it is void."[93] It appeared in *Bowman v. State*,[94] that a search warrant issued by a general sessions court judge was executed within five days after issuance by an officer who noted the return date more than five days after issuance and returned the warrant to a city judge. The defendant in the case contended that the search warrant was void, both because returned to a different court than the one which issued it and because the return date was noted more than five days after issuance; therefore, that evidence obtained thereunder was inadmissible. Rejecting these contentions, the supreme court in effect held that the admissibility of evidence obtained under a search warrant is dependent upon whether at the time of search and seizure the warrant had been validly issued and executed and that these determinations are to be made independently of a consideration of the manner in which the warrant was subsequently returned.[95] Concerning the officer's failure to observe the statutory requirement that a search warrant shall "be returned . . . within five (5) days after its date," the court held that "the failure of the officer to make the return within the five-day period was merely a failure on his part to carry out a ministerial duty. His failure to perform this simple act could not and did not in any way affect the validity of the warrant and the execution thereof by the officer."[96] As to the failure to observe the statutory requirement that a search warrant shall "be returned to the magistrate by whom it was issued," the court held that "returning the warrant before an official other than the one who issued it does not within itself affect the validity of the search or the admissibility of evidence obtained pursuant thereto."[97] Although it did not say so, presumably the court treats the latter statutory requirement, also, as merely imposing a ministerial duty upon the officer involved.

The defendant in the *Bowman* case also objected to the admission of the evidence seized during the search under the warrant on the

93. TENN. CODE ANN. § 40-507 (1956).

94. 211 Tenn. 38, 362 S.W.2d 255 (1962).

95. This language from a previous decision was quoted with approval at page 257 of the opinion: "The reasonableness of the search made depended upon the authority possessed by the officer at the time of making the search. Any omission subsequently made by the officer, in the method of returning the search warrant, could not affect the right of the officer to make the search, nor could it affect the competency of the evidence disclosed by the search." Bragg v. State, 155 Tenn. 20, 23, 290 S.W. 1, 2 (1927).

96. 362 S.W.2d at 257-58, citing Bettich v. United States, 84 F.2d 118 (1st Cir. 1936); Evans v. United States, 242 F.2d 534 (6th Cir. 1957), *cert. denied*, 353 U.S. 976 (1957); Wince v. State, 206 Miss. 189, 39 So. 2d 882 (1949); 1 VARON, SEARCHES, SEIZURES AND IMMUNITIES 410 (1961).

97. 362 S.W.2d at 257.

grounds that she had no control or interest in the premises searched. However, the court quickly disposed of this objection by invoking the rule in Tennessee that one who disclaims an interest in the premises or possessions searched or in the articles seized cannot question the legality of the search and seizure nor object to evidence obtained by the search.[98]

3. *Searches and Seizures without Warrants.*—The day after a robbery in Jackson, Tennessee, a person later charged with that crime was arrested and jailed in Corinth, Mississippi as a result of his participation in a disturbance at an inn in the latter city. Upon learning that an automobile of the make and model of the arrestee's had been used in the Tennessee robbery, the Mississippi officers informed the sheriff at Jackson of the presence of such an automobile in Corinth and were in turn asked by the sheriff to search the car. Without placing further charges against the incarcerated arrestee and without getting a search warrant, the Mississippi officers searched both the arrestee's car and a cabin he had occupied at the inn. Evidence thereby obtained was admitted against the arrestee in a subsequent prosecution and conviction in Tennessee for armed robbery. On appeal, the supreme court in *Ellis v. State*,[99] reversed, holding that the search had been illegal; therefore the evidence secured thereby was inadmissible.

Although the court recognized the rule, well-established in Tennessee, that a search may be reasonably made without a warrant if the search is incidental to a lawful arrest,[100] it emphasized the requirement that the search be in connection with the lawful arrest. In this case, assuming the Mississippi arrest of appellant for a minor offense there to have been lawful, the court held that the lawfulness of that arrest did not validate a subsequent search of his car and cabin on suspicion that he had used the car in committing a different and unconnected offense at a previous time and place.[101]

The state on appeal in the *Ellis* case apparently argued that a formal arrest of the appellant for the Tennessee robbery, during the

98. Dobbins v. State, 206 Tenn. 59, 332 S.W.2d 161 (1960); Templeton v. State, 196 Tenn. 90, 264 S.W.2d 565 (1954); Allen v. State, 161 Tenn. 71, 29 S.W.2d 247 (1930).

99. 211 Tenn. 321, 364 S.W.2d 925 (1963).

100. See the discussion, and cases cited, in Kendrick, *Criminal Law and Procedure—1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1077-79 (1960); Kendrick, *Criminal Law and Procedure—1959 Tennessee Survey*, 12 VAND. L. REV. 1131, 1138-40 (1959); Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 612-24 (1949).

101. The court quoted the following language from Elliott v. State, 173 Tenn. 203, 210, 116 S.W.2d 1009, 1012 (1938):

"[I]n declaring the authority of the arresting officer to search and seize, the authority is always limited to (1) offensive weapons and tools of escape and (2) evidence of guilt of the offense for which the *lawful arrest* has been made."

time he was already under lawful arrest on the disturbance charge in Mississippi, would have validated the search and seizure as an incident to the lawful arrest for robbery, and that the failure to observe such formality should not render the search and seizure invalid. However, the court rejected this line of argument, noting that it had been previously made to the court and rejected.[102]

4. *Indictments.*—The general robbery statute, Tennessee Code Annotated section 39-3901, defines robbery as "the felonious and forcible taking from the person of another, goods or money of any value, by violence putting the person in fear," whereas another statute, Tennessee Code Annotated section 39-4207, provides somewhat less severe punishment for one who shall "feloniously steal or take by robbery" public records or valuable papers of various specified kinds. In the *Lamere* case[103] the defendants were convicted of the offense defined in section 39-4207 under an indictment in part charging that they:

> did unlawfully, feloniously and forcibly take from the person of Crawford Bean the following described personal property, to wit: one file and papers, the same being of value, the personal property of Crawford Bean, Attorney, with intent to convert the same to their use and to deprive the true owner thereof, by the use of force, violence and the use of a dangerous and deadly weapon, to wit: pistols, and by putting him, the said Crawford Bean, in fear of bodily injury, against the peace and dignity of the State.

On appeal the defendants contended that their motion to quash should have been sustained because the indictment was couched in terms of the general robbery statute, section 39-3901, rather than in terms of section 39-4207, the one he was convicted of violating. The supreme court, while conceding both that the indictment could have been made more explicit by specifying item-by-item exactly what papers were contained in the file referred to, and also that some prior decisions of the court seem to turn on whether such degrees of particularity were observed, nonetheless overruled this contention. Relying on a somewhat later formulation that "the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' "[104] the court held that in the instant case the indictment was sufficiently certain to give the defendants notice that they were accused of having taken a file and papers of value, the personal property of a named person, by robbery

102. Bromley v. State, 203 Tenn. 194, 310 S.W.2d 432 (1958).

103. 370 S.W.2d 466 (Tenn. 1963).

104. State v. Cornellison, 166 Tenn. 106, 109, 59 S.W.2d 514, 516 (1932).

from his person, and that no further notice was needed to enable them to prepare to defend this charge.

In *State v. Hughes*,[105] the state appealed from the action of a trial court in quashing an indictment charging that the defendant violated Tennessee Code Annotated section 59-858, in that he "did drive a motor vehicle upon a public highway of Davidson County, to wit: McGavock Pike, in wilful or wanton disregard for the safety of persons or property upon said highway, by driving said vehicle to his left across a yellow stripe in said highway against the peace and dignity of the State of Tennessee." The supreme court affirmed the judgment. Although the court held that the indictment was not banned for duplicity merely because it contained the general allegations of the statutory offense in the language of the statute itself and also related the act which the defendant was alleged to have committed in violation of the statute,[106] the indictment was held to be defective because the specific act alleged therein did not charge an offense against the laws of the state. The court took judicial notice that not always does one violate the laws of the state by driving "to his left across a yellow stripe"; for example, it would be no violation of law to drive across a yellow stripe that is to the left of the center line when no yellow stripe appears to the right of the center line. Therefore, the court held the indictment failed to serve the necessary function of giving notice to the defendant of the offense with which he is charged.[107] In so holding, it adopted the statement that "if the facts alleged do not constitute such an offense within the terms and the meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient."[108]

As noted previously, the court held in *Gervin v. State*,[109] that an indictment couched in terms of criminal solicitation, a misdemeanor at common law, is insufficient legally to allege the statutory felony of attempt to commit murder.

The Code provides that

> it shall be the duty of the foreman of the grand jury to indorse on the indictment, or, if it be a presentment, on the subpoena, the names of the witnesses so sworn by him, and sign his name officially, but the omission to endorse the same on the indictment or subpoena shall in no case invalidate

105. 371 S.W.2d 445 (Tenn. 1963).

106. Citing State v. McAdams, 198 Tenn. 55, 277 S.W.2d 433 (1955); Scott, *Criminal Law and Procedure—1955 Tennessee Survey*, 8 VAND. L. REV. 992, 998-99 (1955).

107. Citing Estep v. State, 183 Tenn. 325, 192 S.W.2d 706 (1946); Stanfield v. State, 181 Tenn. 428, 181 S.W.2d 617 (1944).

108. 4 WHARTON, *op. cit. supra* note 5, § 1760, quoted in 371 S.W.2d at 447.

109. 371 S.W.2d 449 (Tenn. 1963).

> the finding of the indictment or presentment, if the witnesses were, in point of fact, sworn by him according to law.[110]

In *Smith v. State*,[111] the indictment failed to list the names of witnesses in a blank space provided therefor after the word "witnesses" and before a statement that they were sworn, but the names of the witnesses and their addresses were listed elsewhere on the indictment, although without a statement that they were sworn. The supreme court rejected the defendant's contention that in such condition the indictment was defective. Reaffirming a previous ruling that this statute is directory and not mandatory,[112] and relying on the precedent that an endorsement on the indictment of the witnesses' names and addresses is sufficient as compliance with the statute,[113] the court pointed out that there was no showing of prejudice to the defendant herein because of the irregularity involved and indicated that the irregularity falls within the Harmless Error Statute.[114] The court also called attention to the fact that there was no proof that the witnesses were not sworn and held that there was therefore a presumption of regularity.[115] Absent an affirmative showing that the grand jury returned the indictment without hearing witnesses, the court concluded, there was no error.

A related provision of the Code requires that "it shall be the duty of the district attorney to indorse on each indictment or presentment, at the term at which the same is found, the names of such witnesses as he intends shall be summoned in the cause, and sign his name thereto."[116] It was assigned as error in *McBee v. State*,[117] that the trial court therein should not have permitted the testimony of two witnesses because their names were not placed on the indictment until the commencement of the second trial in the case. Adopting the rule that a trial court may in its discretion allow the endorsement of the name of a witness on the indictment at any time if good cause for the delay is shown or if the accused is not prejudiced by such action, the court overruled this assignment of error upon finding both conditions were present in this case. There was good cause for the delay (these two witnesses were necessary at the second trial, not at the first, in order to establish the death of a certain witness following

110. TENN. CODE ANN. § 40-1708 (1956).
111. 369 S.W.2d 537 (Tenn. 1963).
112. Mendolia v. State, 192 Tenn. 656, 241 S.W.2d 606 (1951).
113. Stanley v. State, 171 Tenn. 406, 104 S.W.2d 819 (1937). The court also cited State v. Youugblood, 199 Tenn. 519, 287 S.W.2d 89 (1956), as a closely related case.
114. TENN. CODE ANN. § 27-117 (1956).
115. Citing Sells v. State, 156 Tenn. 610, 4 S.W.2d 349 (1928).
116. TENN. CODE ANN. § 40-2407 (1956).
117. 372 S.W.2d 173 (Tenn. 1963).

the first trial as grounds for introducing at the second trial the transcript of the deceased witness' testimony given at the first trial) and the accused was not prejudiced by allowing the delayed endorsement (the reason for the rule is to make known to the accused the names of witnesses who will be called to testify against him so that he will not be surprised or handicapped in the preparation of his case, and no such surprise or handicap was claimed or shown here).

C. *Trial*

1. *Right to Counsel.*—The constitutional[118] and statutory[119] right to counsel in a criminal prosecution was interpreted and enforced by the supreme court in *Johnson v. State.*[120] In that case, at the time set for trial (the forenoon of a certain date), the defendant's counsel asked and was granted leave to withdraw from the case, whereupon the court appointed other counsel and postponed the trial until one p.m. the same day. Before the trial commenced, the newly appointed defense counsel moved for a continuance, stating that he had not had opportunity to prepare for trial and that the defendant's witnesses, one of whom would testify to facts material to the defense of the case, had not been subpoenaed. The motion was denied, the defendant was put to trial upon his plea of not guilty, the trial was concluded, and the defendant was sentenced—all on the same day. Adopting the rule that a reasonable time for the preparation of a defendant's case must be allowed after assignment of counsel by the court, concluding that the counsel in the instant case had not been afforded a reasonable time, and holding the defendant's constitutional right to representation by counsel without unreasonable restriction had thereby been violated, the court reversed the judgment and remanded the case for a new trial. This result clearly was called for by the constitutional and statutory guaranties[121] of an accused in this state and by precedent;[122] the contrary result—sanctioning of the forcing of the accused to trial without opportunity for adequate preparation of the case by counsel—would have in effect deprived

118. "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . ." TENN. CONST. art. 1, § 9.

119. "In all criminal prosecutions, the accused is entitled to a speedy trial, and to be heard in person and by counsel." TENN. CODE ANN. § 40-2001 (1956). "Every person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for his defense, as well to facts as to law." TENN. CODE ANN. § 40-2002 (1956). "If unable to employ counsel, he is entitled to have counsel appointed by the court." TENN. CODE ANN. § 40-2003 (1956).

120. 372 S.W.2d 192 (Tenn. 1963).

121. Notes 118 and 119, *supra.*

122. Poindexter v. State, 183 Tenn. 193, 195, 191 S.W.2d 445, 446 (1946); State v. Poe, 76 Tenn. 647, 654 (1881). The court also relied on Raisor v. Commonwealth, 278 S.W.2d 635 (Ky. 1955); State v. Lane, 258 N.C. 349, 128 S.E.2d 389 (1962).

the accused in large measure of his right to counsel and to a fair trial.[123]

2. *Consolidation for Trial.*—The generally accepted rule is that several indictments charging related offenses by a defendant may be consolidated for trial and that it is immaterial that one of the offenses charged is a felony and another is a misdemeanor.[124] Tennessee has followed this rule for a number of years,[125] and the supreme court renewed its adherence to it in the *Epstein* case.[126] The trial of the defendant there was conducted on two indictments—a felony indictment charging the bringing of stolen property into the state[127] and the receiving of property stolen outside the state,[128] and a misdemeanor indictment charging a violation of the pawnbroker's act[129]—the court having overruled his motion for a separate trial under each indictment. The supreme court affirmed, stating the test that "if the facts out of which the two indictments grew are so closely interlocked and related that it would be necessary to introduce most of them in either case then clearly the two transactions should be tried together" and "if these different charges under these different indictments grow out of the same state of facts and are not repugnant or inconsistent they should be joined for trial even though one indictment charges a misdemeanor and the other a felony."[130] Whether the indictments should be consolidated for trial is discretionary with the trial court, the court stated, upholding the exercise of discretion by the trial court herein on finding that the defendant had not been significantly prejudiced or embarrassed by the decision not to segregate the indictments in separate trials.

3. *Severance for Trial.*—A well-established common law principle related to that discussed immediately above, and one long recognized in Tennessee,[131] is that in cases where different defendants have been jointly indicted the trial court may in its discretion refuse their

123. MORELAND, MODERN CRIMINAL PROCEDURE 269-70 (1959).

124. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 320 (1947); 5 WHARTON, *op. cit. supra* note 5, § 1942.

125. Hardin v. State, 210 Tenn. 716, 355 S.W.2d 105 (1962); Tenpenny v. State, 151 Tenn. 669, 270 S.W.989 (1924).

126. Epstein v. Tennessee, 211 Tenn. 633, 366 S.W.2d 914 (1963).

127. TENN. CODE ANN. § 39-4220 (1956).

128. TENN. CODE ANN. § 39-4219 (1956).

129. TENN. CODE ANN. § 45-2219 (1956).

130. 211 Tenn. at 647, 366 S.W.2d at 920.

131. Anderson v. State, 207 Tenn. 486, 341 S.W.2d 385 (1960); Tomlin v. State, 207 Tenn. 281, 339 S.W.2d 10 (1960); Kirkendoll v. State, 198 Tenn. 497, 281 S.W.2d 243 (1955); Dykes v. State, 194 Tenn. 477, 253 S.W.2d 555 (1952); Stanley v. State, 189 Tenn. 110, 222 S.W.2d 384 (1949); Stallard v. State, 187 Tenn. 418, 215 S.W.2d 807 (1948); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948); Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932).

motion for separate trials unless a joint trial would unduly prejudice their rights; or, to state the principle negatively, it is not necessary that persons indicted jointly be tried jointly, the court having the discretionary right, in the interest of justice, to grant a severance for trial when it appears that a defendant may be prejudiced in his defense by being put to a joint trial.[132] Whether a trial judge has the discretion to order a joint trial of different defendants *separately* indicted for offenses arising from the same transaction is not so well established at common law, although what authority there is indicates that here too the trial judge has the discretion to order a joint trial when it will not result in prejudice to the defendants,[133] and a 1952 Tennessee Supreme Court decision[134] so holds. During the survey period, the supreme court overruled an assignment of error in *Yelton v. State*,[135] that the trial court erred in denying the motion for a severance for trial made by one of two defendants indicted for burglary. Although it is not clear from the court's summary of the facts that the two defendants had been jointly indicted,[136] perhaps this occurred because the supreme court in overruling the assignment quoted and relied on a statement, particularly apposite to a joint indictment situation, that "when several persons are charged jointly with a single crime, we think the state is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants."[137] The court's reliance on this quotation and others of similar import, and its conclusion that "our view of this record is that the trial court did not abuse his discretion in refusing to grant a separate trial to the plaintiff in error,"[138] indicates that the court determined, although it did not expressly so find, that there had been no showing of prejudice to the moving defendant's rights by the refusal to grant severance. Assuming there was no showing of prejudice, there should be no quarrel with the court's decision, whether the defendants had been jointly indicted or not, because a joint trial in either case where the facts are a part of a single transaction is in the best interests of prompt and economical judicial administration.

4. *Appointment of Court Reporter.*—The Code provides for the

132. 5 WHARTON, *op. cit. supra* note 5, § 1944.

133. Warren, *Criminal Law and Procedure*, 6 VAND. L. REV. 1179, 1186 (1953). See also 5 WHARTON, *op. cit. supra* note 5, §§ 1942-43.

134. Dykes v. State, 194 Tenn. 477, 253 S.W.2d 555 (1952).

135. 211 Tenn. 464, 365 S.W.2d 877 (1963).

136. The Court simply reported that "James David Cannon and James A. Yelton were indicted on September 29, 1961 for burglary of a grocery store known as Big Star No. 54 located in Memphis, Tennessee." 211 Tenn. at 466, 365 S.W.2d at 878.

137. Woodruff v. State, 164 Tenn. 530, 539, 51 S.W.2d 843, 845 (1932).

138. 365 S.W.2d at 881.

appointment of a court reporter in capital cases under certain circumstances:

> Whenever any party shall be indicted and arraigned upon any indictment or presentment on which the death penalty may be inflicted and the district attorney-general in charge of the prosecution shall make it known that he intends to insist upon the infliction of capital punishment and such defendant be financially unable to employ counsel and the trial court be required to appoint counsel for such defendant, the trial judge then after making due inquiry and investigation as to the financial condition of the accused may in his discretion appoint a capable court reporter to report such trial, such court reporter to be paid the prevailing rates therefor in such community; provided that the entire amount to be paid to such court reporter for any one case shall not exceed two hundred fifty dollars ($250). The sums directed to be paid to such court reporter shall be taxed as a part of the costs and payable in the same way as other costs of such prosecution.[139]

In *Tucker v. State*,[140] a first degree murder case, the counsel for the defendant, prior to the selection of the jury, moved that a court reporter be paid for by the state inasmuch as the defendant was alleged to be indigent and, upon conviction and sentence of twenty years and a day in the penitentiary, defendant assigned as error on appeal the denial of the motion. The appointment of a court reporter being, by statute, discretionary with the trial court when, among other circumstances, the district attorney-general states that he intends to insist on the infliction of capital punishment and the defendant is financially unable to employ counsel and has court-appointed counsel, the supreme court held that there was no error in the refusal of the trial court in this case to appoint a reporter when not only did the district attorney-general not insist on a death sentence but also the defendant was represented by counsel of his own choice.

In *Grove v. State*,[141] the defendants, who had been convicted of armed robbery, a crime for which capital punishment can be inflicted, contended that since they were indigent the court should have, under the statute set out above, taxed the state with at least two-hundred-fifty dollars of the amount necessary to hire a court reporter. However, the supreme court, citing the *Tucker* decision, held that it was not error for the trial court in its discretion to fail to appoint a court reporter when the district attorney-general did not insist on the infliction of capital punishment (although the court later charged the jury the law on the maximum penalty) and the defendants, in fact, had a reporter.

5. *Evidence.*—Evidentiary questions involved in some of the

139. TENN. CODE ANN. § 40-2010 (1956).
140. 210 Tenn. 648, 361 S.W.2d 494 (1962).
141. 211 Tenn. 448, 365 S.W.2d 871 (1963).

criminal cases reported during the past year are treated elsewhere in this survey,[142] but they are footnoted here[143] as a convenience to the reader.

6. *Instructions.*—The Code specifically requires that in felony prose-

142. Patterson, *Evidence—1963 Tennessee Survey*, 17 VAND. L. REV. 1058 (1964).

143. *Confessions:* Grove v. State, 211 Tenn. 448, 365 S.W.2d 871 (1963) (evidence of falsity of defendants' confessions as to crime other than those they were being tried for, inadmissible to show that confessions made as to crimes they were being tried for were induced by coercion). *Corpus delicti*: McClary v. State, 362 S.W.2d 450 (Tenn. 1962) (within court's discretion whether to require its showing before admitting proof as to guilt of particular persons; "live" or current lottery tickets sufficient to establish it in professional gambling case). *Corroboration*: Carroll v. State, 370 S.W.2d 523 (Tenn. 1963) (not required to support testimony of prosecutrix in rape case, but afforded by numerous specified items of evidence); Gibson v. State, 211 Tenn. 95, 362 S.W.2d 470 (1962) (testimony of prosecutrix in rape case corroborated by testimony of two witnesses that within minutes after the alleged act occurred she was hysterical in relating to them that defendant had raped her); Yelton v. State, 211 Tenn. 464, 365 S.W.2d 877 (1963) (testimony for state by accomplice of defendants must be corroborated, specified items of independent evidence were sufficient). *Cross examination*: McBee v. State, 372 S.W.2d 173 (Tenn. 1963) (not reversible error that defendant did not have opportunity to cross examine a state's witness whose testimony at first trial was introduced at second trial when affidavits repudiating that testimony, executed by the witness after the first trial, were permitted to be introduced at second trial as a means of destroying the witness' testimony); Taylor v. State, 369 S.W.2d 385 (Tenn. 1963) (proper for state on cross examination to question a character witness for defendant in an assault prosecution as to whether he knew that defendant had previously been arrested for gambling and had fought officers when taken into custody for that offense); Grove v. State, *supra* (not error to refuse defendants' counsel the right to cross examine an officer as to his taking confessions from defendants concerning crimes other than ones for which they were being tried). *Defendant as witness*: Hill v. State, 211 Tenn. 682, 367 S.W.2d 460 (1963) (if defendant testifies on the issue of validity of search, after state has rested and defendant's objection to admissibility of evidence on ground of illegality of search has been overruled, he is subject to cross examination on all issues). *Offer of defendant before trial to plead guilty*: Dykes v. State, 372 S.W.2d 184 (Tenn. 1963) (error to admit testimony of state's witness that defendant had stated before trial that he would plead guilty, state waived agreement by proceeding to trial on plea of not guilty). *Other crimes*: Carroll v. State, *supra* (testimony concerning commission of a crime by defendant other than the one for which he was being tried admissible where both crimes were so much a part of the same transaction that proof of one tended to elucidate and establish the other, the testimony tended to establish defendant's motive and criminal intent and to break down his claim of mistake or accident, and the testimony tended to prove a pattern of criminal conduct similar to that accompanying the crime on trial). *Presumptions and inferences*: Dykes v. State, *supra* (testimony as to eleven cases of beer in defendant's refrigerator and automobile and two men drinking beer on his premises sufficient for inference by jury that the possession of beer was for the purpose of sale); McClary v. State, *supra* (payment and possession of Federal Wagering Tax Stamp justifies a presumption of gambling during the period covered by the stamp). *Searches and seizures*: Ellis v. State, 211 Tenn. 321, 364 S.W.2d 925 (1963) (evidence secured by unlawful search and seizure, although occurring in another state, inadmissible); Venable v. State, 210 Tenn. 664, 362 S.W.2d 222 (1962) (evidence seized incidental to an unlawful detention or arrest inadmissible). *Transcript of earlier trial*: McBee v. State, *supra* (testimony of two witnesses at an earlier trial from transcript was properly introduced at second trial when the record had been certified as correct by the trial judge and approved by defense counsel; not necessary for judge at second trial to require the reading of the entire transcript from first trial in order to admit transcribed testimony of two witnesses).

cutions the trial court charge the jury as to the law of lesser included offenses even though not requested by the defendant to do so.[144] In *Strader v. State*,[145] (a felony prosecution for the statutory offense of assault and battery upon a female under the age of twelve years with intent to carnally know her[146]), the supreme court reversed and remanded for the failure of the trial court to charge the jury, although not requested to do so, as to the included misdemeanors of assault and battery and of assault[147] when there was evidence upon which guilt of such included offenses could have been found. Despite the fact that the duty of trial courts in felony cases to charge the jury as to lesser included offenses seems on the face of the statute to be mandatory in all such cases, without reference to evidence as to a lesser offense, the *Strader* decision continues recognition of the exception carved out by prior judicial amendment. This exception is that where no evidence has been offered on which conviction of a lesser included offense could be sustained the court is not required to instruct as to the lower offense.[148] However the result is reached, it is the general rule in American jurisdictions.[149]

In a few instances the supreme court has held that it is reversible error for a trial judge in a criminal case to fail to charge the jury on a particular point even though not required by statute nor requested by a party to do so. These in the past have been limited to charges in felony cases on the identity of the accused,[150] reasonable doubt,[151] the weight to be given a dying declaration,[152] and circum-

144. "It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." TENN. CODE ANN. § 40-2518 (1956).

145. 210 Tenn. 669, 362 S.W.2d 224 (1962).

146. TENN. CODE ANN. § 39-606 (1956).

147. After the indictment in the *Strader* case, section 39-606 was amended to include another offense—an assault and battery upon a female under the age of twelve years "with intent to unlawfully sexually molest or fondle her." TENN. CODE ANN. § 39-606 (Supp. 1963).

148. "Thus, the command of this statute is without qualification or exception. It includes all cases of felonies with lesser included offenses, and requires the judge to charge the jury as to all the law of each of such offenses in all such cases. But we have held that such charge need not be given where there is *'no evidence'* of such offense, and the charge would be a mere abstraction 'upon hypothetical questions not suggested by the proof.'" Cood v. State, 69 Tenn. 293, 294-96 (1878); Baker v. State, 203 Tenn. 574, 577, 315 S.W.2d 5 (1958).

"But where the evidence, upon any view the jury may take of it, permits an inference of guilt as to such lesser included offenses, it is the mandatory duty of the Trial Judge to charge all the law as to each of such offenses, and a failure to do so requires a reversal and a new trial." 210 Tenn. at 697, 362 S.W.2d at 228-29.

149. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 455-56 (1947).

150. Ford v. State, 101 Tenn. 454, 47 S.W.703 (1898).

151. Frazier v. State, 117 Tenn. 430, 100 S.W.94 (1906).

152. Pearson v. State, 143 Tenn. 385, 226 S.W.538 (1920).

stantial evidence when the case is based solely thereon.[153] These charges must be given, though not requested, because each of them "belongs in a class denominated as fundamental."[154] It is remarkable that the court went beyond this short list last year to include two additional situations in which an unrequested charge should have been given. In *Poe v. State*,[155] a felonious assault case, it was held reversible error, not saved by the Harmless Error Statute, for the trial court without request to fail to instruct the jury on the subject of alibi.[156] And in the *Morrison* case,[157] a homicide case in which it appeared that the defendant killed a man in the act of forcibly assailing the defendant's habitation, the court reversed a conviction for failure of the trial court to give a charge, though not requested, on the rights of one when his home is broken into.[158]

In *Rowan v. State*,[159] an attempt was made to get the supreme court to add still another charge to the list of those that trial courts must give, even though not requested to do so. There it was argued on appeal of a felony conviction that the trial court, even in the absence of a special request, committed reversible error for failing to charge the jury on the statutory[160] and constitutional rights[161] of the defendant not to give testimony in the case. Conceding that "this matter has given us considerable concern"[162] and that the judgment must be reversed "if the failure of the court to so instruct the jury is considered to be basic or fundamental,"[163] the supreme court held that upon the weight of authority of decisions in other jurisdic-

153. Bishop v. State, 199 Tenn. 428, 287 S.W.2d 49 (1956).
154. 199 Tenn. at 433, 281 S.W.2d at 52.
155. 370 S.W.2d 488 (Tenn. 1963).
156. "We think such instruction ought to have been given in the case before us. It was a close case on the facts, and an alibi was practically the only defense. Such an instruction on this issue was as fundamental and necessary to a fair trial in this case as were the instructions on the issues in the cases above cited: identity, reasonable doubt, circumstantial evidence, and dying declaration." *Id.* at 491. A conflict of authority exists concerning whether there is a duty to instruct as to alibi in the absence of a request. Some of the cases are annotated in Annot., 118 A.L.R. 1303, 1304-11 (1939), wherein it is said, *id.* at 1304, that the rule in most jurisdictions is that there is no such duty.
157. 371 S.W.2d 441 (Tenn. 1963).
158. "The charge in this case by the trial judge to the jury is the stock printed charge given in murder cases with the correct printed definition of voluntary manslaughter, etc. There was no request made nor is there any charge concerning the rights of an individual when his home is broken into. The charge is not questioned; but we feel that under this charge without any special request, or any particular definition of the rights of one when his home is broken into under these circumstances, that the jury very easily could have misconstrued the rights of the defendant." *Id.* at 443.
159. 369 S.W.2d 543 (Tenn. 1963).
160. TENN. CODE ANN. § 40-2403 (1956).
161. TENN. CONST. art. 1, § 9.
162. 369 S.W.2d at 546.
163. *Id.* at 547.

tions,[164] the trial court could not be put in error for failure, in the absence of a special request, to charge the jury concerning the defendant's rights not to take the stand and give testimony. The court expressed the opinion that the general instructions that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt were sufficient to protect the defendant's constitutional and statutory right not to testify."[165]

What if a trial court, in the absence of a special request, gave the jury instructions as to the defendant's rights not to take the stand and testify—would that be error? It was held in the *Yelton* case[166] that the unrequested charge that "the defendants are not required to take the stand in their own behalf and their failure to do so cannot be considered for any purpose against them, nor can any inference be drawn from such failure of the defendants to take the stand in their own behalf" was proper[167] although there was no assignment of error that it was improper.[168] It may be noted, however, that shortly afterwards in deciding the *Rowan* case[169] the supreme court by dictum indicated that it was still somewhat bothered by the point: "However, reflecting further it might be considered error to call attention of the jury to the failure of the defendant to testify, thereby placing an undue emphasis upon such failure."[170]

When a trial judge misstates the law to the jury it is of course not necessary that a special request be tendered to correct this affirmative error. The supreme court so held in *Burgess v. State*,[171] reversing an

164. Holding that it is not error to give the instruction absent a special request to do so: Harris v. United States, 41 F.2d 976 (D.C. Cir. 1930); Bradley v. State, 35 Ariz. 420, 279 Pac. 256 (1929); People v. Mitsunaga, 91 Cal. App. 298, 266 Pac. 1020 (1928); Matthews v. People, 6 Colo. App. 456, 41 Pac. 839 (1895); State v. Williams, 90 Conn. 126, 96 Atl. 370 (1916); Bargeman v. State, 17 Ga. App. 807, 88 S.E. 591 (1916); Felton v. State, 139 Ind. 531, 39 N.E. 228 (1894); State v. Reid, 200 Iowa 892, 205 N.W. 517 (1925); State v. Younger, 70 Kan. 226, 78 Pac. 429 (1904); People v. Warner, 104 Mich. 337, 62 N.W. 405 (1895); Metz v. State, 46 Neb. 547, 65 N.W. 190 (1895); State v. Lesh, 27 N.D. 165, 145 N.W. 829 (1914); State v. Magers, 36 Ore. 38, 58 Pac. 892 (1899); Bosley v. State, 69 Tex. Crim. 100, 153 S.W. 878 (1913); State v. Comer, 176 Wash. 257, 28 P.2d 1027 (1934); Johns v. State, 14 Wis. 2d 119, 109 N.W.2d 490 (1961). *Contra*, State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

165. 369 S.W.2d at 548.

166. 211 Tenn. 464, 365 S.W.2d 877 (1963).

167. *Id.* at 471.

168. Rowan v. State, 369 S.W.2d 543, 548 (Tenn. 1963).

169. 369 S.W.2d 543 (Tenn. 1963).

170. *Id.* 547. The court, however, noted, *id.* at 548, that Tennessee and other states hold that it is not error to instruct the jury on a defendant's failure to take the stand, and it quoted from an opinion of Learned Hand, Becher v. United States, 5 F.2d 45, 49 (1924) that "it is no doubt better if a defendant requests no charge upon the subject, for the trial judge to say nothing about it; but to say that when he does, it is error, carries the doctrine of self-incrimination to an absurdity."

171. 369 S.W.2d 731 (Tenn. 1963).

involuntary manslaughter conviction resulting from a death caused by the defendant's driving his automobile into a pedestrian. The trial court had charged the jury as to reckless driving in terms of a pre-1955 statute under which ordinary negligent conduct could amount to reckless driving rather than in terms of the statute in effect since 1955 defining reckless driving in terms of willful or wanton conduct.[172] The court took the occasion to reiterate the principle, that in criminal cases the accused is entitled "to such a charge as the facts of the case require, and nothing short of that will satisfy the demands of justice."[173]

In the *Lester* case,[174] a homicide case, the defendant offered the trial court an instruction as to insanity, his theory being that prior to the killing he had been hit on the head and rendered so unconscious as not to remember what he did until some time after the killing. The court refused to give the requested instruction. The supreme court held that this was not error, because there was evidence only as to a condition of amnesia and none at all as to a condition of insanity. Although an accused is entitled to an affirmative instruction on every issue raised by the evidence, the court correctly held that it is equally true that a trial court is not required to instruct on matters not raised by the evidence.[175]

The refusal of the trial judge in the *Yelton* case[176] to grant two special requests of the defendant in charging the jury was assigned as error. One request was that "the Court instructs you gentlemen, that the witness, Tommy Junior Guy, was and is an accomplice as a matter of law, and under the law, you cannot convict these defendants on the uncorroborated testimony of the witness, Tommy Junior Guy." The jury was charged instead as to what an accomplice is under the law, that a defendant cannot be convicted upon the testimony of an accomplice unless there is evidence independent of his testimony corroborating his testimony, and that the jury is the judge as to whether or not any witness is an accomplice. The supreme court held that this was sufficient and that it is unnecessary for a trial court to spell out or define the character of each witness, remarking in the latter connection that if the court were to do so it would probably be alleged as error for invading the province of the jury.[177]

172. TENN. CODE ANN. § 59-858 (1956).

173. 369 S.W.2d at 732, citing a number of prior decisions, including Crawford v. State, 44 Tenn. 190 (1867), in which decision this statement of the principle was originally made by the court.

174. 370 S.W.2d 405 (Tenn. 1963).

175. *Id.* at 409.

176. 365 S.W.2d 877 (1963).

177. *Id.* at 882.

The other instruction specially requested in the *Yelton* case was to the effect that "if a witness testifies falsely to a material fact, you may disregard the entire testimony of that witness." The supreme court held that, although this charge could have been properly given, it was not error for the trial court to refuse to give it when he had fully covered the matter complained of in other instructions given as to how witnesses are impeached and the weight to be given the testimony of witnesses.[178]

The court was presented with two questions about instructions in *Taylor v. State*,[179] an appeal from a conviction of an assault with intent to commit manslaughter. A character witness for the defendant was cross-examined as to whether he knew that the defendant had previously been arrested for gambling and had on that occasion fought arresting officers. It was contended that the trial judge erred in failing to instruct the jury that evidence so elicited could be considered only as to the witness' credibility and not as to the defendant's guilt or innocence. While recognizing the rule that trial judges are required to give an affirmative charge on every issue of fact put in controversy by the pleading and raised by the proof,[180] the court concluded that this rule did not apply here since the subject matter of the cross-examination had not been put in controversy by the indictment or pleading. The court held that the failure of the trial judge to instruct the jury as to the purpose for which the evidence elicited on cross-examination was admitted was not such error as is reversible or fundamental.[181]

A more interesting question in the *Taylor* case was whether the trial judge had given an oral charge contrary to the statutory requirement[182] that in felony cases the judge's entire charge shall be reduced to writing before being given to the jury. At the trial the judge in fact gave a lengthy written charge to the jury, including instructions as to various degrees of crime and the punishments available respectively for them. However, when the jury subsequently returned and reported merely that they had found the defendant guilty and had fixed his punishment at one to five years in the penitentiary and a fine of five-hundred dollars, the judge orally said to the jury, "gentle-

178. *Ibid.*

179. 369 S.W.2d 385 (Tenn. 1963).

180. Myers v. State, 185 Tenn. 264, 206 S.W.2d 30 (1947).

181. 369 S.W.2d at 386, citing Bishop v. State, 199 Tenn. 428, 287 S.W.2d 49 (1956); Webb v. State, 140 Tenn. 205, 203 S.W.955 (1918).

182. "On the trial of all felonies, every word of the judge's charge shall be reduced to writing before given to the jury, and no part of it whatever shall be delivered orally in any such case, but shall be delivered wholly in writing. Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement." TENN. CODE ANN. § 40-2516 (1956).

men, it is necessary that you state in your verdict whether or not the defendant is guilty of an assault with the intent to commit murder in the second degree or an assault with the intent to commit voluntary manslaughter. You may either retire to the jury room to consider this matter or may if you wish state your decision from the jury box." While the supreme court interpreted the statutory requirement as being imperative and not directory, it held that the trial court's quoted oral statement was not reversible error because it was only an explanation to the jury as to how to mark their verdict rather than being an instruction as to the law in the case. In that connection it adopted and applied this formulation of principle: " 'The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence . . . statements as to the form or character of the verdict' need not be in writing."[183]

7. *Verdict.*—In several cases decided during the survey period the supreme court scrutinized verdicts in light of requirements of Tennessee's Indeterminate Sentence Law.[184] It will be noted that this statute, when applicable, requires the jury in formulating its verdict of guilty to fix the maximum term "for not more than —— years." The court in the Taylor case[185] was faced with a situation in which the jury had brought in a guilty verdict and set the punishment at one to five years in the penitentiary and a fine of five-hundred dollars, which verdict was attacked on appeal as being improper for failing to set out a "definite maximum." The court concluded that the jury by this verdict had fixed a maximum term of five years and that if they had attempted to fix a minimum term that part of the verdict was to be treated as surplusage.[186] However, the court held that the verdict was invalid since the verdict called first for a prison term and then a fine, whereas the statute[187] under which defendant was sentenced had

183. 369 S.W.2d at 387-88, quoting from 23A C.J.S., *Criminal Law* § 1301 (1961).

184. "Whenever any person over eighteen (18) years of age is convicted of any felony or other crime punishable by imprisonment in the penitentiary, with the punishment for said offense within minimum and maximum terms provided by law, the jury in addition to finding the defendant guilty shall fix the maximum term of the convicted defendant and its form of verdict shall be: 'We find the defendant guilty as charged in the indictment, or 'we find the defendant guilty of _____ (whatever may be the offense charged), and fix his punishment at imprisonment in the penitentiary for not more than _____ years,' and the court imposing judgment upon such verdict shall not fix a definite term of imprisonment, but shall sentence such person to the penitentiary for a period not more than the term fixed by the jury, making allowance for good time as now provided by law." TENN. CODE ANN. § 40-2707 (1956).

185. 369 S.W.2d 385 (Tenn. 1963).

186. *Id.* at 388.

187. TENN. CODE ANN. § 603 (1956).

been previously interpreted by the supreme court[188] as prescribing punishment by either imprisonment in the penitentiary without more or by imprisonment in the county jail and a fine. Whether one mode of punishment or the other would be adopted was interpreted to be a jury determination. The court treated the jury's imposition of a fine in addition to a prison term as improper and struck it from the judgment, and affirmed the judgment as so modified.[189]

In the *Smith* case,[190] instead of expressly fixing a maximum term in its verdict, the jury simply found the defendant guilty and added: "Recommend minimum sentence." It was contended on appeal that the verdict was void under the Indeterminate Sentence Law for failing to fix a maximum sentence. The court rejected this contention, holding that, a maximum sentence and a minimum sentence having both been provided by statute for the crime of which the defendant was convicted, the minimum sentence so provided being three years, the jury verdict of "minimum sentence" amounted to setting the defendant's punishment at both a maximum and a minimum of three years.[191] Although by statute the jury was required to fix the punishment, the court held that the use of the word "recommend" in its verdict did not render the judgment void.[192]

In *Nicholas v. State*,[193] a conviction and fifteen years prison sentence for second degree murder based on a verdict that "they (the jury) find the defendant, Gilbert Nicholas guilty as charged" was reversed because of invalid verdict. In the first place, inasmuch as the punishment for murder in the second degree is fixed by statute at not less than ten nor more than twenty years,[194] the Indeterminate Sentence Law was applicable, and the verdict was improper for failure to fix maximum punishment.[195] Further, the court held the verdict invalid for failing to state, as required by statute,[196] whether the defendant was found guilty of first or second degree murder.[197]

A verdict was held invalid by the court in *Baldwin v. State*,[198] for being unintelligible. The defendant had been indicted on one count for forgery as defined in the Code,[199] and on a second count for passing or offering to pass a forged instrument in violation of a

188. Morton v. State, 91 Tenn. 437, 19 S.W. 225 (1892).
189. 369 S.W.2d at 389.
190. 369 S.W.2d 537 (Tenn. 1963).
191. *Id.* at 540.
192. *Id.* at 539-40.
193. 211 Tenn. 264, 364 S.W.2d 895 (1963).
194. TENN. CODE ANN. § 39-2408 (1956).
195. 211 Tenn. at 266, 364 S.W.2d at 896.
196. TENN. CODE ANN. § 39-2404 (1956).
197. 211 Tenn. at 266, 364 S.W.2d at 896.
198. 372 S.W.2d 188 (Tenn. 1963).
199. TENN. CODE ANN. § 39-1701 (1956).

separate Code section.[200] The jury's verdict was "that they find the defendant guilty of forgery *or* passing forged papers *or* attempting to pass forged papers under $100.00 and assess his punishment at confinement in the State Penitentiary for a period of not more than 5 years." (Emphasis added.) The verdict being expressed in the disjunctive, and the crimes of forgery and offering to pass forged papers being distinct, the court concluded that the verdict was so unintelligible as to render it invalid since one could only speculate as to what the jury intended. Said the court: "Where two or more offenses are charged in the same indictment, the verdict must be so worded as to indicate of which offense the defendant is found guilty."[201]

In three decisions[202] the court adhered to its long-held position that directed verdicts—even of acquittal—in criminal cases are not authorized in Tennessee, a minority position[203] which we have had occasion to criticize before.[204]

8. *Motions after Verdict.*—In the *Tucker* case[205] counsel for defendant, after the verdict, moved the court to furnish a copy of the trial transcript to the defendant, whom he alleged to be indigent. The motion was overruled, and this action was assigned as error on appeal, the defendant relying on the United States Supreme Court decision in *Griffin v. Illinois*,[206] as supporting his contention that his rights under the fourteenth amendment had been violated thereby. The court rejected this contention, as it had a similar contention in a previous decision,[207] holding the *Griffin* decision not to be controlling. The *Griffin* ruling that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts"[208] does not mean that states must furnish indigent defendants in all criminal cases with a transcript;[209] rather the United States Supreme Court pointed out in *Griffin*[210] and has recently re-

200. TENN. CODE ANN. § 39-1704 (1956).

201. 372 S.W.2d at 189, citing 53 AM. JUR. *Trials* § 1056 (1945).

202. Rowan v. State, 369 S.W.2d 543, 546 (Tenn. 1963); Yelton v. State, 211 Tenn. 464, 479, 365 S.W.2d 877, 884 (1963); McClary v. State, 211 Tenn. 46, 58, 362 S.W.2d 450, 455 (1962).

203. 5 WHARTON, *op. cit. supra* note 5 § 2075.

204. Kendrick, *Criminal Law and Procedure—1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1091-92 (1960), Morgan, *Procedure and Evidence—1960 Tennessee Survey*, 13 VAND. L. REV. 1197, 1224 (1960).

205. 210 Tenn. 648, 361 S.W.2d 494 (1962).

206. 351 U.S. 12 (1956).

207. Beadle v. State, 203 Tenn. 97, 310 S.W.2d 157 (1958); Miller, *Criminal Law and Procedure—1958 Tennessee Survey*, 11 VAND. L. REV. 1224, 1230-31 (1958).

208. 351 U.S. at 19.

209. Eskridge v. Washington Prison Board, 357 U.S. 214, 216 (1958).

210. "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may

affirmed[211] that other means affording adequate appellate review to indigent defendants may be used by the states. And one of such means that the United States Supreme Court has approved is the narrative bill of exceptions.[212] Inasmuch as the Tennessee Supreme Court has long accepted the narrative bill of exceptions as affording all defendants (indigent or otherwise) a full and adequate appellate review and has indeed expressed a preference for it[213] and the record in the instant case did not affirmatively show that a narrative bill of exceptions could not have been prepared by this defendant, the court held that it was not a violation of his constitutional rights to require him through his counsel to prepare a narrative bill of exceptions rather than to provide him with a copy of a trial transcript prepared by a court-appointed reporter.

III. Legislation

Acts of the 1963 Tennessee General Assembly having some effect on criminal law and procedure are summarized below. Code and section references are to Tennessee Code Annotated. Chapter references are to the Public Acts of Tennessee, 1963.

Chapter two amends section 40-2903 (providing that trial judges have no authority to suspend the execution of sentence after the defendant has begun to serve it) to authorize such judges to suspend the remainder of a jail or workhouse sentence, where at least thirty days of such a sentence have been served and the costs or fine and costs have been paid or secured, despite the expiration of the term of court at which the judgment was pronounced or an earlier refusal to suspend in toto the judgment. It adds that it is not to be construed

find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases." 351 U.S. at 20.

211. "In considering whether petitioners here received an adequate appellate review, we reaffirm the principle, declared by the Court in *Griffin*, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U.S. at 20. Alternative methods of reporting trial proceeding are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript." Draper v. Washington, 372 U.S. 487, 495 (1963).

212. "It has become the usual, because the more convenient, method to prepare a bill of exceptions by use of a stenographic transcript of the evidence. Even so the bill ought not to contain all the evidence but only that which is relevant to the issues made upon the appeal, and often it is expedient to summarize the evidence and transmute it into narrative form." Miller v. United States, 317 U.S. 192, 198 (1942). This decision was cited by the Court in the *Griffin* decision in support of the statement that other methods than a stenographer's transcript may be used to afford adequate appellate review to indigent defendants. 351 U.S. at 20.

213. Beadle v. State, 203 Tenn. 97, 103, 310 S.W.2d 157, 160 (1958).

as granting to trial judges the right to suspend the payment of fines except at the term at which the judgment was rendered.

Chapter four repeals section 14-1105 [which made it a misdemeanor for one fraudulently to procure or attempt to procure any allowance (from the county court?) for a person not entitled to it] and repeals section 14-1116 [which made it a misdemeanor for one to attempt to obtain under Code sections providing for a mother's pension fund (also repealed by chapter four) any allowance for any child not entitled thereunder to receive such allowances].

Chapter nine repeals chapter twenty-three of title fifty-six of the Code concerning requirements of companies engaged in life and casualty insurance upon an assessment plan, including section 56-2311 (which made it a misdemeanor for an officer or a representative of a corporation subject to this chapter to transact or attempt to transact business in the state until the corporation had complied with the provisions of this chapter).

Chapter ten repeals chapter ten of title fifty-four of the Code concerning the road tax and working on roads, including criminal provisions in section 54-1004 (which made it a misdemeanor for one appointed as a district road commissioner to fail or refuse to serve), section 54-1025 (which made it a misdemeanor for one willfully to disobey a road overseer's summons to work on the roads, or to fail or refuse to commute the obligation by furnishing a substitute or by payment of certain sums of money to the district road commissioner), section 54-1035 (which made it a misdemeanor for a district road commissioner or overseer by connivance or willful neglect to permit the escape of prisoners assigned to work on the roads), section 54-1040 (which made the continued dereliction of duty by a district road commissioner or overseer an indictable offense punishable by fine), and section 54-1041 (which made it a misdemeanor for a district road commissioner to issue a road order not written wholly with pen and ink or printed and written with pen and ink).

Chapter fourteen repeals section 44-1505 (which made it a misdemeanor for one to take up and confine livestock, or to allow livestock to remain on his inclosed lands for more than ten days without posting at the most public place in his neighborhood), section 44-1506 (which made it larceny for one to kill, sell, conceal, or to "make way" with livestock), and section 44-1523 (which provided penalties for the taker-up of a stray who fails to deliver to the ranger within fifteen days after appraisement the appraised value of the stray, who makes use of a stray before it is appraised, who removes a stray out of the county where it was taken up or sells or disposes of such stray within twelve months after appraisement, or who fails to

pay to the treasurer one-half of the appraised value of the stray within twelve months after appraisement).

Chapter fifteen repeals section 43-2009 (which made it a misdemeanor for one to buy, sell, barter, exchange, or receive or deposit any cotton in the seed, or ginned but not baled, between the hours of sunset of any one day and sunrise of another).

Chapter twenty-three amends section 40-3502 (authorizing the Governor to grant pardons) specifically to authorize the Governor in his discretion to pardon any person who has been illegally convicted and who has served a prison sentence for a crime when it is afterwards determined that he was not guilty of the crime. It also provides that such a pardon shall restore all rights of citizenship to the pardoned person.

Chapter twenty-five amends section 39-507 to provide that it is a felony, punishable by imprisonment of from one to five years, for one willfully and maliciously to set fire or cause a fire to be set on another's lands. This chapter also repeals section 39-508 (which made it a criminal offense for one deliberately and willfully to start a fire in a woods or forest with intent to destroy the same, punishable by imprisonment in the state penitentiary for from two to ten years and rendering such an offender infamous).

Chapter twenty-six amends section 39-509 so as to make it a misdemeanor, punishable by a fine of from ten to fifty dollars or by imprisonment in the county jail or workhouse for from seven to thirty days or by both such fine and imprisonment, for one negligently or carelessly to set fire or to cause fire to be set on another's lands or negligently or carelessly to suffer a fire set by himself on his own land to escape and damage another's property.

Chapter thirty-two amends section 40-3102 (concerning the time for commencing a term of imprisonment) by providing that a defendant who has served time in the jail, workhouse, or penitentiary, either prior or subsequent to any conviction arising out of the original offense for which he was tried, shall receive credit on his sentence for such time.

Chapter forty-seven[214] makes it a felony, punishable by imprisonment from ten to twenty-one years, for one willfully and maliciously to injure another by means of dynamite, fuses, caps, bombs, or any other explosive with intent to cause death or great bodily harm.

Chapter eighty[215] makes it a misdemeanor, punishable by a fine of from ten to five-hundred dollars or by imprisonment in the county jail or workhouse for not more than six months or by both such fine and

214. TENN. CODE ANN. § 39-1412 (Supp. 1963).

215. TENN. CODE ANN. § 39-2215 (1956).

imprisonment, for one willfully and maliciously to give or to cause to be given a false alarm of fire.

Chapter eighty-four conforms various sections of the Criminal Code to the newly-adopted Uniform Commercial Code as follows:

Section 1 of chapter eighty-four amends section 39-1933 (providing that if a person who, in violation of section 39-1932 disposes of personal property covered by a mortgage or trust deed shall pay the debt, to secure which the mortgage was executed, before he is arraigned for trial, he shall not be liable under section 39-1932) to make sections 39-1932 and 39-1933 applicable only in cases where the agreement involved was executed prior to July 1, 1964.

Section 2 of chapter eighty-four amends section 39-1936 to provide that it is a misdemeanor, punishable by a fine of not less than fifty dollars and imprisonment for from sixty days to six months, for one to execute a mortgage, trust deed, or security agreement covering any personal property upon which there is a previous such encumbrance without first advising the mortgagee, or trustee, or beneficiary, or secured party, as to the parties and amounts involved in such previous agreements unless these facts are at the time of its execution incorporated into the subsequent mortgage, deed of trust, or security agreement.

Section 3 of chapter eighty-four amends section 39-1938 (making it a criminal offense for the "maker" of a registered mortgage or deed of trust upon personalty to remove from the state any property covered thereby without the written consent of the holder of the indebtedness secured by deed of trust) by providing that it applies only in cases where the mortgage or deed of trust involved was executed prior to July 1, 1964.

Section 4 of chapter eighty-four adds a new section 39-1954 making it a misdemeanor, punishable by imprisonment in the county jail or workhouse for not more than six months or by a fine of not more than fifty dollars or by both, for the purchaser of personal property under a written or printed conditional sale contract executed prior to July 1, 1964, without having paid for it and without the consent of the seller or his assignee, to sell, give away, or otherwise dispose of or conceal it with intent to deprive the seller or his assignee of it or its proceeds so that the seller or assignee cannot by legal process recover its possession when so entitled under the contract terms; except that these provisions do not apply to any person so selling, giving away, or otherwise disposing of or concealing, property bought under a conditional sale contract if he shall pay the amount due on the property or shall surrender it to the person lawfully entitled to its possession, before he is arraigned for trial, and shall pay the costs.

Section 5 of chapter eighty-four adds a new section 39-1955 making

it a felony, punishable by imprisonment for from one to five years and by a fine of from two-hundred-fifty to five-hundred dollars, for one to remove from the state personal property the title to which has been retained under a conditional sale contract executed prior to July 1, 1964, when the amount thereon exceeds fifty dollars, unless the consent of the seller or his assignee be obtained in writing before its removal; and making it a misdemeanor so to remove personal property on which the amount so unpaid is fifty dollars or less.

Section 6 of chapter eighty-four adds a new section 39-1956 making it unlawful, punishable by imprisonment for from one to five years, for a debtor in possession of consumer goods or equipment subject to a security interest (as defined under the Uniform Commercial Code—Secured Transactions) to remove from the state (except casually or temporarily) any such collateral without the written consent of the secured party.

Section 7 of chapter eighty-four adds a new section 39-1957 making it a felony for a debtor in possession of consumer goods or equipment subject to a security interest (as defined under the Uniform Commercial Code—Secured Transactions) to dispose of or conceal such collateral with intent to deprive the secured party of all or any part of the collateral or proceeds from it, subject to punishment by imprisonment for from three to ten years when the value of such property exceeds one-hundred dollars, and for from one to five years when the value does not exceed one-hundred dollars except that in such latter case the court or jury may commute the punishment to imprisonment in the county jail for any period less than one year.

Section 8 of chapter eighty-four adds a new section 39-4237 providing that any debtor under the terms of a security agreement who has no right of sale or other disposition of the collateral, or who has a right of sale or other disposition of the collateral but is to account to the secured party for the proceeds therefrom, and who sells or disposes of the collateral and fraudulently fails to pay the secured party the amount of the proceeds due under the security agreement shall be guilty of a fraudulent breach of trust;[216] that the failure of such a debtor to turn over to the secured party such collateral or pay the amount of the proceeds due as provided in the security agreement is prima facie evidence of fraudulent intent; and that, in the event the debtor violating this section is a corporation or partnership, any officer, director, partner, or agent of such debtor who actively participates in the act violating the section, or who knows of and acquiesces in such violation by another officer, director,

216. As defined in TENN. CODE ANN. § 39-4226 (1956), and punishable as provided in TENN. CODE ANN. § 39-4228 (1956).

partner, or agent, shall be guilty of a fraudulent breach of trust and punishable as such.

Chapter ninety-five[217] makes it a misdemeanor, punishable by a fine of from one-hundred to one-thousand dollars, for a county court clerk, upon order of the Commissioner of Revenue divesting him of duties as to handling state revenue, to fail to deliver to the Commissioner or the Commissioner's agent all state properties, monies, records, reports, forms, and the like in his possession. Each day of such refusal is made a separate offense.

Chapter ninety-six[218] provides that, whenever a confession or admission against interest shall have been made before any state law enforcement officer or agency by a person charged with a crime, a copy of the same, if written, together with a list of the names and addresses of all persons present when it was made shall be given to the defendant or his counsel on demand; that, if such confession or admission against interest was not written, a list of the names and addresses of all persons present when it was made shall be furnished; and that no confession or admission against interest shall be admitted as evidence in any case unless a copy of it and/or a list of names and addresses of persons present when the confession was made is furnished as required by this act.

Chapter one-hundred-two[219] makes it a misdemeanor, punishable by a fine of from twenty-five to fifty dollars, for one to buy, sell, lease, trade, or transfer from or to Tennessee residents at retail an automobile manufactured or assembled, commencing with the 1964 models, unless it is equipped with front seat safety belts of such type and installed in such manner as approved by the Tennessee Department of Safety.

Chapter one-hundred-seventeen,[220] the "Tennessee Commercial Feed Law of 1963," establishing a system of regulation by the Commissioner of Agriculture of the sale, manufacture, and distribution of commercial feeds and customer formula feeds in Tennessee, including the issuance of permits and the levying and collecting of inspection fees, provides in section 12 thereof[221] that one convicted of violating any of the provisions of this act or the rules or regulations issued under it, or who impedes, obstructs, hinders, or otherwise prevents or attempts to prevent the Commissioner or his representative in performance of his duty under this act, shall be adjudged guilty of a misdemeanor and fined from fifty to one-hundred dollars for the first

217. TENN. CODE ANN. § 67-1628 (Supp. 1963).
218. TENN. CODE ANN. § 40-2441 (1956).
219. TENN. CODE ANN. § 59-930 (1956).
220. TENN. CODE ANN. §§ 44-1101 to -1113 (1956).
221. TENN. CODE ANN. § 44-1112 (1956).

violation and from one-hundred to five-hundred dollars for a subsequent violation. It also provides that, in prosecutions under this act involving the composition of a lot of commercial feed, a certified copy of the official analysis signed by the Commissioner shall be accepted as prima facie evidence of the composition.

Chapter one-hundred-twenty-five[222] makes it a misdemeanor, punishable by a fine of from two to fifty dollars or by imprisonment in the county jail or workhouse for not more than thirty days or by both, for one to abandon or otherwise willfully to leave any animal of the canine or feline species on public lands or rights of way.

Chapter one-hundred-fifty-five amends section 59-509, concerning overweight vehicles, to provide that it is (1) a misdemeanor, punishable by a fine of from twenty-five to fifty dollars, for any person, firm, or corporation to own or operate over state roads any motor vehicle in excess of the maximum limits provided by this statute or with a greater gross weight than that authorized by the registration of such vehicle, and (2) a misdemeanor, punishable by a fine of from twenty-five to fifty dollars and/or confinement in the county jail for not more than thirty days, for one to operate any vehicle required to be registered under certain chapters of this title without having attached and displayed thereon a valid and outstanding registration plate or plates issued to the owner for the current registration year.

Chapter one-hundred-sixty-one[223] makes it a misdemeanor, punishable by a fine of not less than ten dollars, for any person to transport a mobile home or house trailer into or through the state without first obtaining a permit as required in sections 59-454 to -461. Each movement of a mobile home or house trailer in violation of this act is made a separate offense.

Chapter one-hundred-sixty-two[224] makes it a felony, punishable by imprisonment for life or for a number of years not less than ten, for one to lie in wait for another and willfully and maliciously assault him from ambush with a deadly weapon with intent to cause death or great bodily harm.

Chapter one-hundred-ninety repeals section 39-4205 and re-enacts it to provide that, in all cases of petit larceny and in all prosecutions for receiving stolen goods under the value of one-hundred dollars, the court may, on conviction, upon the jury's recommendation substitute imprisonment in the county jail or workhouse in lieu of punishment in the penitentiary; and that on demand of the defendant the jury shall as a part of their verdict assess all punishment for such offense and may, in lieu of punishment in the penitentiary, substitute

222. TENN. CODE ANN. § 39-423 (1956).
223. TENN. CODE ANN. § 59-460 (1956).
224. TENN. CODE ANN. § 39-614 (1956).

imprisonment in the county jail or workhouse for any time less than one year.

Chapter one-hundred-ninety-one, in part, strikes section 46-1648 in its entirety and substitutes for it the provisions that one who violates any provision of the Securities Law of 1955 as amended shall be guilty of a misdemeanor, punishable by a fine of from fifty to twenty-five-hundred dollars or by imprisonment in the county jail for from thirty to one hundred and eighty days or both; and that one who engages in a fraudulent practice declared unlawful in section 48-1644 shall be guilty of a felony, punishable by a fine of from fifty to five-thousand dollars or by imprisonment in the penitentiary from one to five years or both.

Chapter two-hundred-six,[225] establishing a retirement system for county-paid judges, in section 39 thereof[226] makes it a misdemeanor, punishable by a fine of not more than five-hundred dollars or by imprisonment in the county jail for not more than twelve months or both, for one knowingly to make any false statement or to falsify or to permit to be falsified any record or records of the retirement system in an attempt to defraud the system.

Chapter two-hundred-twenty-two amends section 57-221 (in part prohibiting the sale to minors of beer and light alcoholic beverages, making it unlawful for the management of places where beer and light alcoholic beverages are licensed to be sold to allow minors to loiter therein, and making it unlawful for minors to buy, or for any person to buy for minors, such beer and beverages) by making it unlawful for a person under the age of eighteen years to have in his possession beer for any purpose, and unlawful for such minor to transport beer for any purpose except in the course of his employment. Punishment for the first offense is set at ten to twenty-five dollars and for each succeeding offense at twenty-five to fifty dollars. Jurisdiction is given to the juvenile court of the county involved.

Chapter two-hundred-twenty-three amends section 57-148 (containing various provisions concerning criminal offenses and penalties under chapter 1, title 57 of the Code as to local option and the regulation of manufacture and sale of intoxicating liquors) to make it unlawful for a person under the age of eighteen years to have in his possession any intoxicating liquor for any purpose, and unlawful for any minor to transport intoxicating liquor for any purpose. Punishment for the first offense is set at twenty-five to fifty dollars and for each succeeding offense at not less than fifty dollars. Jurisdiction is given to the juvenile court of the county involved.

225. TENN. CODE ANN. §§ 17-501 to -539 (1956).

226. TENN. CODE ANN. § 17-539 (1956).

Chapter two-hundred-thirty-five in section 1[227] requires any person soliciting magazine orders or making contracts for the future delivery of magazines conditioned on payment of a subscription fee in any county of the state to register his presence with the sheriff of the county before so doing and to furnish the sheriff an adequate description of any motor vehicle to be used in soliciting such sales, and in section 2[228] makes the violation of the foregoing provisions a misdemeanor, punishable by a fine of from ten to fifty dollars.

Chapter two-hundred-thirty-eight amends section 39-1904 to substitute five days instead of ten days as the period after written notice of nonpayment by drawee is mailed to the last known address of the drawer of a check, draft, or order during which such drawer, if he obtained money or property or credit thereon with fraudulent intent, must pay such instrument or be subject upon conviction to punishment as in the case of larceny of such money or property; and to add that notice shall be dispensed with in case the drawer has theretofore been convicted of violating this section.

Section two-hundred-forty-seven amends section 38-601 (concerning reports to law enforcement officials of certain types of injuries) further to require hospitals, clinics, sanitariums, doctors, nurses, pharmacists, undertakers, embalmers, or any other person called upon to render aid or medical assistance to a child or children under sixteen years of age, when such child or children is suffering from or has sustained a wound or injury which appears to be unusual or of such nature as to indicate or raise suspicion that it was caused by child brutality or child abuse, to report the same immediately to specified law enforcement officials. Failure on the part of any person or firm or corporation so to report is punishable, upon conviction, as provided for under section 38-603.

Chapter two-hundred-sixty-four amends section 37-264 (concerning the prosecution and sentencing of juveniles) to provide that any child sixteen years of age or older who while confined in a juvenile institution commits an act of assault and battery with a knife or other dangerous weapon shall be tried in the court which would have jurisdiction of the offense if he were an adult, and that the juvenile court shall not assume any further jurisdiction of him; amends section 37-265 (concerning remand by the juvenile court of a child to the sheriff for proceeding according to the criminal laws when there is reasonable cause to believe he has been guilty of rape or murder) to provide as to a child committed to a juvenile institution under this section a procedure for his transferral at age eighteen to the state penitentiary; amends section 41-829 (concerning the duties of super-

227. TENN. CODE ANN. § 62-1601 (1956).
228. TENN. CODE ANN. § 62-1602 (1956).

intendents of state institutions for delinquent children) to provide a procedure for the transfer of mentally ill inmates to the appropriate state mental hospital or institution for mental treatment; amends section 41-832 (concerning retention in state institutions for delinquent children or incorrigible children from the time they reach age eighteen until they are twenty-one years old) to provide that any child age sixteen years or over confined in a juvenile institution who escapes therefrom shall be guilty of a misdemeanor and to provide procedures for his prosecution as an adult in the court having jurisdiction of the offense as if he were an adult; and amends section 41-834 (concerning the return of children improperly committed to institutions for delinquent children to the committing court) to provide for the transfer from institutions for delinquent children to a child caring agency of children suffering from a social disease or epilepsy or a physical disability to such an extent that the juvenile institution is unable properly to carry on its program.

Chapter two-hundred-eighty amends section 62-1507 (making it unlawful for persons or organizations other than those listed in section 62-1502 to solicit funds from individuals in the state without complying with the requirements of section 62-1504 for reporting to the secretary of state) to make any solicitation in violation of chapter 15 of title 62 of the Code concerning professional fund raisers a misdemeanor.

Chapter three-hundred-sixteen[229] provides a system for regulating contracts for the payment of future or prearranged funeral or burial services, including the furnishing of services and articles of personal property used in connection therewith, and in section 6 thereof[230] makes the violation of any of these provisions a misdemeanor punishable by a fine of from one-hundred to five-hundred dollars or by imprisonment for from ten days to ninety days or both.

Chapter three-hundred-twenty-four[231] requires any person withdrawing fifty-thousand or more gallons per day of water from any source (except withdrawals from public water systems by customers thereof) to register such withdrawal with the Division of Water Resources when required by the Division. It also requires notice to the Division by a person who renews a withdrawal which has not been made within the last three years, or a person who currently withdraws fifty-thousand gallons or more of water per day and increases the withdrawal by ten per cent or more. Failure to register or to give notice, as required, is made a misdemeanor, punishable by a fine of from ten to fifty dollars.

229. TENN. CODE ANN. § 62-528 to -535 (1956).
230. TENN. CODE ANN. § 62-533 (1956).
231. TENN. CODE ANN. § 70-2005 (1956).

Chapter three-hundred-twenty-five[232] provides for the licensing of water well drillers, makes it unlawful to operate equipment in drilling a water well except under the supervision of a licensed water well driller, and requires water well drillers to furnish the Commissioner of Conservation with certain information as to wells drilled; and section 10 thereof[233] makes a violation of any of these provisions a misdemeanor, punishable by a fine of from twenty-five to one-hundred dollars.

Chapter three-hundred-sixty provides that any person who has been admitted to bail for appearance before any state court for a felony or a misdemeanor, or who has been convicted of a felony or a misdemeanor and has an appeal pending thereafter, and who intentionally incurs a forfeiture of such bail and willfully leaves the state shall be guilty of the offense of bail jumping, punishable in felony cases by imprisonment in the penitentiary for from one to five years,[234] and in misdemeanor cases by a fine of not more than fifty dollars or by confinement in the county workhouse for not more than one year or both.[235] It also provides that any person who has been admitted to bail for appearance before any state court as a witness in either a felony or misdemeanor case and who intentionally incurs a forfeiture of bail and willfully leaves the state, or who does not make appearance at the time of trial as required, shall be guilty of bail jumping, punishable by a fine of not more than fifty dollars or by confinement in the county workhouse for not more than one year or both.[236]

. Chapter three-hundred-sixty-nine amends section 52-1204, as amended (in part making it a criminal offense for a person or firm to obtain or to attempt to obtain, or to procure or attempt to procure the administration of, barbital or a legend drug by fraud, deceit, etc.) to add a proviso that it shall nevertheless be unlawful for any person to have a prescription for such drugs filled by mail (except as to a person or firm whose mail order business is not more than fifteen per cent of his or its total volume of business); and amends section 52-1206 (making it unlawful for one to receive by mail or otherwise or to have in his possession barbital or legend drugs without such drugs having been prescribed by a licensed physician, dentist, or veterinarian and having been dispensed by a registered pharmacist in this state) to provide an exception as to a person who is a resident of another state who has the prescription for such drugs filled by a licensed and registered pharmacist of such other state, and to make

232. TENN. CODE ANN. §§ 70-2301 to -2310 (1956).
233. TENN. CODE ANN. § 70-2310 (1956).
234. TENN. CODE ANN. § 39-3813 (1956).
235. TENN. CODE ANN. § 39-3814 (1956).
236. TENN. CODE ANN. § 39-3815 (1956).

the section inapplicable to a person or firm whose mail order business is not more than fifteen per cent of his or its total business.

Chapter three-hundred-eighty[237] authorizes methods of voting by absent voters in all elections in the state and in section 14 thereof[238] makes it a felony, punishable by confinement in the penitentiary from one to three years, for any person to vote, or offer to vote, under this act when he is not legally entitled to do so, and for any person to aid or abet another in voting illegally or offering to do so, with knowledge of such illegality. The venue in such cases is the county where the illegal ballot is cast or sought to be cast, without reference to the place where it was prepared or mailed. Section 14 of this chapter also provides that if two or more persons conspire to violate any absentee voting election laws of the state, and one or more of the parties do an act to effect the object of the conspiracy, all of the parties to the conspiracy upon conviction shall be confined in the penitentiary for from one to three years and in addition in the jury's discretion may be fined not more than one-thousand dollars. Section 14 of chapter three-hundred-eighty further provides that any person found guilty of fraudulently issuing a medical certificate as required in this act, and any person found guilty of making certification as an attesting official to an absentee ballot without first determining that such ballot was unmarked when brought by the voter to such person as an attesting official, shall upon conviction receive the penalty hereinabove provided. And section 15 of this chapter[239] makes it a misdemeanor, punishable by a fine of from fifty to one-thousand dollars or by imprisonment in the county jail or workhouse for from ten days to thirty days or both, for any election or primary election official willfully or with gross negligence to fail to perform any act or duty required of him under this act.

237. TENN. CODE ANN. §§ 2-1601 to -1616 (1956).
238. TENN. CODE ANN. § 2-1614 (1956).
239. TENN. CODE ANN. § 2-1615 (1956).