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CRIMINAL LAW AND PROCEDURE— 1957 TENNESSEE SURVEY

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SUBSTANTIVE CRIMINAL LAW

Homicide: The statutory requirement that a killing be "willful, deliberate, malicious, and premeditated"¹ for a finding of murder in the first degree is not applicable to a killing committed while in the perpetration of one of the felonies listed in the statute. This question arose in *Farmer v. State*,² in which it appeared that the killing resulted from the setting on fire of a dwelling, i.e., arson, by the defendant. It was urged on appeal to the Tennessee Supreme Court that there was no proof of felonious homicide because there was no showing of an intent to kill nor even that the defendant had knowledge of the existence of the victim, a two and one-half year old child. The court was not impressed with this argument, however, and stated that where a causal connection between one of the felonies listed in the statute and the death is shown, no proof of intent to kill or malice toward the victim is necessary. This of course follows the development of the felony-murder rule.³

The effect of voluntary intoxication as negating an intent to kill was involved in *Gibbs v. State*,⁴ another homicide case. The defendant in that case was tried for the third, chronologically, of a series of four killings and convicted of first degree murder. One of the contentions urged on appeal, although apparently rather diffidently, was that the killing was the product of the voluntary intoxication of the defendant and therefore not murder. Treated as a question of proof in this case, as the court apparently did, there seems to be no doubt that the defendant's contention was baseless. However, the court states that the fact that the defendant, although possibly intoxicated, "went out with a loaded rifle" and killed the victim, together with three other persons, makes the killing "murder" regardless of a lack of intent to kill on the part of the defendant, citing *Rogers v. State*.⁵ The *Rogers* case was a conviction for second degree murder which occurred through the defendant's operation of his automobile at a high rate of speed on the wrong side of the highway while he was voluntarily intoxicated. There the court held that the malice necessary for a conviction of murder

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1. TENN. CODE ANN. § 39-2402 (1956).
2. 296 S.W.2d 879 (Tenn. 1956).
3. See PERKINS, CRIMINAL LAW 33-36 (1957).
4. 300 S.W.2d 890 (Tenn. 1957).
5. 196 Tenn. 263, 265 S.W.2d 559 (1954).

arose from wilfully and knowingly acting in such a manner as seriously to endanger life, and that voluntarily becoming intoxicated did not deprive the act of such wilfulness or knowledge.⁶ The present case, however, involving the additional factor of premeditation, might better have called forth such a factually similar case as, for example, *Mullendore v. State*,⁷ in which the court, speaking of the effect of voluntary intoxication on the degree of homicide, stated:

Drunkness, wilfully induced, to be effective to reduce a murder from first to second degree, must be so complete that at the actual moment of the commission of the crime the defendant's senses are so stupified by drink that he is incapable of forming a premeditated and deliberate design to kill.

A conviction of second degree murder in *Whitsett v. State*⁸ was reduced by the Supreme Court to voluntary manslaughter on the grounds that the killing in question occurred during the heat of passion aroused by adequate provocation. This was the classic case of the killing of the wife's paramour by the "wronged" husband. The killing occurred several months after the husband was first put on notice of the cuckoldry. The court was able to find, however, that fresh fuel was added to the husband's passion by a third person through the confirmation to the defendant, about an hour before the killing, of the illicit acts of the deceased.

Although the defendant appeared to act rationally for that hour, he reacted with savage suddenness when he then encountered the deceased by chance. After a short motorized chase, he killed the deceased with a shotgun he happened to have in his car. On these facts it was found that not only was the provocation adequate but also the sudden heat of passion aroused met the objective test.

Rape: Section 39-603 of the Tennessee Code Annotated provides punishment for an assault with intent to commit a felony and for an attempt to commit a felony where the punishment is not otherwise prescribed; section 39-604 covers an assault and battery with intent to rape; section 40-2520 authorizes, under an indictment for an offense, a conviction of any lesser included offense or of an attempt to commit the offense. These statutes were involved in *Jones v. State*⁹ in which the defendant was convicted of an attempt to commit a felony under a charge of rape. He contended on appeal that, since the proof indicated that an act of sexual intercourse had actually been accomplished with the consent of the prosecutrix, he could not be convicted of the

6. See the comment on this case in Ball, *Criminal Law and Procedure—1954 Tennessee Survey*, 7 VAND. L. REV. 825, 826 (1954).

7. 183 Tenn. 53, 60, 191 S.W.2d 149, 151 (1945).

8. 299 S.W.2d 2 (Tenn. 1957).

9. 292 S.W.2d 713 (Tenn. 1956).

attempt. The common law doctrine of merger of offenses, under which there could usually be no conviction for an attempt where the offense was actually committed, has been, as the court indicates, practically abolished by section 40-2520 of the Code.¹⁰ Also, as section 39-605 does not prescribe punishment for an attempt to commit rape without the assault and battery, section 39-603 was the proper statute in this case since consent obviated the commission of a battery.

Robbery: The question of what constitutes a "deadly weapon" in the commission of the offense of robbery under section 39-3901 of the Tennessee Code Annotated¹¹ was considered in *Cooper v. State*¹² and *Turner v. State*.¹³ In the *Cooper* case the Supreme Court held that a toy pistol does not come within the statutory term of "deadly weapon"; in the *Turner* case it held that a "sawed-off shotgun" is a "deadly weapon" regardless of its being unloaded at the time of the robbery. The distinction the court draws is not in the degree of apprehension engendered in the victim, which the court points out is the gravamen of the common law offense of robbery and therefore not affected by the amendment of the statute, but in the increased likelihood of harm resulting from the use of a genuine weapon, although unloaded. That all courts are not of one mind as to the definition of "deadly" in such a statute is pointed out in the present opinion. Defining "deadly," as these cases appear to do, by judicial fiat as "capable of being rendered deadly" seems to be a pragmatic solution to a difficult problem. It certainly seems likely that more serious harm could result from use of a genuine, though not then loaded, firearm than from the use of the most realistic appearing toy.

Assault and Battery: A single act directed at two or more persons may constitute only one crime. Thus, in *Huffman v. State*¹⁴ the intentional ramming of an automobile with more than one occupant is a single assault and battery.

Liquor Offenses: In *Muzzall v. State*¹⁵ it was held that the unlawful possession of intoxicating liquors¹⁶ is a continuing offense so that there may be a subsequent conviction for such possession of a cache of liquor which remained undiscovered in a previous raid which had itself resulted in a conviction for unlawful possession. In *Hall v. State*¹⁷ it was reiterated that the presumption that property in the form of

10. *Grindstaff v. State*, 172 Tenn. 77, 110 S.W.2d 309 (1937); *Heaton v. State*, 130 Tenn. 163, 169 S.W. 750 (1914). See also PERKINS, CRIMINAL LAW 477-81 (1957).

11. This section was amended by Tenn. Pub. Acts 1955, c. 72, so as to make robbery "accomplished by the use of a deadly weapon" a capital offense.

12. 297 S.W.2d 75 (Tenn. 1956).

13. 300 S.W.2d 920 (Tenn. 1957).

14. 292 S.W.2d 738 (Tenn. 1956).

15. 290 S.W.2d 647 (Tenn. 1956).

16. TENN. CODE ANN. § 39-2507 (1956).

17. 292 S.W.2d 716 (Tenn. 1956).

illegal whisky found in the home is in the sole possession of the husband may be rebutted by proof that the wife was exercising joint or individual possession of the whisky. Interestingly enough, the defendant wife in that case some years before had won a reversal of a conviction on the identical point of her possession of whisky in a similar case, although involving a different husband.¹⁸

CRIMINAL PROCEDURE

As usual, many of the questions of criminal procedure, as well as evidence questions, which arose during the survey period are dealt with in the article on Procedure and Evidence.¹⁹ Some comment, however, is made below of cases so considered.

Criminal contempt: Some general statements as to the applicability of criminal procedures and the rights of defendants in criminal contempt proceedings were made in *Davidson County v. Randall*.²⁰

Arrest: In cases in which items of real evidence are critical to the proof it is frequently contended, sometimes apparently only hopefully, that the evidence is inadmissible as being the product of an unlawful search following an unlawful arrest. Because of the nature of the cases, this is particularly true in liquor violations involving the illegal possession or transportation of liquor. Such a case was *McBride v. State*,²¹ in which it appeared that police officers, after receiving advance information that the defendant was transporting liquor illegally, attempted to stop the defendant's car on a highway. The defendant evaded apprehension; and the police gave chase, eventually capturing the defendant in a cul-de-sac, where he was immediately arrested for reckless driving. A quantity of liquor was perceived on the rear floor of the car, and an additional quantity was later found in the car's trunk. Evidence as to the liquor taken from the trunk was excluded at the trial for an unstated reason,²² but the defendant was convicted of transporting illegally on the basis of evidence as to the liquor seized from the rear floor. On appeal the Supreme Court held that the arrest for reckless driving was legal and the accompanying search, as far as looking into the automobile to see the liquor, was not unreasonable. In *Herrington v. State*²³ police officers, after receiving general information that the defendant was illegally transporting liquor, stopped

18. *Lea v. State*, 181 Tenn. 378, 181 S.W.2d 351 (1944); *Lea v. State*, 182 Tenn. 45, 184 S.W.2d 162 (1945).

19. Morgan, *Procedure and Evidence—1957 Tennessee Survey*, 10 VAND. L. REV. 1144 (1957).

20. 300 S.W.2d 618 (Tenn. 1957).

21. 290 S.W.2d 648 (Tenn. 1956).

22. See *Simmons v. State*, 198 Tenn. 587, 281 S.W.2d 487 (1955); Earle, *Criminal Law and Procedure—1956 Tennessee Survey*, 9 VAND. L. REV. 980, 983 (1956).

23. 291 S.W.2d 587 (Tenn. 1956).

the defendant's car and inspected his operator's license. The defendant then voluntarily agreed to a search, which disclosed a quantity of liquor in the car. Although asserted, no question of unlawful search was present.

Warrant: The fact that the affidavit on which a search warrant was issued was not dated does not invalidate the warrant where the affidavit itself shows probable cause for the issuance.²⁴ This is to be distinguished from the case²⁵ in which the affidavit does not allege the date of the offense.

*Indictment:*²⁶ In *Huffman v. State*²⁷ the indictment charged that the defendants, jointly, "did unlawfully, wilfully, maliciously and feloniously make an assault . . . with an automobile . . . [by driving] an automobile into and against a vehicle occupied by [naming the occupants] . . . with wilful, malicious and felonious intent to maim and injure. . . ." This, the court said, merely charged the offense of battery. The trial court, however, charged the jury on the basis of an assault with intent to commit voluntary manslaughter as an included offense under section 39-604 of the Tennessee Code Annotated and the jury convicted on that basis. Although a conviction for an offense greater than that charged in the indictment could not be affirmed, the court found that the defendant was clearly guilty of battery and, on the basis of *Corlew v. State*,²⁸ a verdict of guilty of battery would be entered by the court and the case remanded for the fixing of a sentence by a jury.

In *Wilson v. State*²⁹ an indictment for theft of "brass rollers" was held to have been properly quashed where the proof showed the items to be "bronze rollers."

Jurisdiction and Venue: The jurisdiction of a state to conduct criminal proceedings against a person who is serving a sentence of probation awarded by a federal court was involved in a habeas corpus petition brought in federal district court in *Eaves v. Edwards*.³⁰ The court there found that the overwhelming weight of federal authority was to the effect that such jurisdiction exists, the exercise of which jurisdiction is a matter of comity between the two sovereigns and may not be raised by the prisoner. The 1955 amendment to section 57-138 of the Tennessee Code Annotated, which exempts from criminality the transportation of liquor in a "wet" county, was involved in *Chadwick v. State*³¹ in which it was held that one who was arrested and charged

24. *State v. Odom*, 292 S.W.2d 23 (Tenn. 1956).

25. *E.g., Welchance v. State*, 173 Tenn. 26, 114 S.W.2d 781 (1938).

26. See the comment on *Jones v. State*, *supra* p. . . .

27. 292 S.W.2d 738 (Tenn. 1956).

28. 181 Tenn. 220, 180 S.W.2d 901 (1944). See also *State v. Odom*, 292 S.W.2d 23 (Tenn. 1956).

29. 292 S.W.2d 188 (Tenn. 1956).

30. 143 F. Supp. 229 (M.D. Tenn. 1955).

31. 296 S.W.2d 857 (Tenn. 1956).

with illegally transporting whisky in a "wet" county could not be tried in that county. The rationale of the decision is that no crime was committed in the "wet" county and that there could be no venue without consent in that county for the trial of a crime which may have been committed in adjacent "dry" counties.

Former Jeopardy: In the "brass—bronze" case mentioned above³² the court held that the quashing of the indictment for the theft of brass rollers was not a bar to trial for the theft of bronze rollers and that the question of former jeopardy was for the court and not the jury.

Juries: There is no constitutional requirement that the same jury which finds the guilt of an accused must fix his punishment, and thus a case in which the appellate court has modified the verdict may be returned to a different jury to assess the new punishment.³³ In *Nelson v. State*³⁴ it was held that prospective jurors for the trial of a crime arising out of a labor dispute are not *per se* disqualified because of their membership in a labor union having no connection with the case.

Instructions: The effect of the Harmless Error Statute³⁵ on errors committed in instructing the jury was involved in two cases. In *Black v. State*³⁶ the jury asked the trial judge for additional instructions on the definition of "malice" in a homicide case. The judge answered the request orally, contrary to the provisions of section 40-2516 of the Tennessee Code Annotated, which requires the charge in all felony cases to be in writing. The error was held not to be "harmless" in this case because of its possible effect on the verdict of the jury in finding guilt of second degree murder rather than voluntary manslaughter. In *Dykes v. State*,³⁷ decided the same day, the error complained of was the failure to charge the jury that they were the sole judges of the law as well as the facts.³⁸ It was held there that the error violated a constitutional right of the defendant and was therefore not "harmless."

Judgment: The Criminal Court of Montgomery County being a court of general, as distinguished from special, jurisdiction, its judgment in a criminal case is subject to collateral attack only on the basis of an error appearing on the face of the record. Such a judgment may not, therefore, be attacked in a habeas corpus proceeding on the ground that the defendant was under the age of eighteen at the time of render-

32. *Wilson v. State*, 292 S.W.2d 188 (Tenn. 1956).

33. *Huffman v. State*, 292 S.W.2d 738 (Tenn. 1956).

34. 292 S.W.2d 727 (Tenn. 1956).

35. TENN. CODE ANN. § 27-117 (1956).

36. 296 S.W.2d 833 (Tenn. 1956).

37. 296 S.W.2d 861 (Tenn. 1956).

38. See the comments on this case in Morgan, *Procedure and Evidence—1957 Tennessee Survey*, 10 VAND. L. REV. 1144, 1165 (1957).

ing the judgment and thus subject to the exclusive jurisdiction of the juvenile court, where the age does not appear on the face of the record.³⁹

*Counsel: State ex rel. Melton v. Bomar*⁴⁰ dealt with the right of a defendant in a joint trial to have separate counsel appointed where his defense was in conflict with the defense of other defendants, although this was found to be inapplicable in that case. The right to appointed counsel on appeal was considered in *State ex rel. Fisher v. Bomar*.⁴¹ The court held that there is no such right.

Appeal: The appeal of a judgment of a juvenile court is, under the statute,⁴² to the circuit court. The Supreme Court thus does not have jurisdiction to entertain such an appeal.⁴³ In *State v. Odom*⁴⁴ the court refers to the availability to the state of a petition for certiorari in a criminal case to obtain a review of action by a trial court alleged to be illegal or in excess of jurisdiction. This is in addition to the appeal allowed by section 40-3401 of the Tennessee Code Annotated in criminal cases in which there was a conviction. An extension to the initial period granted for the filing of a bill of exceptions must be made by the trial court within the initial period in order to be effective.⁴⁵

Sentences: The trial court's jurisdiction of a case under a suspension of sentence is continued by the statute⁴⁶ for a period of twelve months. If notice of a proceeding for the revocation of the suspension is served within that period, jurisdiction over the sentence is retained by the court even though the actual proceedings may be had more than twelve months after the entry of the suspension and the notice itself may be amended after the twelve months' period to make more specific the derelictions charged.⁴⁷ In *Hooper v. State*⁴⁸ it was also stated that the required notice of proceedings to revoke a suspension of sentence need not be construed as strictly as an indictment and proof of derelictions related to that given in the notice, although not specified, may be received.

RECENT LEGISLATION

A number of the acts of the 1957 Tennessee Legislature have some effect on criminal law or procedure. These are summarized below. Chapter references, unless otherwise indicated, are to the Tennessee Public Acts, 1957.

39. *Bomar v. State ex rel. Stewart*, 300 S.W.2d 885 (Tenn. 1957).

40. 300 S.W.2d 875 (Tenn. 1957).

41. 300 S.W.2d 927 (Tenn. 1957).

42. Tenn. Pub. Acts 1957, c. 315, § 1, TENN. CODE ANN. § 37-273 (Supp. 1957).

43. *Norrod v. State*, 300 S.W.2d 926 (Tenn. 1957).

44. 292 S.W.2d 23 (Tenn. 1956).

45. *Duboise v. State*, 290 S.W.2d 646 (Tenn. 1956).

46. TENN. CODE ANN. § 40-2906 (1956).

47. *McGuire v. State*, 292 S.W.2d 190 (Tenn. 1956).

48. 297 S.W.2d 78 (Tenn. 1956).

Chapter 45⁴⁹ defines and regulates the sale and use of fireworks, making a violation punishable as a misdemeanor.

Chapter 82 adds⁵⁰ as grounds for the making of an arrest by an officer without a warrant that the person arrested "is attempting to commit suicide."

Chapter 85 amends the sections of the criminal code dealing with malicious injury or destruction of property with explosives⁵¹ and adds to the code provisions dealing with the illegal possession or transportation of explosives, making such possession or transportation a felony.

Chapter 94 amends section 51-436 of the Tennessee Code Annotated regulating the taking, transporting or sale of minnows for bait.

Chapter 104⁵² defines and makes unlawful the crime of barratry. Barratry is defined as "stirring up litigation"; "stirring up litigation" is defined as "instigating or attempting to instigate a person or persons to institute a suit at law or equity"; and "instigating" is defined as "bringing it about that all or part of the expenses of the litigation are paid by the barrator or . . . persons . . . acting in concert with" him. There are a number of exceptions and exemptions to the statute. Corporations, especially foreign corporations, are singled out for special penalties. In general, statutory barratry appears to be a hybrid of common law maintenance and barratry.⁵³

Chapter 113 amends section 33-624 of the Tennessee Code Annotated by raising to a felony the doing of certain acts in connection with, inter alia, the escape of, or knowing sale of certain articles to, an inmate of a state mental hospital. Thus one who, while visiting his relative in a state hospital, gives him a cigarette without the permission of the institution's superintendent is subject to imprisonment in the state penitentiary for one to three years!

Chapter 124⁵⁴ defines and provides punishment for the crime of "shoplifting." This differs from larceny⁵⁵ in that the crime of shoplifting is complete upon the taking of goods with intent to convert and there is no requirement under the statute of a "carrying away." The statute also raises certain presumptions from the possession of goods in a store. Chapter 164⁵⁶ provides certain immunities for the police officer or merchant who takes into custody or detains a person when there is probable cause for believing that the one detained has committed shoplifting.

49. TENN. CODE ANN. §§ 53-3001 to -3005 (Supp. 1957).

50. See TENN. CODE ANN. § 40-803 (Supp. 1957).

51. TENN. CODE ANN. §§ 39-1405 to -1410 (Supp. 1957).

52. TENN. CODE ANN. §§ 39-3405 to -3410 (Supp. 1957), formerly *id.* § 39-3212 (1956).

53. PERKINS, CRIMINAL LAW 448-54 (1957).

54. TENN. CODE ANN. §§ 39-4235 to -4236 (Supp. 1957).

55. See TENN. CODE ANN. § 39-4202 (1956).

56. TENN. CODE ANN. §§ 40-824 to -826 (Supp. 1957).

Chapter 215⁵⁷ makes it unlawful to intercept and retransmit radio, telephone, or telegraph communications transmitted by law enforcement agencies.

Chapter 262,⁵⁸ repealing a similar 1955 act, requires new refrigerators for sale to be equipped with certain safety devices and provides a penalty for violation.

Chapter 288⁵⁹ defines "sex offenders" and provides for their commitment and treatment as mentally ill persons. The statute provides that such offenders (an actual "offense" apparently is not necessary to make one subject to the act as long as there is a course of misconduct in sexual matters evidencing a lack of control of sexual impulses) may be retained in institutions until pronounced cured. See also chapter 353 with reference to parole of sex offenders.

Chapter 301 amends section 39-4203 of the Tennessee Code Annotated so as to raise the distinction between grand and petty larceny from \$60 to \$100 as to the value of goods stolen.

Chapter 332 amends section 39-1910 of the Tennessee Code Annotated concerning untrue, deceptive or misleading advertising. It is made clear by the amendment that radio and television advertising are subject to the statutes and that employment and loans, among other things, are among the subjects of false advertising.

Chapter 360⁶⁰ provides punishment for the making of lewd, obscene or lascivious remarks or proposals by telephone. Chapter 394⁶¹ punishes certain types of fortunetelling in counties with populations over 400,000.

Chapter 404⁶² makes it a misdemeanor for any owner, operator or manager of any place of business to allow the playing of pin-ball games and similar devices by persons under the age of eighteen. Ignorance, on the part of the person in charge of the location of the games, of the age of the player is stated to be no excuse for a violation.

Chapter 410⁶³ is the Unfair Trade Practice and Advertising Act, relating to the household furniture and appliance business. The act apparently is directed primarily at pseudo-wholesalers. Chapter 411⁶⁴ provides regulations regarding the keeping of records by dealers in used automobile parts.

57. TENN. CODE ANN. §§ 39-3111 to -3114 (Supp. 1957).

58. TENN. CODE ANN. § 39-2213 (Supp. 1957), as amended by Tenn. Pub. Acts, 1957, c. 262, §§ 1-2.

59. TENN. CODE ANN. §§ 33-1301 to -1305 (Supp. 1957).

60. TENN. CODE ANN. § 39-3002 (Supp. 1957).

61. TENN. CODE ANN. § 39-1946 (Supp. 1957).

62. TENN. CODE ANN. §§ 39-1008 to -1010 (Supp. 1957).

63. TENN. CODE ANN. §§ 69-601 to -607 (Supp. 1957).

64. TENN. CODE ANN. §§ 59-1404 to -1407 (Supp. 1957).