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# Criminal Law and Procedure -- 1961 Tennessee Survey (II)

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## I. Substantive Criminal Law

*1. Offenses Against the Person—(a) Kidnapping.*—In reviewing *Cowan v. State*,[1] the Tennessee Supreme Court noted the following facts:

Defendant, seeing an automobile stop at an isolated spot on a so-called "lovers' lane," approached it by way of a woods, being unseen by the two teen-age couples in the automobile until he was quite nearby. The occupants' attempt to drive away was thwarted by the defendant's exhibiting and threatening to use a pistol, warning against further escape attempts, and demanding and receiving the ignition key. He then insisted that the

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1. 347 S.W.2d 37 (Tenn. 1961).

girls have sexual intercourse with him; and when they refused, he stated that he would not "take it" but would keep them there until they "give it" to him. Subsequently, against resistance, he made attempts at fondling the girls until some seven hours later, at 3:30 A.M., he returned the ignition key and permitted the four young people to leave.

On defendant's appeal from a kidnapping conviction under a statute in relevant part providing certain punishment for "any person who forcibly or unlawfully confines . . . another, with the intent to cause him to be secretly confined, or imprisoned against his will . . . ."[2] the supreme court stated that whether such a situation comes within this statute was a novel question.[3]

Affirming the conviction, the court held that the defendant had, within the terms of the statute, "secretly" (as well as "forcibly" and "unlawfully") confined the four occupants of the automobile. Depriving them of their personal liberty for a period of seven hours at night at an "isolated place where it was quite unlikely that they could secure 'the assistance of the law necessary to release them from' this unlawful restraint"[4] was sufficient to satisfy the statute's secrecy element; and this aggravation made this a case of kidnapping rather than ordinary false imprisonment.[5]

That the Tennessee kidnapping statute covers the *Cowan* fact situation, and that the case was therefore correctly decided seems clear enough even without reference to other cases reaching a like conclusion. But the supreme court (lacking a Tennessee precedent) strengthened its opinion by citing from other jurisdictions several such decisions which had analogous facts and applied similar statutes.[6]

*(b) Threats for Purpose of Obtaining Action.*—The concept of extortion—originally limited to the situation of a public official obtaining the property of one whose consent had been induced by the wrongful use of force or fear or under color of official right, the obverse of bribery[7]—has been considerably enlarged upon by statute. Commonly, the statutory offense may now be committed by a private individual (in which event it is often called "blacknail"). And the offense now includes threatening injury to

2. TENN. CODE ANN. § 39-2601 (1956).

3. 347 S.W.2d at 39.

4. *Id.*, quoting from People v. Florio, 301 N.Y. 46, 50, 92 N.E.2d 881, 883 (1950), 17 A.L.R.2d 993 (1951).

5. Unlawfully seizing another with intent merely to detain him against his will—*i.e.*, without intent that the confinement be secret—amounts to false imprisonment only when secrecy is by statute an element of the crime of kidnapping. PERKINS, CRIMINAL LAW 135 (1957).

6. Doss v. State, 220 Ala. 30, 123 So. 231 (1929), 68 A.L.R. 712 (1930); Brown v. State, 111 Neb. 486, 196 N.W. 926 (1924); People v. Florio, *supra* note 4.

7. CLARK & MARSHALL, CRIMES 794-95 (6th ed. 1958).

the person of another with intent to compel the latter to act against his will.[8]

In this regard, a Teunessee statute (in part) makes it unlawful "if any person . . . maliciously threaten . . . to do any injury to the person . . . of another, with intent thereby . . . to compel the person so threatened to do any act against his will . . . ."[9]

The quoted provisions, seldom involved in reported Tennessee decisions,[10] came before the supreme court for interpretation and application recently in *Furlotte v. State*.[11] There, the defendant had been indicted for violating the statute by threatening to injure one Wright for the purpose of compelling Wright to sign a statement reciting that Wright had participated in an illicit love affair with defendant's wife. Upon being convicted, defendant brought error to the supreme court, arguing that his acts did not violate the statute. The conviction was affirmed, the court noting evidence that, with drawn gun, defendant had orally accused Wright of having had illicit relations with defendant's wife, and had presented to Wright a written statement to such effect, which Wright signed at pistol point. The court rightly concluded that such conduct was in violation of the statute.

The court in *Furlotte* also correctly held that a comment, injected into an opinion some ninety years ago, that a threat to compel another to do a minor act of no great injury or serious importance would not be punishable under the statute[12] is inapplicable in this case because defendant's

8. 3 WHARTON, CRIMINAL LAW AND PROCEDURE § 1396 (Anderson ed. 1957). In the particular form last referred to, the statutory offense could hardly be classified as the common law crime of extortion sometimes is—either as an offense affecting the administration of governmental functions (PERKINS, *op. cit. supra* note 5, at 418), or as an offense against property (*id.* at 319; CLARK & MARSHALL, *op. cit. supra* note 7). Rather, this kind of coercion of the individual seems to fit less awkwardly into the category here assigned it—offenses against the person—than elsewhere, although obviously the fit is not a perfect one.

9. TENN. CODE ANN. § 39-4301 (1956).

10. Justice Burnett, in writing the opinion for the court in Furlotte v. State, 350 S.W.2d 72, 75 (Tenn. 1961), said the court had been able to find "only two reported cases on this statute in this State"—State v. Needham, 147 Tenn. 50, 245 S.W. 527 (1922) and State v. Morgan, 50 Tenn. 262 (1871). On petition to rehear the *Furlotte* decision, counsel for the plaintiff in error cited the court to a rather recent decision concerning this statute, in which Justice Burnett wrote the opinion of the court—State v. Smith, 197 Tenn. 350, 273 S.W.2d 143 (1954). Besides these, Vaughn v. Lee, 1 Tenn. App. 30 (E.S. 1925) has to do with this statute, and Parrish v. State, 129 Tenn. 273, 164 S.W. 1174 (1914) refers to it.

11. 350 S.W.2d 72 (Tenn. 1961).

12. The court (*id.* at 75) refers to this comment as a holding, but it does not come up to that level, being unnecessary to the decision in the case wherein it was made, as appears from the following quotation: "The statute is a highly penal one, and we deem it proper to say, was not intended to apply to every idle threat, but such as are evidence of serious purpose to do the injury threatened, and that, some serious injury, such as is alleged in this indictment [that defendant pursued another with a pistol, stating that the latter would suffer the consequences unless he should leave Smith's Cross Roads immediately]. Nor would it apply to a threat to compel a man to do

purpose was to compel the individual subjected to the threat to admit to a "clear violation of the law for which he could be indicted and prosecuted."[13]

Since it is the exercise of an improper influence which is the gravamen of the offense, a number of decisions have held that when a threat is made to disclose alleged facts about the threatened person it is immaterial whether the alleged facts are true or false.[14] Accordingly, the supreme court a number of years ago in *State v. Needham*[15] held that it is immaterial to this offense under the Tennessee statute whether the person against whom a threat to accuse of a crime is directed is guilty or innocent of the alleged crime. Citing the *Needham* decision, the court in the *Furlotte* case went a step beyond it (although not indicating an awareness of the difference in the situations involved in the two cases in this respect); the court held that the truth of the allegations in the statement which Furlotte allegedly compelled Wright to sign at pistol point was not a defense to Furlotte's prosecution under the statute.[16] This extension of the *Needham* rule seems to be proper and consistent with the wording and purpose of the statute.

*2. Offenses Against the Habitation—(a) Burglary—Defense of Entrapment.*—In the 1960 survey article the suggestion was made that defense attorneys not hesitate to raise the defense of entrapment in cases in which the state has used its own officers or informers to instigate crimes; for while the Tennessee Supreme Court had made statements to the effect that this defense is not recognized in Tennessee, in the event of such circumstances it was thought to be "almost inconceivable that it [the defense] should then be ruled out."[17]

That estimate has now apparently been borne out by the 1961 decision in *Hagemaker v. State*,[18] although the opinion supporting the decision is not entirely clear.

In the *Hagemaker* case, the supreme court recounted proof from the trial below that, pursuant to a prearranged plan among a sheriff, a sometime agent and informer of the sheriff, and the superintendent of a

any minor act, of no great injury, or serious importance; but only such serious threats of injury as should be used to compel a party to do some act materially and seriously affecting his interest . . . . But we hold that a serious and malicious threat, intended to compel a party to leave the place of his residence, on pain of death, or great bodily harm, is an attempt, by threats, to compel a man to do such an act against his will as was intended to be prohibited by the statute . . . ." State v. Morgan, 50 Tenn. 262, 265 (1871).

13. 350 S.W.2d at 75.

14. 3 WHARTON, *op. cit. supra* note 8, § 1397, and cases there cited.

15. 147 TENN. 50, 56, 245 S.W. 527, 529 (1922).

16. 350 S.W.2d at 75.

17. Kendrick, *Criminal Law and Procedure—1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1063 (1960).

18. 347 S.W.2d 488 (Tenn. 1961).

manufacturing company, the agent-informer approached three working men (two of whom had never before been in trouble) with talk about money, guided them to a building of the company at midnight, and suggested that they all go inside through unlocked doors; that the sheriff and his deputies, secreted in advance in the building, apprehended them inside the building, although the agent-informer "escaped" before the group was taken to jail; and that the company superintendent was also in the plant at the time of the midnight raid, accompanied the sheriff to the jail, and functioned as prosecutor in the case.

In reviewing the conviction of the three men of burglary in the third degree,[19] the supreme court stated that "there is only one question before us and that is the court below erred in not allowing these defendants the defense of entrapment."[20] Although remarking preliminarily that "it is clearly established that the doctrine of entrapment is not recognized in this State," the court pointed out a recent leading case where "the Court did not say that it would not recognize the defense of entrapment where the whole machinery to violate the law originated in the minds of the officers of the law, or their agents."[21]

After saying that it was necessary for it to examine "the law" on the question, the court quoted extensively from *Corpus Juris Secundum* statements about entrapment, *inter alia*, that "entrapment is shown where it appears that officers of the law or their agents . . . lured accused into committing an offense";[22] determined that "under the facts in this particular case these defendants were lured into the commission of the offense by the informer"[23] (or "agent of the sheriff"[24]; and reversed the lower court judgment and dismissed the case. The conclusion seems warranted therefore that the Tennessee Supreme Court thereby settled in favor of the defendants the "one question before us . . . that . . . the court below erred in not allowing these defendants the defense of entrapment," and itself recognized the defense. In doing so, however, it would have been better for the court to have stated directly that it recognizes the defense under appropriate circumstances and to have repudiated expressly its statements in previous cases of nonrecognition.

That the present court, while reluctant expressly to disapprove prior expressions about entrapment, seemed to be quite ready now to embrace the doctrine is further indicated in that its view of the *Hagemaker* case afforded

19. "Burglary in the third degree is the breaking and entering into a business house, ont house, or any other house of another, other than dwellinghouse, with the intent to commit a felony." TENN. CODE ANN. § 39-904 (Supp. 1961).
20. 347 S.W.2d at 489.
21. *Ibid.*
22. *Id.* at 490-91, quoting from 22 C.J.S. *Criminal Law* § 42(2), at 138 (1961).
23. 347 S.W.2d at 491.
24. *Id.* at 490.

a separable basis for supporting, without reference to entrapment, the judgment there entered. Near the end of its opinion, seemingly as an alternate basis for the decision, the court stated the conclusion that "the record discloses that the defendants were in no sense trespassers on the property of the cement company, but that the cement company, through the superintendent, was a party to the allurement, and as such the defendants could not be trespassers, which was necessary for the State to show, in the first place, that they were guilty of a felony."[25] If the defendants did not trespass in gaining entrance to the building in question, then they could not be guilty of burglary, which requires a trespassory breach;[26] and the court's determination to this effect was sufficient by itself to support the judgment of reversal and dismissal.

3. *Offenses Against Property—(a) Forgery.*—The case of *Johnson v. State*[27] has interesting implications both in the law of bills and notes[28] and in criminal law.

From the criminal law standpoint, the supreme court affirmed convictions of two individuals for forgery under the following unusual facts: one had executed a check in the first instance and the other had subsequently written an endorsement on it, but a determination was made that the original execution was not a forgery, and no determination was made that the endorsement by itself was a forgery.

The court could not find a similar fact situation in the sources consulted by it. At a former time, *G* had worked for *A*, but subsequently *G* went into business on his own, maintaining a bank account in the name of his (*G*'s) firm. *G* authorized *A* to draw checks on the account by signing *G*'s name. *A* drew a number of checks from time to time in this manner, payable to various aliases of *J*, an employee of *A*. On each occasion, without giving his real name, *J* endorsed the check with the alias appearing as payee and cashed it with some other person, and then *J* and *A* divided the proceeds of the transaction. *A* and *J* carried on this practice after the

25. *Id.* at 491.
26. See, *e.g.*, PERKINS, *op. cit. supra* note 5, at 152.
27. 345 S.W.2d 883 (Tenn. 1961).
28. One bills and notes problem has to do with the fictitious payee provision of the UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(3): "The instrument is payable to bearer . . . (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." TENN. CODE ANN. § 47-109 (1956). A respected commentator on the law of negotiable instruments has construed the quoted provision as meaning that, when the party executing an instrument intends that the designated payee shall have no interest in the instrument but that the person to whom he actually issues it shall have an interest in it, the instrument is to be treated as bearer paper, and hence the endorsement of the designated payee's name is not a forgery but an inoperative signature. BRITTON, BILLS AND NOTES § 149 (2d ed. 1961). If this be a correct interpretation of section 9(3), it would seem to follow that, from the law of bills and notes viewpoint, the endorsement of the instrument in the *Johnson* case was not in itself a forgery.

account was depleted, and whenever A received notice of a lack of funds in the account to pay a check he would produce money to make the cheek good. Eventually a party to whom one of these checks was offered by J became suspicious and notified the police. The arrest, indictment, conviction, and appeal of A and J on forgery charges followed.

Since A had been authorized by G to draw checks by the signature A actually used, the court concluded that the signing of G's name by A did not constitute a forgery in and of itself. However, stating that the creation of this writing might still be a forgery as the crime is defined by Tennessee statute,[29] it pointed to a previous decision holding that a person may commit forgery as so defined by fraudulently making—even over his own signature—a paper writing which, if genuine, would have legal efficacy and which might operate to the prejudice of the rights of another person.[30] In upholding the convictions of the two defendants in this case, the court laid heavy emphasis upon "the criminal intent to deceive and defraud," which it concluded "clearly was shown" by the facts,[31] and cited a number of secondary authorities as supporting the proposition that the heart of the crime of forgery is the endeavor to give an appearance of truth to a deceptive and false writing in order to induce another to give credit to it.[32]

Even if the defendants in the instant case intended, as they had done in previous transactions, to make the checks good, the criminality of their conduct would not be lessened as the facts were determined. They were found to have had the intent to use a deceptive or false writing to gain some advantage—the equivalent of an intent to defraud. It is against this intent to defraud that forgery laws are aimed. There is simply too great a risk to innocent parties that conduct such as practiced by these defendants will eventually result in loss without reparation. A writing that is false in any material part has such an obvious tendency to accomplish fraud that fact finders are justified in inferring an intent to that end from the mere creation of it. And, underlying all of these principles, of course, is the social interest in the integrity of instruments—the public policy supporting forgery statutes and decisions such as the instant one.[33]

*4. Offenses Against the Public Peace—(a) Libel.*—It was held in *State v. Guinn*[34] that for an individual in writing to apply the term "Hitler-like

29. "Forgery is the fraudulent making or alteration of any writing to the prejudice of another's rights." TENN. CODE ANN. § 39-1701 (1956).

30. Luttrell v. State, 85 Tenn. 232, 235-37, 1 S.W. 886, 887-88 (1886).

31. 345 S.W.2d at 885.

32. 4 BACON, ABRIDGMENT OF THE LAW 353 (1852); 2 BISHOP, CRIMINAL LAW §§ 584, 585(3), 598(4) (9th ed. 1923); Annot., 49 A.L.R.2d 853, 856 (1956).

33. On intent to defraud as an element of forgery, see MILLER, CRIMINAL LAW § 130 (1934); PERKINS, *op. cit. supra* note 5, at 303-05; SNYDER, CRIMINAL JUSTICE 475-76 (1953).

34. 347 S.W.2d 44 (Tenn. 1961).

tactics" to a district attorney general concerning an official investigation that he had conducted was criminal libel per se:

> [W]here the libelous language is such that the administration of public justice is questioned in such a way as to injure or hurt the administration of it . . . the language thus used is a criminal libel. When the language tends in any way to injure the administration of government or public justice the courts as a rule have considered it libelous because public confidence in the courts is a matter of paramount necessity to the government. Any attack upon the courts or its judges or those having a part in the machinery of the administration of justice is dangerous and some authorities have said that it is almost as dangerous as an attack upon the government when it does attack the administration of justice or the officers administering it for the same reason that renders a seditious libel indictable . . . .
>
> This term ["Hitler-like tactics"] when applied to an ordinary citizen or to a lawyer, as it was in Schy v. Hearst Publishing Co., 7 Cir., 205 F.2d 750, might not be libelous, but when the term is applied to a District Attorney General in the conduct of his office it implies far more, because the application of the term is not to the individual as an individual but to his acts in the way in which he is conducting his office. When we apply this term to a District Attorney General, who is a quasi-judicial officer representing the State, and who is presumed to act impartially and in the interest of justice, it clearly infers that this officer in his acts is guilty of official oppression.[35]

## II. Criminal Procedure

*1. Proceedings Preliminary to Trial—(a) Search Warrants.*—The General Assembly in 1959 added to the code chapter on search warrants requirements that (1) such warrants be issued in the original and with two exact copies, one to be left with the person or persons served and the other to be kept in the issuing officer's records; and that (2) the issuing officer indorse the warrant with the hour, date, and name of the officer to whom delivered for execution. And it was provided that failure to comply with these requirements makes any search conducted under such warrant an illegal search or seizure.[36]

During the survey period the supreme court nullified convictions in two cases because search warrant procedures fell short of the new requirements.

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35. *Id.* at 46.

36. "All magistrates, clerks of courts, judges and any other person or persons whomsoever issuing search warrants shall prepare an original and two (2) exact copies of same, one (1) of which shall be kept by him as a part of his official records, and one (1) of which shall be left with the person or persons on whom said warrant is served. The original search warrants shall be served and returned as provided by law. The person or persons as aforesaid who issue said warrants shall indorse the warrants showing the hour, date, and the name of the officer to whom the warrants were delivered for execution, and the exact copy of such warrant and the endorsement thereon, shall be admissible in evidence in the courts. Failure to comply with this section shall make any search conducted under said warrant an illegal search and seizure." Tenn. Code Ann. § 40-518 (Supp. 1961).

In *Talley v. State*[37] a conviction had been obtained on the basis of evidence procured under a search warrant not indorsed by the issuing justice of the peace so as to show the hour, date, and name of officer to whom it was delivered for execution. The warrant had simply been signed and dated by the justice and addressed to "The Sheriff or any Lawful Officer Within or of Said County." Also it did not appear that the justice had made copies of the warrant. The trial court overruled defendant's objections to the warrant and to the evidence obtained under it, holding that the statutory provision as to indorsement was "an unreasonable requirement" and that the warrant issued in this case was "a substantial and sufficient compliance with the law."[38] The supreme court, however, reversed and remanded upon concluding that the language of the statute is mandatory and indicative of a legislative intent to require strict compliance.

And in *Johnson v. State*[39] the court reversed and dismissed because two exact copies had not been made of the search warrant under which the evidence necessary to conviction had been obtained, most of the description set out in the original having been omitted from the defendant's copy and substantial dissimilarities appearing in the original and the second copy because of too-short carbon paper.

The court in the *Johnson* case rested its decision also on a second basis—that the warrant was general, and therefore in violation of the state constitution,[40] for purporting to authorize the search of a motel consisting of six cabins, when, in fact, one of the cabins was occupied by someone other than the defendant, a stranger to the process.[41]

A different kind of searches and seizures problem was presented in *Bewley v. State*.[42] There, county law enforcement officers, without a warrant, entered upon the defendant's premises within a city and searched the grounds about his residence, although it was not shown that a complaint had been made concerning defendant or that he had committed an offense in the officers' presence. They discovered what was assumed to be moonshine whiskey; but, instead of taking possession of it themselves,

37. 345 S.W.2d 867 (Tenn. 1961).

38. Minute entry of the trial court, quoted *id.* at 869.

39. 348 S.W.2d 295 (Tenn. 1961).

40. "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted." TENN. CONST. art. 1, § 7.

41. For precedents for the holding that a search warrant, purporting to authorize the search of multiple premises occupied by different persons, is invalid, see Worden v. State, 197 Tenn. 340, 343, 273 S.W.2d 139, 140-41 (1954); State v. Bass, 153 Tenn. 162, 167, 281 S.W. 936, 937 (1926).

42. 347 S.W.2d 40 (Tenn. 1961).

they subsequently had the city chief of police obtain and serve a search warrant for defendant's premises. A conviction for illegally possessing whiskey was reversed and the case was dismissed, the supreme court holding that the search which disclosed the whiskey was void for being in violation of defendant's rights under the state constitution.[43] Said the court:

> The State, having through its representatives produced the evidence of the violation of law by one of its citizens by means prohibited by the Constitution, cannot be permitted through its judicial tribunal to utilize the wrong thus committed against the citizen to punish the citizen for his wrong; for it was only by violating this constitutionally protected right that his wrong has been discovered. It might be said that the Chief of Police came back with a search warrant and that the unlawful act of the Sheriff and his deputies did not apply to the Chief of Police. However, the Sheriff and his deputies were trespassers and by reason of this trespass saw the whiskey under the home of the defendant, and then went and obtained a search warrant and accompanied the Chief of Police to defendant's property.[44]

The decision in the *Bewley* case seems correct from every standpoint. It is consistent with: the principle that the guaranty of the Tennessee Constitution against unreasonable searches and seizures is to be "liberally construed in favor of the individual";[45] the direction indicated previously in this area of the law by the Tennessee court;[46] and the developing law of searches and seizures in other states and in the federal courts.[47]

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43. The court's statement (347 S.W.2d at 41) that the search was a violation of "Article Four, as amended, of the Constitution of Tennessee" is obviously an inadvertence inasmuch as article 4 deals only with elections and military duty. Undoubtedly, the court intended to refer to article 1, section 7, *supra* note 40.

44. 347 S.W.2d at 41, citing Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946) and Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947).

45. Hughes v. State, 176 Tenn. 330, 339, 141 S.W.2d 477, 480 (1940).

46. "The Constitution of this State protects citizens of this State against unreasonable searches and seizures, and it has been held consistently that officers may not search premises without having a proper search warrant, and that, if such search is made in defiance of the rights of the owner of the premises, any evidence obtained through such unlawful search is inadmissible against the owner in any prosecution." Kelley v. State, 184 Tenn. 143, 145, 197 S.W.2d 545, 546 (1946).

See also Murphy v. State, 194 Tenn. 698, 254 S.W.2d 979 (1953). In the latter case, two highway patrolmen, pursuant to a radio call from their superior officer concerning defendant "to stop him and see what he had" and to make an "investigation," halted defendant in his automobile on the pretext of examining his driver's license; and one patrolman detained him while the other went for a search warrant, under which they subsequently searched his automobile and seized evidence upon which he was convicted of illegally possessing intoxicating liquor. The court answered "We think not" to its question, "[D]oes the issuance of a valid search warrant, following an unlawful arrest, have the effect of legalizing the arrest and justify the introduction of evidence discovered as a result of the search?" 194 Tenn. at 704.

47. See cases cited in Annot., 143 A.L.R. 135 (1943); 4 WHARTON, *op. cit. supra* note 8, § 1580.

Justice Holmes long ago rejected the proposition "that the protection of the Constitution covers the physical possession but not any advantages that the Government

*(b) Indictments and Presentments.—Bullard v. State*[48] presented the interesting situation of a defendant having been indicted under the bad check law for giving a bad check on a certain date, separately indicted for public drunkenness as of another date, and (after consolidation of the indictments for trial together over his objection) convicted in a single trial upon both charges. The defendant's position on appeal was that the trial court had erred in using the consolidation procedure when the indictments upon their face showed by their dates and the nature of the charges that they were for distinct offenses not provable by the same evidence and in nowise resulting from the same series of acts.

The supreme court, referring to a statement by defense counsel that he "feels" the action of the lower court to have been in error, remarked that "such a reaction to such not usual trial procedure is understandable."[49] And, as to the position taken by some courts that such a consolidation over a defendant's objection is not permissible because it might prejudice the defendant and that the practice after its adoption would be exceedingly difficult to regulate with a proper regard for his rights,[50] the court expressed its view that "it cannot be gainsaid that there is considerable force" in such reasoning.[51]

But the court adopted the so-called "majority" view that "in any case, the propriety of trying together separate indictments or informations against the same accused over his objection rests in the sound discretion of the trial court, which has the obligation to safeguard not only the rights of the government but also of the accused and to see that such rights are not jeopardized."[52] And, evidently being of the opinion that the trial court in the instant case had not abused its discretion in this regard, the court rejected the defendant's contention and affirmed the judgment of conviction:

> Apropos here, this court is unable to perceive how the testimony of the particular misdemeanor charged (public drunkenness) generally rising little

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can gain over the object of its pursuit by doing the forbidden act." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920). A more recent pronouncement took this form: "A federal agent cannot participate in an unlawful search, and then on the basis of what he observed in the course of that search, and on that basis alone, go to a United States Commissioner and swear out a search warrant. Such a search warrant, and the evidence procured in the course of a search thereunder, would be merely the illegal product of a previous unlawful search by federal authorities. See Silverthorne Lumber Co., Inc. v. United States, 1920, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319; Fraternal Order of Eagles, No. 778 v. United States, 3 Cir., 1932, 57 F.2d 93. See also Johnson v. United States, 1948, 333 U.S. 10, 68 S. Ct. 367, 92 L.Ed. 436." McGinnis v. United States, 227 F.2d 598, 603-04 (1st Cir. 1955). See also United States v. Bush, 172 F. Supp. 818 (E.D. Tenn. 1958).

48. 348 S.W.2d 303 (Tenn. 1961).

49. *Id.* at 305.

50. Annot., 59 A.L.R.2d 841, 859 (1958).

51. 348 S.W.2d at 305.

52. Annot., *supra* note 50, at 845.

> above a petty misdemeanor presented in the same case as the testimony for the giving of the worthless check upon an entirely different date could have affected the rights of defendant, Bullard, to his prejudice with reference to the deliberation of the jury as to his guilt on the worthless check charge, or vice versa as to his guilt of the publie drunkenness charge.[53]

It is possible, of course, that some jurors in deliberating about what should be done as to a defendant in a case will deem the man under consideration more blameworthy if they have had accusations, evidence, and argument by the state in the same proceeding concerning several alleged criminal actions on his part, than they would if he stood before them on a single charge. When such a reaction is evoked in even fewer than all the jurors, the outcome may be more severe for the defendant after compromises in the jury room are made in order to get the agreement of all.

In looking at other cases wherein the "majority" view has been taken, one is impressed by the fact that appellate courts when upholding a consolidation of indictments against a defendant's objection have given weight to such factors as that the issues were the same in both cases, the facts were the same in both cases, the offenses grew out of the same transaction or chain of circumstances, the indictments were for closely related offenses, the offenses indicated a common scheme or continuing course of conduct, the witnesses would be the same if separate trials were held, and the evidence offered to support one indictment would to considerable extent support the other. In addition, the matters of delay and expense are given attention. But the proviso is always found that the consolidation must not result in prejudice to the accused or in embarrassment to the presentation of his defense.[54]

If any of the factors favoring consolidation recounted in the immediately preceding paragraph were present in the *Bullard* case (other than an assumed saving in time and expense), they are not apparent in the brief report of it. To the contrary, it is stated that the alleged offenses occurred on different dates, and the implication may be drawn from the manner in which the court stated defendant's contention and the absence of findings to the contrary that these were unrelated and distinct offenses not provable by the same evidence and in no sense resulting from the same series of acts.

So, while purporting to adopt the "majority" view that the trial court has discretion whether to consolidate several indictments over a defendant's objection, the court, by upholding the exercise of discretion to consolidate in a case evidently lacking the bases found for such exercise in the "majority" cases, seems to have gone beyond the usual "majority" position.

53. 348 S.W.2d at 306.
54. Annot., *supra* note 50, at 855-56.

Very likely Tennessee trial courts have heretofore seldom if ever consolidated for a single trial over a defendant's objection two or more indictments charging unrelated offenses committed at separate times; otherwise the question would surely have been presented to the supreme court before now. It is to be hoped that the *Bullard* decision will not stimulate this practice in view of the possibility of abuse inherent in it.

It was objected in *Coke v. State*[55] that the presentment therein did not set out the offense charged in the language of the statute. In overruling this objection, the supreme court reiterated the long-standing rule in the state that, while it is better practice to use the words of the statute, it is not essential to do so as long as the words substituted are equivalent to the statutory words.[56]

2. *Trial—(a) Evidence.*—Evidentiary questions involved in some of the criminal cases comprehended in the survey period are treated elsewhere in this survey by another writer,[57] but they are footnoted here[58] as a convenience to the reader.

55. 345 S.W.2d 673 (Tenn. 1961).

56. The report of the *Coke* case does not set out the words in the presentment and in the statute which were the subject of the objection and of the court's ruling on the point. For previous cases in point, see State v. Smith, 119 Tenn. 521, 105 S.W. 68 (1907) (statute: "knowingly, wilfully, and maliciously cut or remove . . . timber . . . without the consent of the owner"; held that substitution in indictment of "feloniously" for "maliciously" was all right); Starks v. State, 66 Tenn. 64 (1872) (malicious stabbing case, "cut, penetrate, and wound" used in indictment instead of statutory word, "stab"—indictment held sufficient); State v. Pennington, 40 Tenn. 119 (1859) (statute: "to wilfully and maliciously . . . throw down any fence"; held sufficient to substitute "unlawfully and wantonly" for "wilfully"); Peek v. State, 21 Tenn. 78 (1840) (passing counterfeit coin case, "likeness and similitude" used in indictment instead of the statutory word, "imitation"—held the indictment not vitiated).

57. Morgan & Handler, *Procedure and Evidence—1961 Tennessee Survey (II)*, 15 VAND. L. REV. 921 (1962).

58. *Competency of witnesses*: Strunk v. State, 348 S.W.2d 329 (Tenn. 1957) (witness, rendered infamous by robbery conviction prior to effectiveness in 1953 of statute stating persons so convicted shall not be disqualified to give testimony in court proceeding and that the statute is "not to be retroactive so as to affect any matter in litigation at the time of passage," not incompetent to testify in a case alleging commission of a crime in 1956). *Corroboration*: Wilkerson v. State, 348 S.W.2d 314 (Tenn. 1961) (although corroboration normally not required in prosecution under statute concerning carnal knowledge of child under twelve years, held required when child did not reveal alleged violation until six months after its occurrence). *Experiments*: Rhea v. State, 347 S.W.2d 486 (Tenn. 1961) (proper to exclude testimony as to experiments by witness with reference to distances at which powder burns might occur and appear, when conditions under which experiments were made were not shown to be similar to those under which firearm was discharged in alleged commission of crime). *Impeachment of witnesses*: Rhea v. State, *supra* (bad conduct discharge from armed services is not admissible for impeachment of witness when it was not shown to have involved an act of moral turpitude) (party may impeach his own witness when surprised by witness' testimony, by asking witness about alleged prior contradictory statements in effort to discredit witness but not as evidence of the facts asserted in the prior statements). *Other crimes*: Johnson v. State, 345 S.W.2d 883 (Tenn. 1961) (evidence of other offenses similar to offense charged is admissible to

*(b) Order of Proof.*—The order of introducing evidence is generally held to be a matter largely in the discretion of the trial court and this discretion is abused only where the order permitted is clearly prejudicial.[59]

*Oliver v. State*[60] raised the question whether such discretion was abused by a trial court in permitting the jury to consider in behalf of the state evidence as to a particular defendant, put on after both the defense and state had rested as to him at the conclusion of the state's evidence.

Oliver and others, including one Crowe, separately indicted for burglary and receiving and concealing stolen property, were jointly tried. The state put on an arresting officer who testified that he stopped an automobile containing the defendants and certain allegedly stolen goods and that "in the presence of all of them," including Oliver, who the officer said was intoxicated, Crowe "told me that they stole it." Following the testimony for the state of another officer to the same effect, and that of an individual claiming ownership of the goods as to their theft and his identification of them, Oliver's counsel moved for a directed verdict. When the motion was denied, he announced that the defense rested. Immediately thereafter the other defendants began testifying in their own behalf. Two defendants, Estepp and Arnett, at that point disclaimed having known that the goods were stolen until the other defendants told the officers at the time the automobile was stopped that "they" (a reference that included Oliver) had stolen the goods. Subsequently the trial court refused to grant an instruction requested by Oliver that "You will not consider against the defendant, Phill Oliver, any evidence introduced after he rested his case." Oliver, upon conviction for receiving and concealing stolen property, assigned this refusal as error on appeal.

The supreme court stated that the general rule that the trial judge has wide discretion as to matters concerning the order of proof, whether to allow a party to reopen a case for further proof, and the like, obtains in Tennessee and elsewhere, although it recognized that the exact question presented on this appeal had not been previously decided by a Tennessee appellate court. As to this specific question, the court concluded that whether evidence introduced after a defendant in a criminal prosecution

show a scheme or design). *Relevancy*: Sims v. State, 348 S.W.2d 293 (Tenn. 1961) (evidence that defendant, prior to killing and robbing woman, had planned to rob truck and kill driver, if admitted to show intent, was relevant to count of indictment for murder; admissible even if prejudicial as to count for killing in perpetration of robbery although defendant not convicted on former count). *Silence of accused*: Oliver v. State, 348 S.W.2d 325 (Tenn. 1961) (evidence admissible that statement incriminating defendant was made by another in defendant's presence and hearing and that he remained silent though having opportunity to speak). *Sufficiency of evidence*: Hatchett v. State, 346 S.W.2d 258 (Tenn. 1961) (unexplained presence of contraband whiskey upon premises occupied by accused and under his control is sufficient to convict for illegal possession thereof).

59. 2 UNDERHILL, CRIMINAL EVIDENCE § 547 (5th ed. 1956) and cases cited therein.

60. 348 S.W.2d 325 (Tenn. 1961).

has rested may be considered by the jury as to him is a matter also in the trial court's discretion. The court reasoned that since the state in putting on its proof as to Oliver had no way to compel the other defendants to testify concerning Crowe's statement to the arresting officer because of the incriminating nature of such evidence as to them, the state had proceeded in the only way it could proceed in presenting the evidence as to Oliver. Consequently, the court held that the trial court had not abused its discretion in allowing this procedure, and the judgment of conviction as to Oliver was affirmed.

In reaching this conclusion, the court quoted with approval the encyclopedic statement that "an accused cannot rest his case on the evidence produced by the prosecution in chief and thereby limit the court or jury to a consideration of only such evidence as has been produced up to the time accused rested his case."[61]

As has been said elsewhere: "Material testimony . . . after the defendant has rested should not be excluded unless an unfair advantage over the defendant is obtained by its admission."[62] If this proviso is observed, there should be no quarrel when a trial court permits the procedure used in the *Oliver* case, particularly when, as there, the state has no workable means by which to produce in its evidence in chief the matters later presented.

*(c) Improper Argument.*[63]—In *Coke v. State*[64] the defendant on appeal urged the objection that the attorney general in his closing argument had commented upon defendant's failure to offer evidence to support his reputation as to truth and veracity in the community. This assignment of error was overruled by the supreme court, which, while agreeing that the attorney general's comment was perhaps not proper, held that defendant could not be heard to complain about such comment when defense counsel in his own closing argument had opened up the subject to comment by stating that defendant stood before them without any evidence against his character for telling the truth.

This conclusion is in line with the sometimes criticized[65] general attitude concerning retaliatory remarks to the effect that even an improper line of discussion by counsel in closing argument is no just ground for complaint when provoked by, or in reply to in like manner, similar remarks

61. 23 C.J.S. *Criminal Law* § 1056, at 1235 (1961), citing Elliott & Hall v. State, 19 Ariz. 12, 165 Pac. 300 (1917).

62. 2 UNDERHILL, *op. cit. supra* note 59, at 1365.

63. See generally Note, *The Permissible Scope of Summation*, 36 COLUM. L. REV. 931 (1936).

64. 345 S.W.2d 673 (Tenn. 1961).

65. The "doctrine of retaliation, offsetting improper summation on the one side by improper summation on the other . . . seems undesirable as it is almost impossible to determine accurately the effect of the comparative misconduct of the parties." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 445 (1947).

of opposing counsel.[66]

Although the court in the *Coke* case noted that there is no Tennessee case in point, the conclusion reached therein seems to complement the holding in a line of Tennessee decisions that, while by statute no argument can be based on the failure of a defendant to take the stand, such immunity does not extend to his failure to offer other witnesses.[67]

Is it reversible error for a trial court to refuse to allow counsel for a defendant in a criminal prosecution to read from law books or to argue law to the jury? As a basis for examining the recent decision on this point in *Saunders v. State*,[68] it seems useful to notice certain provisions in the state constitution and to review previous decisions of the state supreme court that are pertinent.

The constitution provides in relevant part: "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . ."[69] and "[I]n all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."[70]

The early landmark case in Tennessee on the question of a criminal defendant's asserted rights to read and argue law to his jury was *Hannah v. State*,[71] the official report of which is so short that it is feasible to set out in full herein:

> Plaintiff in error was convicted of assault and battery. During the trial of the cause, counsel for the defendant was arguing such legal propositions as he claimed were applicable to the facts of the case. The Attorney General objected, and insisted that questions of law should not be argued to the jury.
>
> The court ruled that counsel might argue the law to the court, and read his authorities to the court, but would not be allowed to read the law books to the jury or argue the law of the case to the jury.
>
> This was error. It is impossible to understand how counsel can make out a case from facts, while he is forbidden to state and argue the law applicable to the facts.
>
> It requires both facts and law to make a prosecution or defense in either civil or criminal proceedings.
>
> Without facts there can be no law to operate. To hold that the facts may be argued, but the law shall not be presented with these facts is to deny the benefit of counsel. The value of facts depend upon the law that governs them. No lawyer can discuss propositions except in a combination

66. 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2083 (Anderson ed. 1957).

67. See, *e.g.*, Ford v. State, 184 Tenn. 443, 449, 201 S.W.2d 539, 541 (1945); Hutchins v. State, 172 Tenn. 108, 113, 110 S.W.2d 319, 321 (1937); Hays v. State, 159 Tenn. 388, 393, 19 S.W.2d 313, 315 (1929).

68. 345 S.W.2d 899 (Tenn. 1961).

69. TENN. CONST. art. 1, § 9.

70. TENN. CONST. art. 1, § 9. Virtually the same wording is used in TENN. CODE ANN. § 39-2703 (1956).

71. 79 Tenn. 201 (1883).

of law and facts. By our Constitution the accused hath a right to be heard by himself and counsel.

Reversed.[72]

A few years later, the court in *Ford v. State*[73] reiterated: "Under our practice his counsel have the right to read and argue the law of his case to the jury."

Whereas in the *Hannah* and *Ford* decisions the court had spoken in very broad terms of the criminal defendant's rights to read and argue law to the jury, the court subsequently indicated limits to these rights. In *Smithson v. State*[74] the supreme court held that it was within the sound discretion of the trial court on the second trial of a homicide case to prevent defense counsel in his argument from reading to the jury the supreme court's published opinion supporting a previous decision in the same case on a former appeal from the first trial, the supreme court in the previous opinion having commented on facts relative to the motives of the deceased and of the defendant as disclosed in the original trial. In *McCormick v. State*,[75] the court stated that it thought a trial court's permitting an attorney general to refer in argument to "the famous *Cudahy* case in Kansas City" to be highly improper when there was nothing in the record to sustain such argument. And in *Davis v. State*[76] the supreme court stated that it was improper for the district attorney general to read to the jury the facts of another case and to compare those facts with the facts of the case being tried. Finally, the supreme court in the recent case of *Marable v. State*[77] held that "since it is within the province and discretion of the trial judge as to what he shall permit or refuse to be read from an opinion, unless he does abuse this discretion and let them compare facts of another case to the facts of this case . . . ."[78] it was not prejudicial error for the district attorney general at the trial below to quote a poem from an opinion in another case where facts of the two cases were not compared in the argument.

In the *Saunders* case, the trial court did not allow defendant to read from portions of certain law books. This was assigned as error by the

72. *Id.* at 201-02.
73. 101 Tenn. 454, 459, 47 S.W. 703, 705 (1898).
74. 127 Tenn. 357, 155 S.W. 133 (1913).
75. 135 Tenn. 218, 186 S.W. 95 (1916). In the civil case of Pullman Co. v. Pennock, 118 Tenn. 565, 102 S.W. 73 (1907), the court held that it was highly improper in a damages action against a carrier for refusal of accommodations, for plaintiff's attorney to read from the report of a decision in another jurisdiction and to state to the jury that it was almost identical to the case being tried, that a verdict of $10,000 had been rendered therein, and that the supreme court in the other jurisdiction had upheld it.
76. 161 Tenn. 23, 28 S.W.2d 993 (1930).
77. 203 Tenn. 440, 313 S.W.2d 451 (1958).
78. *Id.* at 459, 313 S.W.2d at 460.

convicted defendant, who argued that since the state constitution makes the jury the judge of both law and facts the court should have allowed defense counsel to read to the jury from various legal sources. The supreme court conceded that the *Hannah* case supported defendant's position, but it overruled that case "as far as it states an abstract principle of law applicable to all occasions"; the court adopted the principle which it interpreted the *Smithson, Davis,* and *Marable* cases as standing for—that "it is a discretionary matter" with the trial court as to whether to allow a party to read from law books to a jury.[79] On petition to rehear, the court took the position that the *Hannah* decision, contrary to the normal interpretation that had been put on it over the years, did not hold to be reversible error the refusal to allow the defense to read any law that it wants to read. It was only this erroneously "accepted rule" of the *Hannah* decision that it was overruling, the court explained.[80]

Having concluded that in trying the *Saunders* case it was discretionary with the court below whether to allow defense counsel to read law books to the jury, the supreme court held further that if the trial court erred in the exercise of its discretion it was only harmless error and, in the light of the Harmless Error Statute,[81] not a ground for upsetting the judgment. The defendant, invoking the rule of *Dykes v. State*[82] to the effect that when a constitutional right is invaded the Harmless Error Statute will not save such error, argued that the Harmless Error Statute does not apply here because a constitutional right of his was denied in not allowing him to read law to the jury. To this the court responded that, although in criminal cases the jury under the constitution is judge of both the law and the facts,[83] there is no constitutional provision giving a defendant the right to read to a jury from law books. In so holding, the court took no notice of the reference in the *Hannah* decision to another of a criminal defendant's rights under the Tennessee Constitution—"to be heard by himself and his counsel"[84]—which the court in the *Hannah* decision indicated was the right violated by refusing to allow him to read law to the jury.

*(d) Instructions.*—In a well-known decision of more than fifty years ago, the Tennessee Supreme Court in *Frazier v. State*[85] held that it is not enough in a criminal case to instruct a jury that they must acquit a defendant if they find his contention or theory of the case to be true; in addition, they must be instructed that "if they found this contention to

79. 345 S.W.2d at 907.
80. *Id.* at 909.
81. TENN. CODE ANN. § 27-117 (1956).
82. 201 Tenn. 65, 296 S.W.2d 861 (1956). See also Ford v. State, 101 Tenn. 454, 47 S.W. 703 (1898).
83. TENN. CONST. art. 1, § 19.
84. TENN. CONST. art. 1, § 9.
85. 117 Tenn. 430, 100 S.W. 94 (1907).

be true, or if the proof offered to support it engendered in their minds a reasonable doubt of its truth, they should acquit."[86] For to leave off the second half of the instruction, the court said, would leave the jury to understand that the defendant had to establish his theory by a preponderance of the evidence, whereas the law is that he is entitled to a verdict of not guilty if a reasonable doubt is created in the minds of the jury.

In the *Saunders* case the following portion of the trial judge's charge was assigned as error for allegedly failing to conform to the approved *Frazier* charge: "If you believe the theory of the defendant or find from all the proof in the case that the State has failed to prove him guilty beyond a reasonable doubt to any one of the assaults with intent to commit felonious homicides or misdemeanors embraced in the Presentment, it is your duty to acquit the defendant."[87]

In overruling this assignment, the court said that the "identical" question had been answered in *Rosenthal v. State*,[88] in which the jury had not been instructed to acquit if they had a reasonable doubt as to defendant's theory, and that "that same answer is equally applicable here."[89] The *Rosenthal* answer: "[I]n the instant case the Court fully charged on reasonable doubt except in respect to the above omission. We think that this omission was nothing more than meagerness in the charge and that it was the duty of counsel to offer a special request and having failed to do so, they cannot now complain of same. *Turner v. State*, 188 Tenn. 312, 219 S.W. 2d 188."[90]

In *Saunders* the court emphasized that the jury had been told that they must acquit if they had a reasonable doubt as to defendant's guilt, and concluded that there was no error in the charge read as a whole. Moreover, the court added that the charge "at least gives to the jury the same meaning as the correct charge set out in the *Frazier* case."[91] Perhaps so, but trial judges would be well-advised to stick to the much clearer wording of the *Frazier* charge.

And to avoid meagerness in the charge, and the "answer" given in *Rosenthal* and *Saunders*, defense counsel should request specially the *Frazier* charge in so many words.

One of the questions on the appeal of *Strunk v. State*[92] was whether it was reversible error in the trial of individuals indicted under the robbery statute[93] to charge the jury with respect to armed robbery but not the

86. *Id.* at 461, 100 S.W. at 102.
87. 345 S.W.2d at 905.
88. 200 Tenn. 178, 292 S.W.2d 1 (1956).
89. 345 S.W.2d at 905.
90. 200 Tenn. at 189, 292 S.W.2d at 6.
91. 345 S.W.2d at 905.
92. 348 S.W.2d 339 (Tenn. 1957).
93. "Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person

lesser offense of simple robbery, both of which are embraced in the statute.

The supreme court held that under the rule of *Powers v. State* ("the general rule is that the trial judge must charge upon every offense embraced within the indictment; but . . . there will be no reversal for his failure to do so, when this court can see that the prisoner suffered no injury by reason of such omission")[94] there was no error. In the *Powers* case it had been held that failure to charge as to the lesser offense was not error when "there was no evidence that would have justified such a charge"[95] and the defendant therefore had not suffered from its omission. And the court viewed the *Strunk* case in the same light, stating that from the evidence defendants were guilty either of armed robbery or no offense at all, and that there was no fact in evidence to support a charge of simple robbery.

To evaluate the court's conclusion in this respect, it is necessary to see what evidence had been put on at the trial. The prosecuting witness and his wife, beer tavern operators, had testified that they were awakened early in the morning in their living quarters at the tavern by the two defendants, one of whom drew a gun and the other of whom took the husband's billfold. The defendants had testified that they went to the tavern unarmed to buy a case of beer and that the prosecuting witness shot one of the defendants who was in the act of reaching for a screen door at the front of the tavern.

Defense counsel on appeal contended in effect that the jury might have believed the part of defendants' testimony that they were unarmed and disbelieved the testimony given in behalf of the state that they were armed, and might therefore have concluded that robbery had been committed other than by use of a deadly weapon. Consequently, it was further contended, an instruction concerning simple robbery under the statute should have been given, defendants were prejudiced because it was not given, and this was reversible error.

Although the supreme court agreed that a jury may believe any part, none, or all of a witness' testimony, the court was persuaded that "there is not one iota of evidence that the robbery was committed other than by the use of a deadly weapon"[96] and it therefore rejected defendants' contention in this regard—a contention which seems to have some merit.

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convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years." TENN. CODE ANN. § 39-3901 (Supp. 1961).

94. 117 Tenn. 363, 372, 97 S.W. 815, 817 (1906). See also Rushing v. State, 196 Tenn. 515, 526, 268 S.W.2d 563, 568-69 (1954); Owen v. State, 188 Tenn. 459, 470, 221 S.W.2d 515, 520 (1949).

95. 117 Tenn. at 372, 97 S.W. at 817.

96. 348 S.W.2d at 344.

Tennessee thus continues to follow the general rule that the trial court should instruct the jury as to lesser and included crimes where a conviction for them is authorized under an indictment, except that such instruction need not be given when the facts show that the defendant is either guilty of the specific or greater crime charged or is guilty of no crime at all. In other words, if no evidence is offered on which conviction of a lower offense could be sustained, the court does not have to instruct concerning the lower offense, but if any evidence is offered which would warrant a verdict as to a lesser offense, instruction as to that offense must then be given.[97]

In *Robinson v. State*,[98] a homicide case, blood test evidence had been admitted at the trial—testimony as to how the test was made, that it "showed .23%," and that the medical and legal professions had agreed that a level of over .15% content of alcohol in blood had tendencies of intoxication. At the conclusion of the trial the court did not charge anything as to presumption of intoxication as evidenced by the test. On appeal from a conviction of involuntary manslaughter, defendant contended that the trial judge erred in not instructing the jury that by statute[99] the presumption of intoxication evidenced by such blood test was not a conclusive presumption and should not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of an intoxicant within certain statutory prohibitions.

Remarking that the failure to charge with regard to presumption of intoxication was more favorable to the defendant than it was adverse, the supreme court held that if the defendant desired the trial court to give an instruction of that nature he should have tendered a special request, and it accordingly overruled the assignment of error.

*(e) Verdict.*—The supreme court continues to hold[100] that directed verdicts—even of acquittal in a criminal case—are not authorized in Tennessee, a position which we have had occasion to criticize before.[101]

97. ORFIELD, *op. cit. supra* note 65, at 455-56.

98. 347 S.W.2d 41 (Tenn. 1961).

99. "If there was, at the time alleged, fifteen hundredths percent (.15%) or more by weight of alcohol in the defendant's blood, as shown by chemical tests of the blood, urine or breath of the defendant, it shall be presumed that the defendant was under the influence of an intoxicant within the prohibition of §§ 59-1031—59-1036; but, this presumption is not conclusive and shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of an intoxicant within the prohibition of §§ 59-1031—59-1036." TENN. CODE ANN. § 59-1033 (1956). This statute, with others, are discussed in Note, *The Law of Presumptions in Tennessee*, 10 VAND. L. REV. 563 (1957).

100. Oliver v. State, 348 S.W.2d 325, 327 (Tenn. 1961).

101. 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).

Two questions worthy of note were raised about the verdict in *Strunk v. State*.[102]

There, two defendants were being tried under an indictment for violation of the robbery statute, which statute covers both armed robbery and so-called simple robbery and provides punishment of not less than ten years imprisonment for armed robbery and of from five to fifteen years for simple robbery.[103] The jury found the defendants "guilty and fixed their punishment at five years in the penitentiary,"[104] whereupon the trial court pointed out that the statute provides for a minimum sentence of ten years for armed robbery, and it directed them to consider their verdict on that basis. Following this, the jury then reported that they found defendants "guilty and fixed their punishment at ten years."[105] As noted hereinbefore,[106] the supreme court was of the opinion that from the facts defendants were guilty either of armed robbery or they were not guilty of any offense. Therefore, the court reasoned that since the jury found defendants "guilty" under the robbery statute, it must have been for armed robbery, and the jury did not have the authority to fix the punishment therefor at less than ten years. Hence, it was held not to be error for the trial court to call the jury's attention to the minimum punishment required for armed robbery and to direct them to consider their verdict accordingly.[107]

A second assignment of error in *Strunk* concerned the failure of the trial court to grant a new trial on presentation of the affidavit of nine of the jurors that they had not found defendants guilty of armed robbery, but only guilty without specifying what the defendants were guilty of, and fixed the punishment at five years. The supreme court overruled this assignment also, reiterating its view that under the facts the jury was not warranted in bringing in a verdict of guilty other than guilty of armed robbery, with a minimum penalty of ten years imprisonment, and holding that the jurors could not impeach their verdict in the manner attempted.[108]

The latter holding is in line with the general position that affidavits from jurors impeaching their verdict are not admissible in support of a motion for a new trial.[109]

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102. 348 S.W.2d 339 (Tenn. 1957).

103. TENN. CODE ANN. § 39-3901 (Supp. 1961), quoted in full at note 93 *supra*.

104. 348 S.W.2d at 342.

105. *Ibid.*

106. See text accompanying notes 92-97 *supra*.

107. The court cited (348 S.W.2d at 342) two previous cases in which the supreme court had said that it was proper for the trial court (after the jury had already brought in a verdict) to explain to the jury, the jury's authority as to a verdict and to direct them to consider further their verdict: Riley v. State, 189 Tenn. 697, 227 S.W.2d 32 (1950); Alexander v. State, 189 Tenn. 340, 225 S.W.2d 254 (1949).

109. 5 WHARTON, *op. cit. supra* note 66, § 2159; ORFIELD, *op. cit. supra* note 65, (1949); Lee v. State, 121 Tenn. 521, 116 S.W. 881 (1909); George v. Belk, 101 Tenn. 625, 49 S.W. 748 (1899).

109. 5 WHARTON, *op. cit. supra* note 66, § 2159; ORFIELD, *op. cit. supra* note 65, at 485-88.