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Criminal Law and Procedure -- 1958 Tennessee Survey

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CRIMINAL LAW AND PROCEDURE— 1958 TENNESSEE SURVEY

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In surveying the field of criminal law and procedure the cases presented to the supreme court during the year were little more than normal or typical. Several of the criminal cases are not presented in detail in this article, as they are dealt with in other survey sections.

SUBSTANTIVE LAW

Homicide: In the case of *Edwards v. State*[1] the court again relies upon the doctrine of *Keller v. State*,[2] in which decision the court held that driving an automobile while intoxicated is an act malum in se, and when a person is killed by an automobile being driven by one who is intoxicated, the driver is guilty of homicide without showing the causal connection between the death and the driver's act,[3] which homicide can be involuntary manslaughter[4] or second degree murder.[5] The court, sustaining the conviction of second degree murder, overruled the contention of the defense that he could not be guilty of such crime, as his state of intoxication precluded malice.[6] The defendant, who had voluntarily put himself in an intoxicated condition, driving on the highway at a high rate of speed, struck a highway patrolman who was standing by a parked car. Since the act under the theory of *Keller v. State* was malum in se, it was not necessary to show that the death was the probable result of the criminal act of intoxication. The facts show that the motorist drove his car on the highway at a high rate of speed heedless of danger to others. Such intoxication does not preclude malice, and under the rules of this state he was properly found guilty of second degree murder.[7]

In the case of *Lewis v. State*[8] there was also a conviction of murder in the second degree and the court found nothing in the record that would tend to exonerate the defendant from the charge of murder.

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1. 304 S.W.2d 500 (Tenn. 1957).
2. 155 Tenn. 633, 299 S.W. 803 (1927), 41 HARV. L. REV. 669 (1927).
3. Davis v. State, 194 Tenn. 282, 250 S.W.2d 534 (1952); Whitlock v. State, 187 Tenn. 522, 216 S.W.2d 22 (1948).
4. Keller v. State, 155 Tenn. 633, 299 S.W. 803 (1927).
5. Owen v. State, 188 Tenn. 459, 221 S.W.2d 515 (1949).
6. *Id.* at 468.
7. Atkins v. State, 119 Tenn. 458, 481, 105 S.W. 353 (1907). "[I]t is murder in such case though the perpetrator is drunk .... Hence a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling." See State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925); Rogers v. State, 196 Tenn. 263, 265 S.W.2d 559 (1953).
8. 304 S.W.2d 322 (Tenn. 1957).

The court overruled the assignment of error that there was no evidence of malice, and that the circumstances of the killing were insufficient to prove murder as there were no eye witnesses, and that the evidence was entirely circumstantial and not inconsistent with the hypothesis that the shot was fired accidentally rather than willfully.

Defendant and several others had gone to the country in a truck to obtain some lumber which the defendant had purchased from the deceased. The defendant, the seller, and two friends who were along indulged in a bit of drinking on the trip to the saw mill and while they were loading the lumber they became loaded with spirits fermenti. The defendant and the deceased had an argument as to the value of the lumber. The defendant had a pistol in his pocket and showed it to several of the members of the group. On the way back they stopped and two of the men got out, leaving the deceased and the defendant in the cab of the truck alone. Shortly thereafter one witness heard a shot and looked towards the men in the truck. The defendant still had a pistol in his hand and the deceased, who was unarmed, was mortally wounded and died shortly thereafter. There was evidence of what went on prior to the shooting and subsequent to the shooting but what happened at the time of the homicide is not testified to except by the defendant himself who stated that he was so drunk that he did not know what he was doing. The defense was that there was no evidence of malice nor was the firing of the shot done maliciously or willfully. The court states that when a homicide is clearly proven and the slayer is ascertained and nothing else is proven, the killing is presumed to be criminal,[9] as every person is presumed to intend the usual and natural consequences of his acts.[10] Malice is presumed under the same circumstances until the contrary appears from either the direct or the circumstantial evidence.[11] The court, in ruling that where the killing may be proven and no accompanying circumstances appear in evidence there is a presumption that the killing was done maliciously, is following the well established rule in this state.[12] There were no circumstances indicating that the killing

9. Draper v. State, 63 Tenn. 246 (1874).
10. *Ibid.*
11. Foster v. State, 74 Tenn. 213 (1880); Epperson v. State, 73 Tenn. 291 (1880).
12. Coffee v. State, 11 Tenn. 283 (1832). "Presumptions only arise where there is an absence of proof. In homicides, when the fact of killing with its attendant circumstances is proved clearly and satisfactorily, so that the proof either shows express malice, or that there was no malice at all, there is nothing to be presumed either the one way or the other; but in cases where the killing may be proved and no accompanying circumstances appear in the evidence, the law presumes that the killing was done maliciously. So where the killing is proved, and the circumstances attending it are shown, though no express malice may appear from the proof, it may be presumed from some attending fact, as if a deadly weapon were used, the law presumes malice." *Id.* at 287. See Bryant v. State, 66 Tenn. 67 (1872).

was accidental; the court therefore concludes that it was done with malice, which supports the charge of second degree murder.[13]

In a conviction of second degree murder in the case of *Hunt v. State*,[14] the court suggests a reduction in sentence to voluntary manslaughter under the rule that death under circumstances which indicate mutual combat, and which grows out of a sudden heat of the combat, is voluntary manslaughter,[15] and not second degree murder.[16]

Defendant was at the home of a friend when the deceased came seeking an occupant of the house who had attacked the deceased's wife. There was a conflict of testimony as to whether or not the defendant came out of the house or was attacked inside, but there was sufficient evidence of mutual combat. There was evidence that both parties were using deadly weapons. The common law held that the killing of a person from a sudden transportation of passion or heat of blood, as in a fight or sudden combat, is manslaughter, and where the defendant willingly engaged in a gun battle out of passion aroused by an unprovoked assault, the killing would be manslaughter.[17] The court reversed with the instruction to correct the judgment with the consent of the state and to enter sentence as manslaughter. Of course, if the state does not consent, the case will be remanded for a new trial.[18]

PROCEDURE

One of the interesting cases, although a civil action for the wrongful death of the plaintiff's husband under the theory that the husband was killed in an unlawful manner without justification, was that of *Gross v. Abston*,[19] in which the court in its decision discussed fully the rights of arrest and the right of an officer or individual to use force in making an arrest or apprehending a fleeing criminal. The court quotes from the case of *Human v. Goodman*:[20]

> An officer has no absolute right to kill, either to take a prisoner, or to prevent his escape, even in felonies, unless reasonably necessary to prevent escape; and whether or not there is a reasonable necessity for an officer to shoot a felon in flight, and the reasonableness of the grounds on which the officer acted, are questions for the jury.

The court then overruled the lower court on the ground that the jury could not find that the defendant had reason to believe that he was shooting at a fleeing felon instead of a misdemeanant.[21]

13. Atkins v. State, 119 Tenn. 458, 105 S.W. 353 (1907).
14. 303 S.W.2d 740 (Tenn. 1957).
15. TENN. CODE ANN. § 39-2409 (1956).
16. State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931).
17. State v. Miller, 223 N.C. 184, 25 S.E.2d 623 (1943).
18. Forsha v. State, 183 Tenn. 604, 194 S.W.2d 463 (1946).
19. 311 S.W.2d 817 (Tenn. App. M.S. 1957).
20. 159 Tenn. 241, 243, 18 S.W.2d 381 (1928).
21. Goodrich v. Morgan, 291 S.W.2d 610 (Tenn. App. M.S. 1956).

The defendant found the plaintiff's husband looking into a bedroom of an adjoining house occupied by the defendant's mother and young sister and testified to the fact that he saw the deceased trying to raise the window. He was called to and told to halt when he started to run but failed to do so, and the defendant shot him. The theory of the defendant was that the plaintiff's husband was attempting to break into the home in the night time. Therefore, he committed a felony, and defendant was in the process of making an arrest for a felony committed in his presence and had a right to use whatever force was necessary to apprehend him. The court found that the most the deceased could have been guilty of was the "Peeping Tom Act" which is a misdemeanor.[22] The court reviews the right of an officer to use force in making an arrest or to shoot a felon in flight if that is the only means of preventing his escape,[23] but, of course, an officer has no right to shoot anyone guilty of only a misdemeanor to stop his flight or prevent his escape. The right of a private person is more restricted than the right of an officer to make an arrest.[24]

In the case of *Duncan v. State*,[25] the court considered the case of a real estate broker who had been prosecuted for a fraudulent breach of trust and embezzlement. He had unsuccessfully offered in evidence a contract between the seller and himself to show that his compensation was to be all money received over the agreed selling price. The seller had agreed to accept $3600 for the property. The purchaser paid $200 in earnest money on an agreed purchase price of $3900. Subsequent to the payment of the earnest money a fire completely destroyed the house on the property, and $3000 in insurance was collected by the owner. The defendant claimed the $200 as part of his compensation, and claimed that the purchaser was entitled to the deed upon the payment of $900 (over and above $3000 collected on insurance by the owners), since the owners had only equitable title to the property after the $200 was paid. The court held that there was no criminal liability on the part of the defendant in obtaining the $200, as he had a right to retain all over and above $3600 as his own.[26] The court found that there was a joint ownership in the collected fund because of his contract of compensation, and he could enforce a vendor's lien on the property for his compensation.[27] Therefore, he had not been guilty of fraud on failure to turn the money over to the owners. He was not an agent of the buyer and could not be guilty of embezzlement, as

22. TENN. CODE ANN. § 39-1212 (1956). See also State v. McClure, 166 N.C. 321, 81 S.E. 458 (1914).
23. Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921).
24. Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (M.S. 1944).
25. 304 S.W.2d 625 (Tenn. 1957).
26. Burke v. State, 157 Tenn. 105, 6 S.W.2d 556 (1928).
27. Moss v. Thomas, 218 Ala. 141, 117 So. 648, 58 A.L.R. 1495 (1928).

his rights were those of a joint owner.[28] He could not be guilty of fraudulent breach of trust, as there was no trust relationship with the seller where he had an interest in the money retained as his own.[29]

In the case of *Franklin v. State*,[30] the defendant was convicted of receiving stolen property. In the absence of proof, either direct or circumstantial, of the receipt of the stolen property from a third party, jury could not convict defendants of receiving stolen property. Defendant was charged in a two-count indictment of larceny and also of receiving and concealing stolen property. The conviction of receiving stolen property amounted to an acquittal of the charge of larceny.[31] The facts of the case were that the defendant and a companion, after visiting a friend in the country, were found the next day in the possession of two of the friend's calves which they claimed to have purchased. There was no evidence of the receipt of the property from a third party. Granting that there may have been sufficient evidence to support a verdict of stealing the property, such is not sufficient to support a verdict of receiving such property knowing it to be stolen. This was discussed further in *Parham v. State*.[32] Since the jury returned a verdict that the defendants were guilty of the charge of receiving and since there was no evidence of a third party having committed the larceny and that the defendants received the property knowing it to be stolen,[33] defendants were ordered discharged.

In the case of *Valley v. State*,[34] the court decided the question as to whether or not it is necessary to have an assault or attempted assault to convict one of an attempt to commit a felony under the statute.[35] Defendant was charged with assault with an attempt to commit a felony, which assault was in the nature of a proposal to a fourteen year old boy for acts of sexual perversion. The minute entry of the lower court shows the defendant guilty of an attempt to commit a felony upon the witness. The bill of exceptions shows the defendant was found guilty of felonious assault. The court, in holding that the statute covers both assault with an attempt to commit a felony and any attempt otherwise to commit a felony, cited the case of *Senter v. State*,[36] where the court stated under this section that the attempt may be made by a personal assault on another or it may be made by

28. Baker v. Cooper, 201 App. Div. 639, 194 N.Y.S. 726 (1922).
29. People v. O'Farrell, 247 Ill. 44, 93 N.E. 136 (1910). See also Burke v. State, 157 Tenn. 105, 6 S.W.2d 556 (1928).
30. 308 S.W.2d 417 (Tenn. 1957).
31. TENN. CODE ANN. §§ 39-4217, 18 (1956).
32. 78 Tenn. 498 (1882).
33. Asbury v. State, 178 Tenn. 43, 154 S.W.2d 794 (1941).
34. 309 S.W.2d 374 (Tenn. 1958).
35. TENN. CODE ANN. § 39-603 (1956).
36. 187 Tenn. 517, 216 S.W.2d 21 (1948).

a simple attempt without a personal assault.[37] Necessary to the court's decision is the conclusion that mere words of solicitation are sufficient to constitute an attempt. This view is not supported by prior cases in this jurisdiction.[38] This would be likened to the case of soliciting a child under twelve years of age to have sexual intercourse, and in so doing the person would be guilty of attempt to commit rape upon such child.[39] The court concluded that the evidence did not show an actual assault, but it did show an attempt to commit a felony and the punishment is the same in either case. The chief justice dissented, but there is no written opinion of the dissent.

A case of interest in the field of searches and seizures was presented in an action by the commissioner of taxation for confiscation of an automobile.[40] In the case of *Atkins v. Harris*,[41] revenue agents, after purchasing whiskey from defendant's wife, arrested defendant and his wife for the possession of unstamped whiskey. The revenue agents did not have a warrant. Subsequent to the arrest, his automobile—which was parked on adjoining property but within about eleven feet of his home—revealed other unstamped whiskey. The court was faced with the decision as to what limitations are placed upon the limited search of a defendant's person and his surroundings by the clause "immediate surroundings" as used in the statute.[42] It must be borne in mind that the situation here does not involve that as set out in *Dolen v. State*,[43] where the search was limited by a valid search warrant to the property and premises of the defendant, and the automobile in the *Dolen* case was located on the property other than that belonging to the defendant. There was no question about the lawfulness of the arrest of the defendant or his wife for the possession of unstamped whiskey. There is no question of the fact that in this state, where the arrest is lawful, the arresting officer has a right to search the prisoner and his surroundings.[44] The only question is: what are "immediate surroundings"? The case holds that they are not necessarily limited to the property controlled by the accused unless so limited by a valid search warrant.[45] The court cites the case of *State v. One Buick Automobile*[46] where the defendant was arrested in his

37. Rafferty v. State, 91 Tenn. 655, 16 S.W. 728 (1891).
38. See Annots., 40 AM. REP. 656 (1912); 25 L.R.A. 434 (1894).
39. McEwing v. State, 134 Tenn. 649 (1915).
40. TENN. CODE ANN. § 57-622 (1956).
41. 304 S.W.2d 650 (Tenn. 1957).
42. TENN. CODE ANN. § 40-803 (1956).
43. 187 Tenn. 663, 216 S.W.2d 351 (1948).
44. TENN. CODE ANN. § 40-803 (1956); Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938). See McCanless v. Evans, 177 Tenn. 86, 90, 146 S.W.2d 354 (1941), where the court stated, "A search warrant is unnecessary to make a lawful search of the premises, or the immediate surroundings of the person where the arrest is made."
45. Carroll v. United States, 267 U.S. 132 (1925).
46. 120 Ore. 640, 253 Pac. 366 (1927).

apartment and the search of his automobile which was parked in the apartment house garage was upheld. In another case where the defendant was arrested in a restaurant and, after proper arrest, search was made of his automobile which was parked on the street, such was upheld as "immediate surroundings."[47] The arresting officer obviously can go further in his search of immediate surroundings of the person arrested after lawful arrest without a search warrant than he could with the limitation placed on "immediate surroundings" by "property under his control" under a properly executed search warrant.[48]

Venue: In *Kelly v. State*[49] the defendant appealed from a conviction of breaking and entering a business house on the grounds that there was no proof by the state as to the section of the city in which the business house was located. Under the constitution the defendant has a right to be tried in the county in which the offense was committed.[50] If a crime is shown to have been committed in or near a certain town or other minor territorial subdivision it is not necessary to show that this territorial subdivision is in the county, as the jury as part of the court could take notice of this geographical fact.[51] Since venue is a matter of proof, the proof must show to the satisfaction of the court and the jury that the crime was committed in the county where the indictment was found and the accused was tried.[52] The court ruled that the only allegation was that the business was located in Bristol, Tennessee, and the only specific fact that the jury could take notice of under the circumstances was the fact that half of the town was in Virginia and the other half in Tennessee. The location of the business house, the *locus in quo,* in the particular section of the city under the particular circumstances, was not a specific fact of which the jury was bound to take notice, and in the absence of proof that the business house was in the county, venue was not established.[53] This would not have been true if the reference had been to Nashville or other cities within the particular counties of the state.

The question in the case of *Beadle v. State*[54] was whether or not the lower court committed reversible error in refusing to appoint a court reporter at the request of a pauper defendant. The defendant was tried for first degree murder for the killing of the husband of his first

47. State v. Cyr, 40 Wash.2d 840, 246 P.2d 480 (1952).
48. Bromley v. State, 310 S.W.2d 432 (Tenn. 1958), where stolen property was found after search of premises was made with a void search warrant. Court rules evidence not admissible as no lawful arrest made before search. Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947).
49. 308 S.W.2d 415 (Tenn. 1957).
50. TENN. CONST., art. 1, § 9.
51. UNDERHILL, CRIMINAL EVIDENCE § 95 (5th ed. 1956).
52. Gilliland v. State, 187 Tenn. 592, 216 S.W.2d 323 (1948); Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945).
53. Franklin v. State, 64 Tenn. 613 (1875).
54. 310 S.W.2d 157 (Tenn. 1958).

wife because they were living together before she had received a divorce from defendant, to the embarrassment of his fourteen year old son who was being teased at school by his playmates. There was evidence of threats by the deceased and also of the fact that he had a knife five inches long at the time he was killed. There was sufficient evidence for conviction of voluntary manslaughter. The question here is one relating to the record, and the refusal of the lower court to appoint a court reporter, therefore depriving the defendant, a pauper, of equal protection of the law under the fourteenth amendment of the United States Constitution. The assignment of error was presented on the basis of the case of *Griffin v. Illinois*[55] where the United States Supreme Court held that where a transcript was required one must be provided by the court to those whose poverty might deprive them of equal justice. In the *Beadle* case, counsel filed a narrative bill of exceptions which was approved by the court. The court holds that this was a sufficient transcript to protect the defendant amply in all of his rights. The rules of the Tennessee Supreme Court, clearly indicate that the court has a preference for the narrative bill of exceptions and therefore does not discriminate against a person who cannot have a stenographic transcript of the record for the appeal. The United States Supreme Court does not require that a stenographic report be provided if the Supreme Court finds other means of affording adequate and effective appellate review to indigent defendants.[56] That court did say, however, that it was necessary to have a stenographic report of the transcript of the record to afford equal protection if one is required by the state court. Under those circumstances it would be a denial of due process under the fourteenth amendment if provisions were not made for the required transcript to be provided for a pauper.

Again the court finds in the case of *Graham v. State*[57] a reversible error in allowing the attorney general of the state to argue the indeterminate sentence law to the jury, as it is not the law of the case or any part of it and could only persuade the jury to give consideration to it in fixing the defendant's punishment.[58]

In the case of *Collier v. State*,[59] the court preserves the distinction between the technical record and the record of the proceedings which must be embodied in a bill of exceptions. On the technical record the court decides the question whether or not a charge of breaking and entering[60] will support a conviction of malicious mischief.[61]

55. 351 U.S. 12 (1956).
56. Miller v. United States, 317 U.S. 192 (1942).
57. 304 S.W.2d 622 (Tenn. 1957).
58. Williams v. State, 191 Tenn. 456, 234 S.W.2d 993 (1950).
59. 308 S.W.2d 427 (Tenn. 1957).
60. TENN. CODE ANN. § 39-903 (1956).
61. TENN. CODE ANN. §§ 39-4501, -04 (1956).

The defendant was charged with malicious mischief and upon conviction an appeal was made to the supreme court. The bill of exceptions was not filed within the thirty days after the overruling of a motion for a new trial, but was filed fifty-seven days later.

At the time of overruling the motion for a new trial defendant was granted forty-five days in which to prepare his bill of exceptions. More than thirty days after the overruling of the motion for a new trial, but before the expiration of the forty-five days previously granted for the filing of the bill of exceptions, a motion was made to extend the time for an additional fifteen days. The bill of exceptions was filed a total of fifty-seven days after the overruling of the motion for a new trial. The trial court was without authority to extend the time for the filing of the bill, and the supreme court ruled that it would not be considered for any purposes since it was a nullity when filed.[62] The technical record does not indicate that the defendant had been charged with malicious mischief as had been orally stipulated would be included in the indictment which was rendered on a charge of breaking and entering. Since the indictment only charged breaking and entering, defendant contended that it would not support the verdict of malicious mischief. The indictment charged that he broke and destroyed a door and other parts of the house and personal property therein. The statute declares that it would be a misdemeanor to destroy, injure, or secrete any goods, chattels, or valuable papers of another. It also declares to be a misdemeanor wantonly to injure, deface, or disfigure any building or fixture attached thereto, or the enclosures thereof, belonging to the state, or any county, city, town, or to another person.[63] The court concluded that it would be impossible for anyone to be guilty of breaking into and entering a building without also being guilty of disfiguring or defacing it. Therefore, it concluded this lesser offense (malicious mischief) must be included within the greater (breaking and entering).

On the other hand, there is no necessary connection of injury of personal property and the offense of breaking and entering, but this defect (including the latter offense or misdemeanor in the same count in the indictment) is not a fatal defect and was waived when the defendant went to trial.[64] The court without difficulty concludes that the term "feloniously" which appears in the indictment takes care of the requirement that the acts done to constitute mischief be done "maliciously and wantonly."[65]

62. Duboise v. State, 290 S.W.2d 646 (Tenn. 1956).
63. TENN. CODE ANN. § 39-4504 (1956).
64. Allen v. State, 199 Tenn. 569, 288 S.W.2d 439 (1956); Johnson v. State, 187 Tenn. 438, 215 S.W.2d 816 (1948); Scruggs v. State, 66 Tenn. 38 (1872).
65. State v. Smith, 119 Tenn. 521, 105 S.W. 68 (1907); State v. Click, 115 Tenn. 283, 90 S.W. 855 (1905).

The test for insane delusion and insanity was restated in the case of *Long v. State*,[66] where the question of insane delusion was presented as a defense to the charge of murder in the first degree. The defendant was charged with killing his son's stepfather under the belief that the deceased intended or was attempting to debauch the defendant's daughter-in-law. Defendant's wife had remarried, and they had all lived in the same community for a number of years. When the son married he moved in with his father, living together and jointly participating in the farming activities. During the last few months of this period the son began to act in a disturbed manner and had to be confined in the state hospital. The daughter-in-law told the defendant that the son was upset because he thought she was carrying on with his stepfather. The deceased came to the home to get farm machinery which had been borrowed by defendant's son from his stepfather. Defendant shot the deceased and then chased him down the road firing continuously until the pistol was empty, inflicting mortal wounds upon the deceased.

Under the test for insanity in this case, as set out in *Davis v. State*,[67] the jury was warranted in concluding that he was not temporarily insane and that he knew right from wrong. Defense had asked for instruction on the part of the lower court that if he was not insane (because proof might show that he knew the difference between right and wrong as set out in the *McNaughten* case) but nevertheless was laboring under an insane delusion regarding the relationship between the stepfather and his son's wife, he should at the most only be guilty of voluntary manslaughter. Defendant argued that this instruction was supported by the *Davis* case, in which the jury found the defendant knew the difference between right and wrong but was insane upon the subject of the relationship between his former wife and the deceased. The chief justice stated in the *Davis* case that the *McNaughten* rule was that homicide committed under an insane delusion would be reduced to manslaughter if the notion embodied in the delusion and believed to be a fact, if a fact indeed, would have excused the defendant.

In the *Davis* case, if the defendant had been convinced of the truth of the alleged relationship, and while under the influence of passion and agitation produced by such information had killed the deceased, he would only have been guilty of voluntary manslaughter. In the present case, however, the relationship of the female is that of the daughter-in-law, and there was no well founded belief that she had been guilty of adultery. The court sustained the lower court in overruling the requested instruction on the basis that the instruction is

66. 304 S.W.2d 492 (Tenn. 1957).
67. 161 Tenn. 23, 28 S.W.2d 993 (1930).

incorrect in that it makes any insane delusion a bar to a conviction for murder; whereas, under the *McNaughten* rule the delusion must be as to something believed to be a fact, which if a fact indeed, would have excused the defendant.[68] In the present case there was no belief in the fact, and the court suggests that the relationship of the female being that of the daughter-in-law might not have been such as to reduce the offense to voluntary manslaughter though he had a well founded belief that she had been guilty of adultery.[69] This case again exemplified a need for further medico-legal study of present legal tests for insanity.[70]

In the case of *Hill v. State*,[71] the defendant had been convicted of a series of larcenies on November 15, 1949, and was sentenced to five years to be served in the workhouse. Sentence was suspended in 1953 and in the early part of 1954 the defendant was arrested for several other larcenies and was out on bond and out of the state during the spring of 1954. Petition was filed by the attorney general on August 30, 1954, requesting revocation of the suspended sentence. The petition was not served on the defendant and was retired October 4, 1956, on the ground that the defendant could not be found. On November 26, 1956, he was served at the request of the attorney general who stated that the defendant had been a fugitive from justice since 1954. The defendant contended that the lower court had no legal authority to revoke the suspended sentence after November 26, 1954, when the original sentence of five years had expired. The question was, did the statute of limitations bar the proceedings for revocation of sentence, since the petition had been retired from the docket and no service was had on the defendant until after the expiration of the judgment of conviction.[72] The court ruled there was sufficient evidence of the forfeiture of the appearance bond to indicate that the defendant was a fugitive from justice in August 1954, and that this accounted for the failure to serve the capias until November 26, 1956. In the absence of direct proof the record of the minutes of the court was accepted as prima facie truth, and the lower court had recorded in the minutes that he was a fugitive from justice and this had tolled the statute of limitations.[73]

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68. 8 VAND. L. REV. 496 (1955).
69. *Id.* at 497. See also Whitsett v. State, 299 S.W.2d 2 (Tenn. 1957).
70. Tatum v. United States, 190 F.2d 612 (1951); State v. White, 58 N.M. 324, 270 P.2d 727 (1954); Kalven, *Insanity and the Criminal Law—A Critique of Durham v. United States*, U. CHI. L. REV. 317 (1955); Moreland, *Mental Responsibility and the Criminal Law—A Defence*, 45 KY. L.J. 215 (1957); Sobeloff, *From McNaughton to Durham, and Beyond—A Discussion of Insanity and the Criminal Law*, 15 MO. L. REV. 93 (1955); Sobeloff, *Insanity and the Criminal Law*, 41 A.B.A.J. 793 (1955).
71. 304 S.W.2d 619 (Tenn. 1957).
72. *Id.* at 621.
73. TENN. CODE ANN. § 40-2907 (1956).

Bomar v. State ex rel. Boyd and *Bomar v. State ex rel. Winslow*[74] are combined habeas corpus proceedings by two persons serving life sentences under the 1939 Habitual Criminal Act.[75] The lower court sustained the petition and the warden appealed. The petitioners contended the act was unconstitutional in that it provided for trial as a habitual criminal in conjunction with a trial for a fourth felony without formal notice in advance of the trial that the act would be invoked. The act provided that the indictment for the felony may or may not charge the defendant with being a habitual criminal, but the defendant "in either case shall, upon conviction, be sentenced and punished as an habitual criminal, as in this act provided."[76] The act says further that "in either case the felony charge shall be deemed and construed as necessarily including and charging such person with being an habitual criminal, and no such indictment or presentment shall be subject to any objection for failure to specifically include a charge that such person is an habitual criminal."[77]

Both petitioners had pleaded not guilty to indictments which charged them with being habitual criminals in addition to the specific felonies—robbery in Boyd's case, assault to commit murder in the first degree in Winslow's case. Each was found "guilty as charged in the indictment" and sentenced to life imprisonment as a habitual criminal. Prior to the decisions in the instant habeas corpus proceedings, another Tennessee prisoner named Rhea had been freed by writ of habeas corpus in the United States district court on grounds that the above quoted sections violated the due process clause of the fourteenth amendment of the United States Constitution and that the defendant should have been given notice in the indictment or otherwise that the state expected to invoke the act.[78] The Supreme Court of Tennessee subsequently released one James E. Bailey on the same grounds.[79] The court finds that the cases of Boyd and Winslow differ from the cases of Rhea and Bailey in that Boyd and Winslow were given express notice in the indictment.

Counsel for the defendants naturally contended that the *Boyd* and *Winslow* cases are controlled by the *Rhea* and *Bailey* cases. They insist that in the two latter cases the court adjudged the entire Habitual Criminal Act unconstitutional.

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74. 312 S.W.2d 174 (Tenn. 1958).
75. TENN. PUB. ACTS 1939, ch. 22. This act was amended to eliminate the features which gave rise to the instant case, and now appears as amended in TENN. CODE ANN. § 40-2801 (1956).
76. TENN. PUB. ACTS 1939, ch. 22 § 4.
77. TENN. PUB. ACTS 1939, ch. 22 § 5.
78. Rhea v. Edwards, 136 F. Supp. 671 (M.D. Tenn. 1955), *aff'd*, 238 F.2d 850 (6th Cir. 1956). See Earle, *Criminal Law and Procedure—1956 Tennessee Survey*, 9 VAND. L. REV. 980, 989 (1956).
79. Bailey v. State, 312 S.W.2d 174 (Tenn. 1958).

The theory of the court in the present cases is that they are controlled by the rule of severability or the doctrine of elision and that the statements contained in the *Rhea* case are controlling only if the same question arises in the present case.[80] The court quotes the Tennessee rule of elision as given in *Davidson County v. Elrod*:[81]

> Perhaps the clearest statement of the rule is that if it is made to appear from the face of the statute that the Legislature would have enacted it with the objectionable features omitted, then those portions of the statute which are not objectionable will be held valid and enforceable, *State ex rel. Bond v. Taylor,* 119 Tenn. 229, 257, 104 S.W. 242, provided, of course, there is left enough of the Act for a complete law capable of enforcement and fairly answering the object of its passage. *Reelfoot Lake Levee District v. Dawson,* supra.

The court then goes on to show that after the elision of the objectionable features mentioned, "there is left enough of the Act for a complete law capable of enforcement,"[82] and the court further concludes that the statute after the elision is one "fairly answering the object of its passage."[83]

The court concluded that the petition should not have been granted since the Habitual Criminal Act of Tennessee, after the elision of the provision with reference to eliminating notice, is a constitutional enactment which does not violate the due process clause or any other clause of the state or federal constitution.

The writer cannot agree with this conclusion reached in these cases as they relate to previous decisions of the state and federal courts. A critical analysis of this case in relation to the court decisions in the *Rhea* case and the constitutionality of the statute prior to the 1950 amendment, may be found in the sections on constitutional law of this survey.

80. Citing Staten v. State, 191 Tenn. 157, 232 S.W.2d 18 (1950); State *ex rel.* Lea v. Brown, 166 Tenn. 669, 64 S.W.2d 841 (1933); Clark v. Lary, 35 Tenn. 77 (1855).
81. 191 Tenn. 109, 112, 232 S.W.2d 1, 2 (1950).
82. 312 S.W.2d 174, 178 (1958).
83. *Id.* at 179.