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Criminal Law and Procedure -- 1955 Tennessee Survey

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CRIMINAL LAW AND PROCEDURE— 1955 TENNESSEE SURVEY

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The reported Tennessee cases in the criminal field decided during the past year deal, as usual, mostly with procedural problems, and only to a lesser extent with problems of substantive criminal law.

SUBSTANTIVE CRIMINAL LAW

Homicide: In *Ivy v. State*[1] the defendant, in the course of a fight with *A*, stabbed *B*, a peacemaker, killing him. The defendant appealed his conviction of involuntary manslaughter on the theory that the evidence did not support the verdict, since it showed that the defendant was striking at *A* in self-defense when he unfortunately stabbed *B*. The court held that the jury could properly find on the evidence either that (1) the defendant, not *A*, was the aggressor, or (2) even if *A* were the aggressor, defendant was not in imminent danger or reasonably supposed danger of death or serious bodily injury, and in either event the defense of self-defense was inapplicable. The case thus simply reiterates some well-settled principles of self-defense in homicide cases.

Crawford v. State[2] involved a conviction of voluntary manslaughter on a murder charge where the jury believed the evidence that the defendant intentionally killed the victim in a rage after the latter struck the defendant with a beer can. Therein illustrated is the settled law of homicide that an intentional killing may be reduced from murder to voluntary manslaughter if the defendant was actually and reasonably provoked by the victim's conduct into an irresistible passion to kill, and the defendant neither actually cooled off nor had a reasonable time to cool off between the provocation and the fatal blow.

Rape: In *Walker v. State*[3] the court adopted the prevailing modern rule that for the crime of violating the age-of-consent (known frequently elsewhere as statutory rape) statute[4] the sexual intercourse element of the crime requires only the "slightest penetration" of the sexual organ of the female by that of the male. It is not necessary that the vagina be entered or the hymen be ruptured; the entering of the vulva or labia is sufficient. This "slightest penetration" rule would of course be equally applicable to ordinary forcible rape, and very likely to sodomy as well.

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1. 277 S.W.2d 363 (Tenn. 1955).
2. 273 S.W.2d 689 (Tenn. 1954).
3. 273 S.W.2d 707 (Tenn. 1954).
4. TENN. CODE ANN. § 10786 (Williams 1934).

Sodomy: The "crime against nature" is not defined in the Tennessee statute punishing the offense except to the extent stated that it may be accomplished "either with mankind or any beast." Can the crime be committed with mankind by penetration "per os" (mouth-genital contact) as well as "per anum"? In *Fisher v. State*[5] the male defendant apparently inserted his organ into the mouth of his partner, whose sex is not revealed in the report. The court held that this conduct amounts to the crime against nature, following the modern trend elsewhere and refusing to follow the common-law definition of sodomy, which, being limited to penetration "per anum" where human partners were involved, did not include mouth-genital connections. It is interesting to note that, at the same time that Tennessee is expanding the scope of sodomy, the American Law Institute's Model Penal Code presently in preparation is now wrestling with the social problem of whether abnormal sexual practices in private between consenting adults should constitute criminal conduct at all, in view of the recent rash of sociological studies pointing to the fact that such conduct is common although rarely punished, and that it causes little harm to others where not involving force, corruption of minors or public display, and that it serves as an important source of material for black-mailers.

Larceny: One rather routine statement appears in a civil case to the effect that one who buys property giving therefor a check on a bank where his funds are insufficient is not guilty of larceny by trick.[6] The statutory crime of false pretenses and the more modern bad check statutes were, of course, created to plug this very loophole in the crime of larceny, where title is obtained by fraud.

Extortion: State v. Smith[7] involved a prosecution for conspiracy to commit extortion, the charge apparently growing out of a strike situation. Although the reported case does not spell out the exact nature of the threat which the striking defendants conspired to make to the nonstriking workers, apparently it was something like: if you do not quit work, we shall beat you up. Is this kind of threat sufficient to constitute extortion, defined by Tennessee statute[8] as including (among other threats) a threat to do injury to the person of another "with intent thereby to extort any money, property or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will"? The court held that the indictment which charged that the defendants conspired to threaten the victims

5. 277 S.W.2d 340 (Tenn. 1955).
6. Hunter v. Moore, 276 S.W.2d 754 (Tenn. App. E.S. 1954) (The court holds that the man who gave the check got title to the car, and thereafter could pass good title to a bona fide purchaser; compare the situation of one who purchases in good faith from a thief.).
7. 273 S.W.2d 143 (Tenn. 1954).
8. TENN. CODE ANN. § 10806 (Williams 1934).

"with intent to extort from them their pecuniary advantage of their right to work" properly charged conspiracy to commit extortion. The right to work is "property" and a "pecuniary advantage" which can be extorted from a worker by threats of violence. Perhaps a simpler, less cumbersome theory of extortion might be that the defendants by threats intended to compel the nonstrikers to do an act (leave their jobs) against their will, although it might be argued that the intent was to induce unwilling nonaction rather than action, and the former is not covered by the extortion statute.

Conspiracy: The case just discussed[9] also held that the crime of conspiracy in Tennessee is complete upon the agreement of the conspirators to do the wrongful act (*e.g.* to commit a crime, such as extortion), no overt act in carrying out the conspiracy being required under the Tennessee conspiracy statute.[10] This was true of the common-law crime of conspiracy and is true today under most statutes, although a few jurisdictions have statutes requiring some overt act.

The court, in its zeal in following *Corpus Juris Secundum*, apparently overlooked a related section of the code,[10a] providing that for conspiracy some act to carry out the object of the agreement is necessary except where the agreement is "to commit a felony on the person of another, or to commit the crimes of arson or burglary." The various counts in the *Smith* case—charging conspiracy to commit assault and battery (probably assault and battery is a Tennessee misdemeanor), to commit an act injurious to public health, morals, trade or commerce, to commit malicious mischief (a Tennessee misdemeanor), and possibly even to commit extortion—do not seem to qualify as charging conspiracies "to commit a felony on the person of another," so that some overt act is necessary.

The same case further states that the crime of conspiracy to commit a crime, and the crime itself if later committed, are separate crimes. This probably means that when conspirators are tried for conspiracy to commit a crime, they cannot secure an acquittal by showing they went ahead and, pursuant to their agreement, committed the crime.[11] Doubtless also they can be convicted of and sentenced for both the conspiracy and the completed crime.[12] An analogous problem arises in cases of attempt, where the better view is that it is no defense to a conviction for attempted crime that the attempt was successful; yet one successful attempt cannot support two separate convictions, one for attempt and the other for the completed crime.

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9. State v. Smith, 273 S.W.2d 143 (Tenn. 1954).
10. TENN. CODE ANN. § 11064 (Williams 1934).
10a. *Id.* § 11068, which modifies § 11066.
11. See Notes, *Merger of Conspiracy in Completed Offense*, 37 A.L.R. 778 (1925), 75 A.L.R. 1411 (1931), showing that such is the general rule.
12. See Notes, 92 L. Ed. 185 (1948), 98 L. Ed. 448 (1954).

Drunken driving: There is sometimes a problem as to whether the defendant, prosecuted for driving while drunk, was "driving" within the meaning of the statute.[13] Is one driving when he turns on the ignition and steps on the starter, but the motor is not yet running? Is he driving when he is being towed or pushed along the street or highway? In *Hester v. State*[14] the court held that one is guilty of drunken driving who while intoxicated sits at the wheel of a car with engine dead which is being pushed by another car along the highway. In view of the purpose to be effectuated by the statute—protection against situations involving danger to the persons and property of others on the streets and highways—this result seems entirely sound.[15]

Criminal Procedure

Evidence: Many of the criminal cases of the past year involved questions of evidence, all of which have been treated elsewhere in this 1955 Survey.[16]

Arrest: In *Satterfield v. State*[17] the defendant, on his trial for driving while drunk, claimed that the police officers made an illegal arrest without a warrant and therefore could not testify as to his intoxicated condition at the time of the arrest. The court held that this testimony was not inadmissible as the result of an unconstitutional search, because there was no search; there is no comparable rule that evidence is inadmissible if the result of an unlawful arrest. "[T]here

13. Tenn. Public Acts 1953, c. 202.
14. 270 S.W.2d 321 (Tenn. 1954).
15. *Cf.* Line v. State, 191 Tenn. 380, 234 S.W.2d 818 (1950) (no "driving" where the car is completely still).
16. See generally Morgan, *Procedure and Evidence—1955 Tennessee Survey,* 8 Vand. L. Rev. 1071 *et seq.* (1955). A number of cases involved presumptions of possession for the crime of possessing intoxicating liquor: Veal v. State, 268 S.W.2d 345 (Tenn. 1954); Lampey v. State, 268 S.W.2d 572 (Tenn. 1954); Evans v. State, 270 S.W.2d 186 (Tenn. 1954); Reece v. State, 273 S.W.2d 475 (Tenn. 1954). An important case dealt with the competency of a witness to testify to the results of a drunkometer test for intoxication: Fortune v. State, 277 S.W.2d 381 (Tenn. 1955). A novel case held that for the trial judge to shake his head without explanation during defendant's closing arguments constituted reversible error as a silent comment on the evidence. Veal v. State, 268 S.W.2d 345 (Tenn. 1954). Other criminal cases were: Crawford v. State, 273 S.W.2d 689 (Tenn. 1954) (dying declarations); Stooksbury v. State, 274 S.W.2d 10 (Tenn. 1954) (judicial notice that 1952 Chrysler worth more than $60 in July 1953); East v. State, 277 S.W.2d 361 (Tenn. 1955) (taking fingerprints held no violation of privilege against self-incrimination); Jones v. State, 277 S.W.2d 371 (Tenn. 1955) (error for prosecution to cross-examine defendant as to prior crimes for which he had been indicted but for which he had been acquitted or which had been *nolle prossed*); Shields v. State, 270 S.W.2d 367 (Tenn. 1954) (limitation of number of defendant's character witnesses); Walker v. State, 273 S.W.2d 707 (Tenn. 1954) (cross-examination of defendant's character witnesses as to defendant's prior acts of misconduct). Two cases dealt with the sufficiency of the description of the premises to be searched contained in a search warrant: Williams v. State, 270 S.W.2d 184 (Tenn. 1954) (description taken from tax list held sufficient); Worden v. State, 273 S.W.2d 139 (Tenn. 1954) [search of multiple premises held insufficient; see Note, 31 A.L.R.2d 864 (1953)].
17. 269 S.W.2d 607 (Tenn. 1954).

is no constitutional immunity from an unlawful arrest."[18]

Preliminary Examination: The Tennessee criminal code provides that upon arrest without a warrant by a private person the latter shall take the arrestee before a magistrate or deliver him to an officer "without unnecessary delay."[19] Perhaps by analogy, although not expressly so provided in the code, a police officer who arrests has a duty to produce the arrested person before a magistrate without unnecessary delay.[20] In *East v. State*[21] the court held that when the arrest was at noon on November 4 there was no unnecessary delay when the defendant's examination was on November 5, and that the federal cases outlawing confessions obtained during a period of unlawful detention,[22] and federal cases condemning state use of coerced confessions,[23] were inapplicable because (1) no confession was involved in the case and (2) no mistreatment of the defendant occurred. Of course mere delay in the preliminary examination without some prejudice to the defendant's defense, is not a reason to reverse a conviction.

Extradition: In *State* ex rel. *Trigg v. Thompson*[24] Trigg, who had been charged with an Indiana crime, and who had been arrested in Tennessee pursuant to an extradition warrant issued by the Tennessee governor, petitioned for release on habeas corpus on the grounds (1) he was not present in Indiana when the crime allegedly was committed and (2) the affidavit sent the Tennessee governor by Indiana did not show personal knowledge of the commission of the crime by affiant. The court held that the writ was properly denied because (1) the evidence disclosed that Trigg was in Indiana on the fatal day[25] and (2) since the affidavit in question satisfied the governors of the two states, the judiciary should not interfere.

Bail: Although a Tennessee criminal defendant before his trial has a constitutional right to bail (except in capital cases where the evidence against him is strong),[26] he loses his constitutional right to bail

18. *Id.* at 608.
19. TENN. CODE ANN. § 11544 (Williams 1934).
20. *Id.* § 11515 (provides that no one shall be committed to prison for a criminal matter until a magistrate shall have held a (preliminary) examination). Most states expressly provide for a speedy preliminary examination after an arrest by a police officer.
21. 277 S.W.2d 361 (Tenn. 1955).
22. *E.g.*, McNabb v. United States, 318 U.S. 332 (1943).
23. *E.g.*, Watts v. Indiana, 338 U.S. 49 (1949).
24. 270 S.W.2d 332 (Tenn. 1954).
25. The UNIFORM CRIMINAL EXTRADITION ACT provides for the extradition of one who cannot be said to have "fled from justice" because he was never in the demanding state, *e.g.*, *D* in Tennessee shoots across the state line killing *V* in Kentucky; Kentucky could extradite under the terms of the statute. The asylum state does not, on a habeas corpus petition, go into the question of the guilt or innocence of the accused; it cannot look behind the official papers accompanying the request for extradition. Thus it seems rather strange that the *Trigg* case considered the evidence as to Trigg's presence in Indiana on the date of the crime.
26. TENN. CONST. Art. I, § 15.

after conviction of a felony,[27] although the legislature may and has provided for bail pending appeal under limited circumstances.[28] The trial judge loses his jurisdiction to admit to bail after conviction once the case has come to an end, and a chancery court never has jurisdiction to admit to bail after the termination of the case.[29]

Wallace v. State[30] dealt with the problem of forfeiture of bail. The defendant, who had been continued on bail pending his motion for a new trial after conviction for robbery, was rearrested upon a void warrant when he got into trouble with the law in another matter. When thus under arrest in charge of a police officer he escaped, went to Virginia and was there caught in the act of another robbery. Are the sureties on the bail bond exonerated by such events? The court held no, because (1) although rearrest normally exonerates the sureties on the bail bond, rearrest on a void warrant does not, and (2) the sureties do not escape forfeiture by the defendant's later arrest and imprisonment in a foreign state.

Jury: The presence of a member of an *exempted* class (here a minister) on a grand jury is not a ground to abate an indictment,[31] although the rule may well be different as regards the presence of a *disqualified* person (*e.g.*, an insane person or one convicted of an infamous crime) on such a jury.

In *Toombs v. State*,[32] a prosecution for receiving stolen property, a member of the trial jury was the husband of a first cousin of the owner of the property stolen, and the two families were friends. On the *voir dire* this juror was silent when asked whether he knew any reason why he should not serve. The relationship was not discovered until after a verdict of guilty. The court held that there should be a new trial because of the presence on the jury of this juror who kept silent when he should have disclosed his relationship to the victim of the crime for which the defendant was being tried.

Indictment: Motion to Quash Versus Plea in Abatement. Like most states, Tennessee criminal procedure provides, in addition to the plea to the merits (guilty or not guilty), for a variety of other procedural devices for raising possible defenses: the plea in bar, plea in abatement, motion to quash, demurrer. As in most states, these devices may not be used once the defendant has pleaded to the merits. In *Walker v. State*[33] the unfortunate defendant picked the wrong device

27. Rosenbaum v. Campbell, 268 S.W.2d 580 (Tenn. 1954).
28. TENN. CODE ANN. § 11658 (Williams 1934).
29. Rosenbaum v. Campbell, *supra* note 27. Here the case ended when defendant's conviction was affirmed by the Supreme Court without considering the merits because of defects in the bill of exceptions. He is now asking for bail pending a suit in chancery court for a new trial.
30. 269 S.W.2d 780 (Tenn. 1954).
31. East v. State, 277 S.W.2d 361 (Tenn. 1955).
32. 270 S.W.2d 649 (Tenn. 1954), discussed more fully in Morgan, *supra* note 16.
33. 273 S.W.2d 707 (Tenn. 1954) (irregularity in grand jury proceedings

at the wrong time— (1) he moved to quash when he should have pleaded in abatement, and so was out of luck; also (2) he was so inept as to plead not guilty first and then make his motion to quash, and was thus doubly wrong. In view of the defendant's difficulty of selecting the proper procedural device from the several possibilities (rather reminiscent of the outdated era when one selected the proper form of action or lost, whatever the merits of the case), it would seem that the federal practice of raising all objections by means of a motion to dismiss[34] would be much preferable.

Indictment: Vagueness. A criminal defendant is of course entitled to be informed of the charge against him, both because of the requirements of the state constitution[35] and federal due process of law.[36] Thus a vague indictment is bad. In the municipal violation case of *Robinson v. Memphis*[37] the defendant was in effect charged with a violation within the city limits of Chapter 49 of the Acts of 1939 and the rules and regulations thereunder adopted by the state commissioner of finance and taxation. Chapter 49 consists of many sections and subsections covering all sorts of prohibited transactions with alcoholic liquor—manufacture, sale, receipt, possession, storage, transportation, distribution. For municipal violations the rules of *civil* procedure apply, and civil procedure requires adequate notice to the defendant of the complaint against him. The court properly held that the charge here was much too vague, and a motion in arrest of judgment should have been granted after conviction. Of course the notice requirements for criminal cases must be at least as definite as for civil cases. A criminal indictment framed as vaguely as the charge in the *Robinson* case would be equally bad, and no conviction could be sustained based upon such a charge.

On the other hand, in *State v. McAdams*[38] the indictment for the misdemeanor of reckless driving charged that the defendant on a certain date in a certain county unlawfully drove an automobile over the public roads in that county "carelessly and heedlessly, in wilful and wanton disregard to the rights or safety of others, and without due caution and circumspection, at a speed and in a manner so as to endanger or be likely to endanger the life, limb or property of any person." The court held that this indictment, written substantially though not exactly in the language of the code section defining reck-

not appearing on the face of the indictment: plea in abatement is proper, motion to quash improper).

34. FED. R. CRIM. P. 12 (a) (abolishing pleas to the jurisdiction, pleas in abatement, pleas in bar, demurrers, and motions to quash, and authorizing the court to permit the motion to dismiss after a plea to the merits).

35. TENN. CONST. Art I, § 9.

36. *In re* Oliver, 333 U.S. 257 (1948).

37. 277 S.W.2d 341 (Tenn. 1955), discussed more fuly in Morgan, *supra* note 16.

38. 277 S.W.2d 433 (Tenn. 1955).

less driving, was not too vague to fulfill the requirements of informing the defendant of the charge against him, especially since it was rather precise in specifying the defendant's wrong as reckless speeding.

Indictment: Charging the Proper Crime. It is a fundamental principle of procedural due process that one who is charged with crime *A* cannot be convicted of crime *B* even if at the trial the proof clearly proves he committed crime *B*.[39] In *Clark v. State*,[40] where the defendant was charged with crime *A* (bigamous cohabitation) and the proof showed crime *A*, the court upset a conviction of crime *B* (bigamy) on the same general principle that one cannot be convicted of a crime for which he was not charged, no matter what the evidence of guilt of such crime. Doubtless under the third possibility (indictment charges crime *A*, proof shows crime *B*, conviction of crime *A*) the result would be the same.

But while bigamy and cohabitation after a bigamous marriage are two separate crimes, it is clear that a lesser included offense (or an offense of a lesser degree) is not a separate offense from the greater offense (or the offense of the higher degree). Thus one can clearly be convicted of manslaughter or battery on a charge of murder, or of murder in the second degree on a charge of murder in the first degree.[41] In *Rushing v. State*[42] a conviction of assault and battery with intent to commit rape upon an indictment for rape was upheld, the former being a lesser included offense of the latter. So also in *Stooksbury v. State*[43] the court authorized a conviction for assault with intent to commit a felony on a charge of assault with intent to commit first degree murder.

Indictment: Joinder of Offenses. A frequently occurring problem in criminal cases involves the difficulty of determining whether the defendant has committed one crime or two. Suppose *D*'s single blow kills both *A* and *B*.[44] The problem is important because of the rule that it is duplicity to charge several offenses in one count, though closely connected offenses or similar offenses (even if separate offenses) may be joined in different counts of a single indictment. The

39. Cole v. Arkansas, 333 U.S. 196 (1948).

40. 270 S.W.2d 361 (Tenn. 1954). The court held that bigamy and bigamous cohabitation after a bigamous marriage are two separate crimes although created by two separate clauses in the one section of the code, TENN. CODE ANN. § 11180 (Williams 1934): "If any person, being married, shall marry another person . . . or continue to cohabit with such second husband or wife in this state."

41. TENN. CODE ANN. § 11758-60 (Williams 1934). The rule would doubtless be the same in the absence of statute.

42. 268 S.W.2d 563 (Tenn. 1954).

43. 274 S.W.2d 10 (Tenn. 1954).

44. One offense: Gunter v. State, 111 Ala. 23, 20 So. 632 (1896); Clem v. State, 42 Ind. 420 (1873). Two offenses: People v. Majors, 65 Cal. 138, 3 Pac. 597 (1884). Tennessee would apparently hold one offense: Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929) (motorist recklessly hit two boys, killing one; one offense).

problem is equally important in the area of double jeopardy, where one cannot be twice in jeopardy for the "same offense."

Where the indictment charges several different but connected (or similar) offenses in different counts in one indictment, the defendant may move (after the proof is in) to make the prosecution elect on which offense it will go to the jury. The general rule is that this motion will be granted only if the defendant is embarrassed in his defense by the multiplicity of charges against him.[45] Where the different offenses are charged in one count, the indictment may be bad for duplicity; but aside from this the problem as to the defendant's embarrassment remains. In *Cox v. State*[46] the defendant was charged in one count with displaying his sexual organ "on January 5, 1954, and other occasions before this indictment found." Different females testified to different acts of display on different dates. The defendant's motion to have the state elect one incident on which to go to the jury was denied. The court held that this was reversible error, on the ground that the defendant might be embarrassed by double jeopardy trouble later. It would seem that if the indictment had contained several counts, one for each separate incident (each specifying the incident, the date and the female victim), the motion to elect would have been properly denied. The difficulty here was in the failure to charge the separate offenses separately.

It has been already noted that the court has stated that the crime of conspiracy, and the completed crime which the defendants conspired to commit, are separate crimes.[47] Without doubt they should be charged in separate counts if included in the same indictment.

Double Jeopardy: Same Offense Versus Different Offenses. As just noted, it is not always easy to say whether the defendant has committed one offense or several offenses when one action causes several injuries. In *Duke v. State*[48] *A* and *B*, strikers, beat up *X* and *Y*, nonstriking truck driver and helper. Actually *A* battered *X* while *B* beat *Y*. In a prior trial *A* and *B* had been convicted of battery of *X* (*A* for doing the actual beating, *B* for his aid and encouragement). Now *A* and *B* are being tried for the beating of *Y*, and their defense is double jeopardy. The court held that the beating of *X* is a separate offense from the beating of *Y*, so that double jeopardy does not bar the prosecution for the *Y* affair.

Trial: Defense of Shooting to Effect an Arrest. In *Shields v. State*[49] the defendant, a constable, was prosecuted for maliciously shooting an automobile. His defense was that he shot to effect an arrest without

45. Pointer v. United States, 151 U.S. 396 (1894) (emphasizing the trial court's discretion in the matter).
46. 270 S.W.2d 182 (1954).
47. State v. Smith, *supra* note 7.
48. 273 S.W.2d 142 (1954).
49. 270 S.W.2d 367 (1954).

a warrant, having reason to believe that the automobile driver was committing a felony. When questioned as to the basis of his belief, he testified that an informer had told him that the driver had committed a crime, but he refused to divulge the informer's name, until the judge said that he must answer; whereupon he gave a name and was very vague on cross-examination as to the person of this name. The court held that when the issue was his reasonable belief, it was proper to make him spell out the basis of the belief by naming the source of his information.

Trial: Instructions. The court reiterated that alleged errors in instructions to the jury must be pointed out at the trial in order to be considered on appeal, and that failure to instruct is not error where there is no request to instruct.[50] The court made a curious statement in *Walker v. State*.[51] The defendant, charged with statutory rape, testified that he had not accomplished the necessary penetration for the crime. He requested an instruction that the indictment did not cover assault with intent to commit statutory rape. Since assault with intent to commit rape is probably a lesser included offense in rape, this instruction stated the law incorrectly and so was properly refused; but the reason the court gave was that it was properly refused because the jury had convicted him of rape. If this means, as it seems to, that one charged with a serious crime (*e.g.*, murder) who gives evidence of a lesser included offense (*e.g.*, manslaughter, battery) cannot complain of refusal of the trial judge to instruct as to the lesser crime after he has been convicted of the greater crime, it seems obviously unsound.[52]

Sentence: Since the indeterminate sentence law[53] is not applicable to convictions of first degree murder, what is the effect of an erroneous indeterminate sentence for such a crime? The court held that the judgment is not void so as to enable the convict to secure his release on habeas corpus.[54] Although Tennessee is a state which gives the jury a large part to play in the determination of the sentence for felonies, with misdemeanors the court sets the punishment unless the defendant makes a seasonal demand that the jury fix his penalty.[55]

Habitual Criminal: In *Chandler v. Fretag*[56] the United States Supreme Court held to be a violation of Fourteenth Amendment due

50. Crawford v. State, 273 S.W.2d 689 (1954).
51. 273 S.W.2d 707 (1954). See *supra* note 3.
52. 26 AM. JUR., *Homicide* 544-45 (1940): "Clearly when requested to do so, the court must charge upon the included degrees of the offense charged, where there is evidence justifying a finding of guilt of the lower offense; its refusal to do so will constitute reversible error if the defendant is convicted of the higher degree."
53. TENN. CODE ANN. § 11766 (Williams 1934).
54. State *ex rel.* Gosnell v. Edwards, 277 S.W.2d 444 (Tenn. 1955).
55. James v. State, 268 S.W.2d 341 (Tenn. 1954), construing TENN. CODE ANN. § 11765 (Williams 1934).
56. 348 U.S. 3 (1954).

process the earlier Tennessee practice, in habitual criminal cases, of advising the defendant orally, at his trial for his present crime, that he will also be tried as an habitual criminal, at least if the defendant is not also granted his requested continuance to secure the services of counsel to fight the habitual criminal charge. This unfair practice was, however, discontinued even before the Supreme Court's decision in the *Chandler* case.[57]

The Tennessee code requires that for habitual criminal treatment for a fourth conviction the three prior convictions must be "for separate offenses, committed at different times and on different occasions."[58] In *Canupp v. State*[59] the defendant previously had been convicted of three apparently similar crimes (the nature of which does not appear), one each in June, July and August. Although the case is silent on the point, perhaps the three were tried in one trial under one indictment containing three counts. The court held without much discussion that these counted as three prior offenses. This seems correct under a statute worded like Tennessee's.[60] The court in the *Canupp* case, following decisions from other jurisdictions, further held that the habitual criminal penalty of life imprisonment without possibility of parole does not constitute cruel and unusual punishment.[61]

Appeal: As already noted, the appellate court will not consider alleged errors in giving or refusing instructions not brought to the attention of the trial court at the time of giving the instructions.[62] Several convictions were appealed on the ground that the verdict was against the weight of the evidence. The court points out, as it has done in the past, that with evidence pro and con the jury's findings on disputed questions of fact are binding on the appellate court, unless the court concludes that the evidence preponderates against such findings.[63]

The Tennessee Supreme Court on appeal has no power, as exists in a few states,[64] to reduce a sentence which falls within legal limits simply because it considers the sentence excessive. However, in *Stooksbury v. State*,[65] the court, finding that the evidence preponderated against a verdict of assault with intent to commit first

57. TENN. CODE ANN. § 11863.5 (Williams Supp. 1952) provides for inclusion, in the indictment for the substantive offense, of the habitual criminal charge.
58. *Id.*, § 11863.1.
59. 270 S.W.2d 356 (1954).
60. See Notes, 58 A.L.R. 20 (1929), 82 A.L.R. 345 (1933), 116 A.L.R. 209 (1938), 132 A.L.R. 91 (1941), 139 A.L.R. 673 (1942).
61. *Ibid.*
62. See note 50 *supra.*
63. Walker v. State, 273 S.W.2d 707 (Tenn. 1954) (conviction upheld); Stooksbury v. State, 274 S.W.2d 10 (Tenn. 1954) (conviction reversed).
64. See L. Hall, *Reduction of Criminal Sentences on Appeal,* 37 COL. L. REV. 521 (1937).
65. 274 S.W.2d 10 (Tenn. 1954).

degree murder, though it did support a conviction for the lesser included crime of assault with intent to commit a felony, reduced the maximum punishment from twenty-one (the maximum for assault to murder) to five years imprisonment (the maximum for assault to commit a felony), without remanding for a new trial.[66] This precedure seems eminently sensible.

66. An earlier case on the same point is Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944). There the court, finding that the evidence did not support a grand larceny conviction but did support one for petit larceny, reduced the sentence to one year, the minimum for petit larceny, but further provided that if the state did not wish to accept it, a new trial would be ordered. The question of the court's power to give a modified sentence was there thrashed out.