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CRIMINAL LAW AND PROCEDURE—1956 TENNESSEE SURVEY

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SUBSTANTIVE CRIMINAL LAW

Homicide: Involuntary manslaughter by automobile was involved in the case of *Smith v. State.*[1] The evidence tended to show that while the defendant was operating his automobile at a speed of possibly 40 miles per hour, he attempted to turn at a dead-end intersection, skidded on loose gravel, and struck his victim at a point approximately four feet off the street. It also appeared that the victim was a child of six who was playing on a bridge leading to a school; that the accident occurred on Christmas day; and that the defendant had consumed an unknown quantity of intoxicating beverages at some time prior to the accident. On these facts the conviction for involuntary manslaughter, based on "willful and wanton negligence," was affirmed. Although there was some evidence of consumption of intoxicants, it was pointed out that the decision did not turn on that question so as to invoke the *malum in se* theory applicable to a homicide committed by an intoxicated driver, on which the leading Tennessee case is *Keller v. State.*[2] The court indicated, however, that the *Keller* decision continues to have vitality.[3] The instant decision is important in that it fills in another interstice in the distinction between "mere civil" or "merely simple" negligence and criminal negligence. The Supreme Court indicated its concern with making this distinction on this particular set of facts.[4] However, application of this decision to future cases is tempered by the court's reiteration that each case of this sort must be determined on its particular facts.

Adequate provocation, so as to reduce a conviction of second degree murder to voluntary manslaughter, was involved in the case of *Hargrove v. State.*[5] In that case the defendant went to the home of his father-in-law, the deceased, to persuade his wife to return home with him. The deceased requested the defendant to leave and, when he refused, went to the telephone to call the police. Whereupon the defendant shot him. The defendant alleged "many years of

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1. 280 S.W.2d 922 (Tenn. 1955).

2. 155 Tenn. 633, 299 S.W. 803 (1927), 41 HARV. L. REV. 669 (1928).

3. 280 S.W.2d at 924. See comments on this question in Ball, *Criminal Law and Procedure—1954 Tennessee Survey,* 7 VAND. L. REV. 825 (1954); 23 TENN. L. REV. 437 (1954).

4. It is perhaps too facile to conclude that extraneous factors may have persuaded the jury that the negligence in this case was criminal and not merely civil.

5. 281 S.W.2d 692 (Tenn. 1955).

provocation and interference by deceased" into his affairs as the producing cause of his sudden fit of anger. But that allegation treads close to the line of proving premeditation, and the court quite properly restricted its consideration to the immediate producing cause of the anger which it found to be the telephone call; and held that such a lawful act might not be considered adequate provocation.[6]

The causal connection between a wound and the death of the deceased was the problem in *McCord v. State*.[7] The evidence was that the defendant, who was convicted of voluntary manslaughter, and the deceased engaged in a fight; an admission by the defendant that he struck the deceased with a knife; and the finding of the body of the deceased (a young boy apparently in previous good health) some hours after the fight with a wound in the left chest. The only direct testimony as to the cause of death was that of an undertaker who expressed the opinion that the wound in the left chest had caused death, although he had not probed the wound for depth nor conducted an autopsy. In concluding that there was sufficient connective proof between the stabbing and the death the court referred to the production of the knife as evidence of the probable depth of the wound and cited cases for the well-established proposition that death may be presumed to have resulted from a wound *from which death might ensue*. But the absence of proof of the actual depth to which the knife was inserted, whether it be a pen knife or a kris, would appear to leave the conclusion somewhat shaky, there being only the opinion of the undertaker to establish that the wound could have caused the death.

Carnal Knowledge: Proof that the defendant actually committed an act of sodomy per anus is not a variance from a charge of assault with intent to carnally know a female under the age of twelve.[8] The Supreme Court held in *Hale v. State*[9] that the gravamen of such an assault is the guilty intent and not the consummation of the intent.

Burglary: The question of whether the statutory crime of burglary in the second degree may be committed by a breaking and entering in the night as well as in the daytime was considered in *Ledger v. State*.[10] The offense in that case was committed at some time between Friday night and Sunday morning. The statute[11] defines second degree burglary as the breaking and entering of a dwelling-house by day. The court, distinguishing a previous case,[12] held that

6. For a concise treatment of adequate provocation, see Perkins, *The Law of Homicide*, 36 J. CRIM. L., C. & P.S. 391, 412 (1946).
7. 278 S.W.2d 689 (Tenn. 1955).
8. TENN. CODE ANN. § 39-606 (1956).
9. 281 S.W.2d 51 (Tenn. 1955).
10. 285 S.W.2d 130 (Tenn. 1955).
11. TENN. CODE ANN. § 39-903 (1956).
12. Davis v. State, 43 Tenn. 77 (1866).

the offense of second degree burglary was a lesser included offense of that of burglary and that the term "by day" was included in the statute not to create a new crime, but to authorize a lesser minimum punishment. Thus, where the proof shows a breaking and entering of a dwelling with felonious intent but fails to show the time, a conviction of burglary in the second degree may be sustained.

Constitutionality: The constitutionality of the 1951 act[13] providing penalties for any person convicted of leaving the state without first complying with a court order to pay support money for the support of a child or children was upheld in *Barger v. State.*[14] The attack on the statute was made on the grounds of illegal discrimination and violation of the privileges and immunities clause. The court held that the classification of persons affected by the act was reasonable and not discriminatory and that the penalty was not an unlawful imprisonment for debt.

That portion of the 1939 act making it a misdemeanor to give or offer premiums or other gratuities to induce a sale of motor fuel at other than posted prices[15] was held to be beyond the police power of the state in *State v. White.*[16] The court held that although that portion of the statute requiring the posting of prices of motor fuels was properly a matter of legislative concern, the prohibition of offering inducements to prospective purchasers "does not relate to the general welfare." "So long as the operator's business does not offend the public morals and work an injustice on the public, its constitutional right to pursue on equal terms to that allowed to others in like business is beyond question, even though his methods may have a tendency to draw trade to him to the detriment of competitors."[17]

In *State v. Estes*[18] it was held that the offense of pulling down the fence or leaving open the gate of another without permission, for which the owner may recover a penalty,[19] is not an indictable offense, notwithstanding that the term "misdemeanor" is used to describe the offense.

The constitutionality of Chapter 267 of the Acts of 1955,[20] establishing the jurisdiction of general sessions courts was challenged in *State v. Simmons.*[21] The validity of the statute was upheld as against an attack that it was violative of the right to trial by jury.

13. TENN. CODE ANN. § 39-219 (1956).
14. 280 S.W.2d 911 (Tenn. 1955).
15. TENN. CODE ANN. §§ 59-1502 to -1504 (1956).
16. 288 S.W.2d 428 (Tenn. 1956).
17. *Id.* at 430.
18. 287 S.W.2d 40 (Tenn. 1956).
19. TENN. CODE ANN. § 39-4530 (1956).
20. *Id.* § 40-118 (Supp. 1955).
21. 287 S.W.2d 71 (Tenn. 1955).

CRIMINAL PROCEDURE

Extradition: The courts, quite properly, continue to avoid a trial on the merits in habeas corpus actions testing the validity of extradition proceedings. Alleged defects in the indictment brought in the demanding state were raised as grounds for refusing extradition from Tennessee in *State ex rel. Sandford v. Cate*[22] and *Reeves v. State ex rel. Thompson.*[23] In the *Sandford* case the relator alleged that the indictment, which was brought in North Carolina and which charged him with embezzlement as a fiduciary, was premature. The court, citing *Munsey v. Clough,*[24] held that this objection was a matter which should not be inquired into by the courts of the asylum state, but constituted a possible defense to be raised upon trial in the demanding state. In the *Thompson* case the relator alleged that an indictment brought in the demanding state which merely averred that the offense was committed "in the fall of 1949" lacked specificity so as to support an extradition warrant. The court referred to the *Sandford* case and held that where evidence that the relator was *not* in the demanding state during the period specified was not presented, the alleged defect must be presented to the courts of the demanding state. In *State ex rel. Johnson v. Llewelyn*[25] the relator alleged that his conviction in the demanding state, Florida, was void because of a denial to him of his constitutional right to due process of law because of a failure to appoint counsel for him. The court, quoting from *State ex rel. Lea v. Brown,*[26] held that the validity of the conviction in Florida must be tested by the Florida courts and may not be raised in a habeas corpus proceeding in Tennessee.

Arrest: Section 40-803 of the Tennessee Code provides in part that:

> *An officer may, without a warrant, arrest a person:*
>
> ....
>
> (2) When the person has committed a felony, though not in his presence.
>
> (3) When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
>
> (4) On a charge made, upon reasonable cause, of the commission of a felony by the person arrested.

In an extensive article on the law of arrest in Tennessee[27] Professor Rollin Perkins has suggested that subsection (2) of the above statute has been over-looked entirely in considering whether an arrest without a warrant was lawful.[28] The cases bear out this suggestion. In

22. 285 S.W.2d 343 (Tenn. 1955).
23. 288 S.W.2d 451 (Tenn. 1956).
24. 196 U.S. 364 (1905).
25. 286 S.W.2d 590 (Tenn. 1955).
26. 166 Tenn. 669, 64 S.W.2d 841 (1933).
27. Perkins, *The Tennessee Law of Arrest,* 2 VAND. L. REV. 509 (1949).
28. *Id.* at 570.

Simmons v. State[29] it appeared that a highway patrolman had, upon information, stopped and searched the defendant's automobile and found therein six cases of whiskey. At the trial for illegal possession (or transportation) of whiskey[30] there was, apparently, an objection to the introduction of evidence as to the product of the search on grounds that the search was conducted illegally as a part of an unlawful arrest. Upon conviction the defendant contended in his appeal that the police officer must be required by the trial court to disclose the name of the informant as a part of the proof of his "reasonable cause" to believe that a felony had been or would be committed by the defendant. On the first hearing of the case the Supreme Court held that it was within the discretion of the trial court not to require the disclosure of the name of the informant in determining from all the evidence whether there was a reasonable basis for the belief. On petition for rehearing it was urged that prior opinions of the court required the disclosure of the informant's name. The court declined to change its previous ruling in the case. The court also went further, and calling attention to the above statement by Professor Perkins, implied that the provision of the statute authorizing an officer to arrest when the person arrested has, in fact, committed a felony would no longer be overlooked. To be sure, the court does not appear to go as far in this regard as Professor Perkins would feel justified. The latter states that:

> One who has arrested the wrong person may be able to give an acceptable explanation of his mistake; but he certainly should be called upon to explain. It does not make sense, however, to require one to explain how he happened to arrest the *right* person.[31]

The court, however, would appear to require that the arresting officer have some information on which to base the arrest. Although it is quite necessary to inquire rather searchingly as to the basis for an officer's reasonable belief that a felony was about to be committed where the arrest was made before the actual commission of the crime, the same strictness should not apply to an arrest after the fact. In every case some opportunity to question the legality of the arrest may be necessary.

In *Robertson v. State*,[32] for example, it appeared that an arrest was made by highway patrol officers merely to satisfy their curiosity con-

29. 281 S.W.2d 487 (Tenn. 1955).
30. It does not clearly appear from the report of the case whether a violation of TENN. CODE ANN. § 39-2507 (1956) (illegal possession of whiskey), or *id.* § 39-2509 (illegal transportation of whiskey) was involved in this case. The former being a misdemeanor and the latter a felony where the amount is more than one gallon, it seems likely that the latter section was the one involved.
31. Perkins, *supra* note 27, at 571.
32. 184 Tenn. 277, 198 S.W.2d 633 (1947).

cerning a motorist, and the three gallons of whiskey which the officers subsequently discovered was, in fact, a surprise to the officers. In that case the court held the evidence so obtained as to the transportation of whiskey inadmissible on grounds that the search was illegal as not accompanying a lawful arrest.

In *Day v. Walton*,[33] the Tennessee Supreme Court had occasion to reiterate the rule in Tennessee with respect to the degree of force which may be exerted by an officer in attempting to effect an arrest of a person guilty of a misdemeanor, as distinguished from a felony. That case was a civil action involving a shooting by a special police officer in order to arrest a person committing a misdemeanor in the officer's presence. The victim was an innocent third person injured by a stray bullet. In stating that an officer is never warranted in law in shooting one guilty only of a misdemeanor to effect an arrest, the court referred to the 1943 opinion of the Court of Appeals, Middle Section, in the case of *State ex rel. Harbin v. Dunn*.[34] That case was also a civil action for damages. A constable, in attempting to arrest fleeing misdemeanants, fired into their automobile and caused it to overturn injuring one and killing the other. It was argued that the shooting into the automobile or at its tires was not equivalent to shooting at the persons of the individuals and that such was the "well-recognized method of stopping miscreants and law-breakers" throughout the country. The court of appeals condemned such a practice, however, and stated that "it is not only a civil wrong but also a crime for a peace officer to use firearms so as to imperil life or limb of a non-resisting, fleeing misdemeanant in an attempt to arrest him or prevent his escape."[35]

Searches: A search which is conducted incident to a lawful arrest, although without a warrant, "may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control."[36] In *Liakas v. State*[37] the question of what may reasonably be searched in connection with the person arrested was considered. In that case the persons were arrested by police officers upon a hue and cry with the fruits of a felony upon them. The defendant also had in his possession a claim check for a parked car which he attempted to dispose of while being searched. The officers took the claim check, traced the car to its location in a commercial parking building, and searched the car without obtaining a search warrant. The fruits of another felony, the subject of the present

33. 281 S.W.2d 685 (Tenn. 1955).
34. 282 S.W.2d 203 (Tenn. App. M.S. 1943); see also, Perkins, *supra* note 27, at 596.
35. 282 S.W.2d at 207.
36. Harris v. United States, 331 U.S. 145, 151 (1947).
37. 286 S.W.2d 856 (Tenn. 1956). Other aspects of this case are in Liakas v. State, 288 S.W.2d 430 (Tenn. 1956).

prosecution, were found in the automobile. On appeal of a conviction for receiving stolen property, the defendant insisted that the evidence obtained from the search of the automobile was inadmissible as being the product of an unlawful search. The Supreme Court held, however, that under all the circumstances the search was reasonable as an incident to the arrest. This appears to extend the "premises" of the arrest rather far and to make the reasonableness test of the search depend upon the convenience of the searching officers who, in failing to obtain a search warrant in this case, appeared to be prompted by zeal for a prompt investigation rather than a necessity for preserving evidence.

In *Voss v. State*[38] it was held that a search conducted incident to a lawful arrest may be reasonably continued after a brief hiatus necessary to take the arrested persons to jail.

Venue: The sometimes bothersome question of the possibility of a crime having been committed across county lines was raised in *Reynolds v. State*.[39] There was not, however, the usual question of the commission of the offense partly in one and partly in another county, which would have given jurisdiction to either county.[40] Nor was there the question of the commission of the offense on the county boundary, where jurisdiction would similarly have been in either county.[41] In the case under discussion the only fact which connected the offense (homicide) with the county was the finding of the body of the victim in the county. The court quite reasonably reached the conclusion that the location of the body in the county raised a presumption that the offense had been committed in that county, which presumption was rebuttable by evidence to the contrary.

Indictments: In *State v. Youngblood*[42] an indictment whose two counts were dependent on each other for a complete statement of the offense was quashed in the lower court. On appeal the Supreme Court upheld the sufficiency of the indictment, citing an early Tennessee case[43] for the proposition that narrow technicality in the drafting of indictments was not required. In *Allen v. State*[44] a presentment for having impersonated "a peace officer" was attacked on the grounds that it did not specify the particular officer impersonated. The court held that, while it might have been better to have specified the particular office which the defendants assumed, the defendants were not misled as to the offense for which they were charged and the

38. 278 S.W.2d 667 (Tenn. 1955).
39. 287 S.W.2d 15 (Tenn. 1956).
40. TENN. CODE ANN. § 40-105 (1956).
41. *Id.* § 40-106.
42. 287 S.W.2d 89 (Tenn. 1956).
43. State v. Pearce, 7 Tenn. *66 (1823).
44. 288 S.W.2d 439 (Tenn. 1956).

defect was either waived by going to trial under a plea of not guilty or else was cured by the verdict of guilty.

Jurors: Notwithstanding that in felony cases the charge to the jury must be reduced to writing and the jury given the written charge,[45] literacy is not a qualification for jury service. In *Kirkendoll v. State*[46] the contention that the requirement for a written charge necessitated a literate jury was answered by the observation that the other jurors could read the charge aloud.

Section 40-2527 of the Tennessee Code authorizes the separation of male and female jurors while outside the courtroom where the case is being tried provided each member of the jury remains in the custody of a duly sworn officer. In *Steadman v. State*[47] this statute was cited by the court as authorizing the separation of jury members of different sex under proper guard for the purpose of allowing the male jurors to watch a television program at the home of one of them. In *Harris v. State*[48] an allegation of error was made based on discrimination against a Negro juror because he was separated from the other, white, jurors for lunch during the trial. The Supreme Court stated that the Negro juror's ability to give a fair consideration to the issues being tried was not affected by the separation, and further that the court would not entertain a complaint by the defendant as to alleged deprivation of rights of a juror.

Trial: Is present mental capacity to stand trial a matter of personal privilege of the accused to raise or not, as he may desire? In *Cogburn v. State*[49] the Supreme Court, referring to the statute[50] authorizing a commitment by the trial court of an individual under indictment for observation as to his sanity, stated that not only was a plea of present insanity not a matter of personal privilege but it was a matter of duty on the part of the state to ascertain the mental competency of the defendant to stand trial.

Former Jeopardy: In *Wade v. Hunter*[51] the United States Supreme Court said in respect to double jeopardy:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a

45. TENN. CODE ANN. § 40-2516 (1956).
46. 281 S.W.2d 243 (Tenn. 1955). Other interesting questions as to qualifications and bias of jurors were also discussed in the case.
47. 282 S.W.2d 777 (Tenn. 1955).
48. 1 RACE REL. L. REP. 401 (Tenn., Dec. 9, 1955).
49. 281 S.W.2d 38 (Tenn. 1955).
50. TENN. CODE ANN. § 33-513 (1956).
51. 336 U.S. 684, 688 (1948).

> trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

And in *Etter v. State*[52] the Tennessee Supreme Court recognized six situations as being well recognized occasions which would warrant the discharge of a jury without jeopardy attaching:

> Certain conditions, if arising in the trial of a case, have come to be well recognized as constituting the occasion which will warrant the discharge of a jury, and, if they appear of record, will bar a plea of former jeopardy. These conditions are set forth in Wharton's Criminal Law, Vol. I, page 549, as: "(1) Consent of the prisoner; (2) illness of (a) one of the jurors, (b) the prisoner, or (c) the court; (3) absence of a juryman; (4) impossibility of the jurors agreeing on a verdict; (5) some untoward accident that renders a verdict impossible; and (6) extreme and overwhelming physical or legal necessity."

In *State v. Malouf*[53] the trial court had granted a mistrial because of illness of the state's chief witness at the first trial and on a second trial sustained a plea of former jeopardy. The Supreme Court held that this factual situation (the illness of a chief witness) met the test of being an "extreme and over-whelming physical or legal necessity," and that therefore the plea of former jeopardy should not have been sustained by the trial court.

In *Davis v. State*[54] the defendant had been convicted under an indictment charging possession of untaxed whiskey. His motion for new trial was granted by the trial court. Before the second trial the state entered a nolle prosequi as to the first indictment after having obtained another indictment charging possession of unstamped whiskey, based on the same occurrance. At the second trial his plea of former jeopardy was overruled by the trial court. The Supreme Court affirmed. Notwithstanding the technicality of the entering of the nolle prosequi by the state, manifestly it was at the insistence of the defendant that the new trial was granted so that he is, in effect, estopped to plead the former jeopardy as a bar.

Sentences: An earlier case,[55] in which it was held that the statute[56] authorizing the trial court to commit a prisoner to the county workhouse rather than the penitentiary in cases where the sentence given for a felony was for five years or less did not authorize such commitment when the maximum sentence was more than five years, was

52. 185 Tenn. 218, 223, 205 S.W.2d 1, 3 (1947).
53. 287 S.W.2d 79 (Tenn. 1956).
54. 282 S.W.2d 357 (Tenn. 1955).
55. West v. State, 140 Tenn. 358, 204 S.W. 994 (1918).
56. TENN. CODE ANN. § 40-3105 (1956).

found to have been overruled in *Graham v. State*.[57] The court there held that the commitment to the workhouse was within the sound discretion of the trial court.

In *Cates v. State*[58] it was held that although the General Sessions Court of Sumner County had authority to sentence the defendant to confinement for ninety days, it had no authority to suspend the sentence; and thus, action taken to revoke the purported suspension was void. The ultimate conclusion by the court that the defendant is subject to the original sentence of the general sessions court could leave him, of course, where he started from. The quantum of proof necessary to support a revocation of a suspended sentence was considered in *Thompson v. State*.[59]

Record: That the "jury book" kept by the clerk is not a part of the record in a criminal case was so held in *Bailey v. State*;[60] and therefore the trial court is not authorized by the statute[61] permitting "mistakes apparent on the face of the record" to be corrected at any time in the discretion of the court, to add the name of a twelfth juror inadvertently omitted from the judgment in a case, by referring to the jury book.

Habitual Offender: Although the Tennessee procedure on charging habitual criminality[62] had been amended even before the decision of the United States Supreme Court in *Chandler v. Fretag*,[63] to require that notice of the intention to try one as an habitual criminal be contained in the indictment or presentment, the initial sentences of those convicted of a felony and of habitual criminality under the prior practice are still expiring. In *Rhea v. Edwards*[64] such a case, *i.e.*, of one convicted in 1950 of armed robbery and of being an habitual criminal, was before the federal district court on a petition for habeas corpus. That court held that the failure to formally notify the defendant that he was to be tried as an habitual criminal, under the prior practice, constituted a denial of due process of law in contravention of the fourteenth amendment to the United States Constitution, and that the statute as it then existed was accordingly void.

57. 279 S.W.2d 265 (Tenn. 1955). The earlier precedent having been overruled by Gilliam v. State, 174 Tenn. 388, 126 S.W.2d 305 (1939).
58. 279 S.W.2d 262 (Tenn. 1955).
59. 279 S.W.2d 261 (Tenn. 1955).
60. 280 S.W.2d 806 (Tenn. 1955).
61. TENN. CODE ANN. § 20-1513 (1956); compare *id.* § 20-1512.
62. *Id.* 40-2803 (1956).
63. 348 U.S. 3 (1954), in which it was held that there was a denial of due process in denying the prisoner the opportunity to obtain and consult with counsel after he was notified, at the trial, of the intent to try him on habitual criminal charges.
64. 136 F. Supp. 671 (M.D. Tenn. 1955).