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Criminal Law and Procedure -- 1954 Tennessee Survey

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CRIMINAL LAW AND PROCEDURE—1954 TENNESSEE SURVEY

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Most of the criminal law cases in the Tennessee courts during the past year have dealt with matters of procedure. The basic principles derived from these cases are treated in the Procedure and Evidence article of this 1954 Survey.[1] However, those cases of especial interest and significance will be considered here in somewhat greater detail. In addition to procedural matters there were a few cases which turned on concepts basic in the substantive law of crimes.

SUBSTANTIVE LAW

Homicide: Tennessee has enunciated and followed a rule which states that driving an automobile while intoxicated is an act *malum in se,* and that when this act results in the death of a human being, the drunken driver is criminally responsible without further showing of facts to establish criminal negligence.[2] This rule was extended in the case of *Reed v. State*[3] to cover a driver, not intoxicated, who deliberately tried to pass another vehicle in the face of heavy oncoming traffic.

The recent case of *Smith v. State*[4] involved facts substantially identical with the *Reed* case. Smith was proceeding in heavy traffic at the unreasonable speed of 60-65 miles per hour (the speed limit at the particular point was 45 miles per hour). In order to avoid striking a car in front of him, he swerved to his left into the path of an oncoming car, and one person was killed in the resulting collision. The court affirmed a conviction of involuntary manslaughter on the grounds that the accused was guilty of criminal negligence. Though the court quoted with approval from *Reed v. State,* with its *malum in se* theory, the decision was based solely on the finding of criminal negligence. It has been suggested that this decision may be an indication that Tennessee is ready to retreat from its somewhat extreme and unsatisfactory *malum in se* theory.[5] This may be a proper inference; however, it should be noted that in *Reed v. State* the accused ap-

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1. See Morgan, *Procedure and Evidence—1954 Tennessee Survey, infra* p. 895.

2. Keller v. State, 155 Tenn. 633, 299 S.W. 803, 59 A.L.R. 685 (1927), 41 HARV. L. REV. 669 (1928); see Warren, *Criminal Law and Procedure—1953 Tennessee Survey,* 6 VAND. L. REV. 1179-80 (1953).

3. 172 Tenn. 73, 110 S.W.2d 308 (1937).

4. 264 S.W.2d 803 (Tenn. 1954).

5. See 23 TENN. L. REV. 438 (1954).

parently deliberately pulled out to pass without being faced with any sudden necessity or peril—a deliberate disregard of the possible serious consequences of his act—whereas in *Smith v. State* the act of the accused in pulling into the left lane came about as the result of a perilous situation into which his antecedent negligence had placed him. This distinction is critical enough to take the *Smith* case completely out of the purview of the *malum in se* doctrine, and thus to negative any inference that the Tennessee Supreme Court is questioning its previous rulings.

A later case, *Rogers v. State*,[6] involved the question of malice. The accused voluntarily became quite drunk, and then drove his automobile on the wrong side of the road at a speed of 60-70 miles per hour. Three people died in the collision which resulted, and the drunken driver was convicted of second degree murder. The accused contended that, as he was completely under the influence of whiskey at the time of the accident, he could not have had the malice, express or implied, necessary to a conviction of murder. The Supreme Court held that one who wilfully drinks intoxicating liquor, and then knowingly drives an automobile while drunk in a reckless and dangerous manner, with knowledge of the peril thus created toward persons using the highway, will be held to have the intent necessary to support a conviction for murder. Here the court is adopting a rule which states that an act is done with malice if "done with knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act."[7] The court is in effect adopting the definition of Professor Perkins that malice, where factual homicidal intent is lacking, is found in "a man-endangering state of mind."[8] Authority, reason and public policy all seem to justify the court's position.

Larceny: Two very interesting cases, turning on the basic definition and elements of larceny were decided by the Supreme Court in 1953-54. In *Cook v. State*[9] the defendant sold timber to X for about $80.00. X's secretary made an error in computation and made out a check payable to defendant for about $800.00, and X signed and delivered the check to defendant without noticing the error. Although there was evidence that defendant was aware of the error as the check was being made out, this fact cannot be taken to have been established. Defendant immediately took the check to the drawee bank and cashed it. The Supreme Court found that the defendant knew at the time that he cashed the check that he was receiving too much money, and that he

6. 265 S.W.2d 559 (Tenn. 1954).
7. Holmes, C.J., in Commonwealth v. Chance, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899).
8. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L. J. 537, 557 (1934).
9. 264 S.W.2d 571 (Tenn. 1954).

intended to keep the money for his own use when he got it. A conviction of larceny was sustained. The court considered the case as simply involving the question as to whether or not there was a felonious taking of the money when the defendant cashed the check. In reaching an affirmative conclusion the court relied upon a Florida case, *Sapp v. State*,[10] wherein the accused, seeking to cash a check for some $40.00, was through error handed over $4000.00 by the bank teller. The Florida court held that one is guilty of a felonious taking if he receives money which he knows is being delivered to him under a mistake, and if he has the intent to convert the money to his own use. This rule is in accord with the better reasoned cases throughout the country. However, it is submitted that there are certain critical distinctions between the *Sapp* case and *Cook v. State* which should have been considered by the court: (1) Sapp was receiving money which in the absence of error on the part of the delivering bank he would not have received; he was thus taking the bank's money with felonious intent at the time he took it. Cook, on the other hand, received from the bank only the sum called for by a duly executed negotiable instrument. The check was genuine; Cook was not taking from the bank money which the bank was not supposed to deliver to him; neither was Cook taking from the bank money which belonged to the drawer of the check. He was, through the agency of the erroneous check, extinguishing a chose in action which the drawer-depositor held against the drawee bank. The writer is not suggesting that the defendant is not guilty of larceny under Tennessee statutes; what is being suggested is that the question in the *Cook* case was: "Does one who innocently takes a check which is erroneously drawn for too great an amount, and who later discovers the mistake, commit larceny when he cashes the check with intent to convert the money to his own use?" The answer may be that he is, but such an answer cannot be reached by reliance upon the admittedly correct rule of *Sapp v. State* as clear precedent.

The second larceny case, *State v. Nelson*,[11] arose under the worthless check law.[12] Accused, with fraudulent intent, obtained a release of a laborer's and materialman's lien upon a dwelling house, by giving the lienholder a worthless check. Under the worthless check statute, the offender must obtain property which may be the subject of larceny. Thus the question was squarely presented as to whether or not the release of a lien upon real estate is property which may be the subject of larceny. The court noted that by statute the common law purview of larceny may be extended to include instruments evidencing rights in real property, and it then found that the Tennessee Legis-

10. 157 Fla. 605, 26 So. 2d 646 (1946).
11. 195 Tenn. 441, 260 S.W.2d 170 (1953).
12. TENN. CODE ANN. § 11157 (Williams Supp. 1952).

lature had done just this. The statute in question provides that "Any person who shall feloniously steal . . . any . . . release . . . shall be punished. . . ."[13] The court reasons that this language necessarily places a release in the category of things which may be feloniously stolen, and therefore within the kinds of property which may be the subject of larceny. Assuming that the term "feloniously steal" is synonymous with "commit larceny of"[14] the reasoning of the court seems sound. Certainly the case comes within the spirit of the worthless check statute, and to so interpret the two statutes does no violence to established canons of statutory interpretation.

Rape: At common law a woman could not, by the nature of the offense, commit the crime of rape, but she could be guilty as a principal in the second degree or accessory by aiding, abetting or counseling a man in its commission.[15] Under a Tennessee statute[16] aiders and abettors in any criminal offense shall be deemed principal offenders. Therefore, any female who aids and abets a male in the perpetration of the crime of rape is subject to indictment and conviction of rape. The Tennessee Supreme Court so held in *Bryson v. State.*[17]

Public Drunkenness: There is no necessary connection between the offense of public drunkenness and the commission of acts which amount to a public nuisance. The offense is complete when one appears in public in a drunken condition. Thus, said the Supreme Court in *Inman v. State,*[18] a conviction will be sustained, even though there is no allegation or proof of any offensive conduct on the part of the accused, aside from the simple fact of his being drunk in a public place.

Selling Beer without a Permit: In *McBride v. State*[19] the facts showed that one Holly obtained a permit to sell beer in an inn which he operated for the defendant. Later defendant took over operation of the inn personally and continued to sell beer under authority of the permit issued to Holly. The court ruled that a beer permit is not assignable and sustained a conviction for selling beer without a permit. The decision seems clearly correct in the light of the commonly understood purpose of the beer permit statute.[20] In the exercise of the police power over an occupation intimately concerned with the public welfare, beer boards issue permits to a particular person for a particular place. Both the place and the person must meet the approval of the licensing body. It is not permissible for a permittee to use his permit

13. TENN. CODE ANN. § 10936 (Williams 1934).
14. The term Stealing "imports, *ex vi termini,* nearly the same as larceny." BOUVIER, LAW DICTIONARY 1132 (Baldwin ed. 1940).
15. MILLER, CRIMINAL LAW 300 (1934).
16. TENN. CODE ANN. § 10758 (Williams 1934).
17. 195 Tenn. 313, 259 S.W.2d 535 (1953).
18. 195 Tenn. 303, 259 S.W.2d 531 (1953).
19. 195 Tenn. 308, 259 S.W.2d 533 (1953).
20. TENN. CODE ANN. § 1191.14 (Williams Supp. 1952).

at a different place than that designated in the permit,[21] and neither should it be permissible for a different person than he who is named in the permit to sell at the permitted place.

Removal of Mortgaged Property from State: In *Miller v. State*[22] the defendant was convicted of violating the Tennessee statute which provides that "No maker of any registered mortgage . . . upon personalty shall move beyond the limits of the state any property embraced in and covered by said mortgage . . . without the written consent of the holder of the indebtedness secured. . . ."[23] The mortgage executed by defendant had not been registered at the time the property was removed from the state. The Supreme Court reversed the conviction, holding that the registration of the mortgage must precede the removal of the property. The court recognized that this decision might open the door to deliberate fraud on the part of a mortgagor who could obtain a loan and execute a mortgage after the county register's office had closed for the day, and could then immediately remove the property from the state without criminal liability. It is submitted that the legislature might well guard against this fraudulent practice by amending the statute to provide that removal of mortgaged property from the state without permission within a limited number of days after execution of the mortgage is a criminal offense, whether or not the mortgage was registered at the time of removal.

Procedural Law

Searches and Seizures: The more significant cases dealing with the Tennessee law of search and seizure are dealt with elsewhere in this Survey.[24] A few other cases should be noted here. In *Kizer v. Ward*[25] Tennessee officers, acting on information supplied to them, witnessed a truck being loaded with liquor under suspicious circumstances in Cairo, Illinois. They followed the truck into Tennessee and stopped it. The driver had no shipping documents as required by Tennessee statute.[26] The Commissioner of Finance and Taxation confiscated the truck and cargo. The court upheld the commissioner, on the ground that the officers had reasonable grounds to believe that a felony was being committed in their presence. As the officers knew that the truck was loaded with whiskey, they had a right to stop it to determine if its documents were in order, and under the statute the driver cannot

21. Sowell v. Red. 192 Tenn. 681, 241 S.W.2d 775 (1951); Tucker v. Carter County Beer Bd., 191 Tenn. 210, 232 S.W.2d 38 (1950).
22. 195 Tenn. 181, 258 S.W.2d 751 (1953).
23. Tenn. Pub. Acts 1951, c. 243, § 1; Tenn. Code Ann. § 10971.1 (Williams Supp. 1952).
24. Morgan, *Procedure and Evidence—1954 Survey, infra* p. 895 at 903.
25. 195 Tenn. 200, 258 S.W.2d 759 (1953).
26. The Tennessee statute requires among other things that the driver of a vehicle transporting liquor through Tennessee must have a bill of lading or memorandum of cargo, indicating the consignor and consignee. Tenn. Code Ann. § 6648.17 (Williams Supp. 1952).

complain of being thus stopped, since he has a duty to exhibit the necessary documents to the proper authorities upon demand. The statute supports no inference that demand shall be made only when there is suspicion of criminal acts. When an official knows that a truck is loaded with whiskey, he has a right to see if its papers are in order. The case is quite similar to and in accord with an earlier Tennessee case, *Evans v. Pearson.*[27]

In *Jones v. State*[28] a highway patrolman notified another patrolman that a certain described automobile was headed toward the second officer with a big carload of whiskey. The second patrolman recognized the car and stopped it. He noticed the neck of a bottle of whiskey protruding from under a blanket in the rear of the car. He arrested the driver and found over 50 gallons of whiskey in the car. The court held that the arrest and search were both legal. The rule is well established that where an officer has reasonable cause to believe that a felony is being committed in his presence, he may arrest without a warrant, and a reasonable search incidental to the arrest is valid.[29]

It is also well established in Tennessee that where an officer stops a vehicle on the pretext of examining the driver's license of the operator, and the officer then sees intoxicating liquor in the car he may not then arrest the driver for illegal possession or transportation of liquor, nor may he hold him until a proper warrant is obtained.[30] However, where a driver is stopped and is asked to exhibit his driver's license, if he voluntarily hands over the incriminating materials, he cannot complain that he was unreasonably searched.[31] And where, as in *Burns v. City of Nashville,*[32] the driver is arrested for a traffic violation, if in answer to an officer's question he voluntarily discloses that he is transporting intoxicating liquor, no problem of illegal search arises, since no search is involved.

Although the Tennessee Supreme Court has shown that it has no sympathy for the law violator whose property is confiscated as an incident to his arrest and conviction of dealing in the illegal liquor

27. 193 Tenn. 528, 246 S.W.2d 964 (1951).

28. 195 Tenn. 390, 259 S.W.2d 864 (1953).

29. This rule is supported by numerous Tennessee cases cited by the court. For a more complete analysis of the right to arrest and search without warrants, see Perkins, *The Tennessee Law of Arrest,* 2 VAND. L. REV. 509, 577, 614-24 (1949).

30. Murphy v. State, 194 Tenn. 698, 254 S.W.2d 556 (1953); Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947); Smith v. State, 182 Tenn. 158, 184 S.W.2d 390 (1945); Cox v. State, 181 Tenn. 344, 181 S.W.2d 338 (1944).

31. Acklen v. State, 267 S.W.2d 101 (Tenn. 1954).

32. 261 S.W.2d 149 (Tenn. App. M.S. 1953). Note that this case was decided in the Court of Appeals. A proceeding brought by a city for violation of a city ordinance is a civil action. Deitch v. City of Chattanooga, 195 Tenn. 245, 258 S.W.2d 776 (1953).

traffic,[33] the confiscating authority must proceed strictly according to law. In *Range Pontiac Sales Co. v. Dickinson*[34] a sheriff confiscated a bootlegger's automobile, but failed to give a receipt and failed to turn the automobile over to the Department of Finance and Taxation within the time provided by the statute.[35] The court held that the confiscation was not good. True, the contest was between lienholders and the commissioner, but under the findings of the court the lienholder stood in no better position than the bootlegger, so that had there been no lien the court's holding would apparently require that the automobile be returned to the owner.

Jurisdiction of Courts: In *State v. Lusky*[36] the defendant was arrested under a criminal warrant issued out of the Davidson County Court of General Sessions. Before the case was heard the attorney general entered a *nolle prosequi,* and on the same day the prosecutor obtained a presentment before the grand jury against the defendant. Defendant contested the jurisdiction of the circuit court on the ground that the sessions court had exclusive jurisdiction. The Supreme Court had no difficulty in concluding that the general sessions court is not a court of coordinate jurisdiction with the circuit court, and the attorney general is free to enter a *nolle prosequi* in the lower court at any time before jeopardy attaches without prejudice to the authority of the grand jury or to the jurisdiction of the circuit court to deal with the defendant subsequently.

Juries: In *England v. State*[37] a third defendant was included in the trial after six jurors had been selected to try the first two defendants. These jurors were allowed to disperse before the trial resumed with the additional defendant. The new party challenged one of the six jurors, and the remaining five were allowed to sit on the case without objection by any of the defendants. Upon their conviction, the first two defendants claimed that the verdict was vitiated by reason of the fact that the jury were allowed to disperse during the trial. The court went to some length to show that dispersal of the jury will vitiate a verdict in Tennessee, but that the court does not approve of the rule in non-capital cases; the court then sustained the verdict on the ground that the trial began anew after the dispersal, and the five jurors were selected anew. This would indicate that the Supreme Court might be prepared to overrule the old Tennessee rule as to the effect of dispersal in non-capital cases if a case were squarely presented to it. However, upon petition to rehear the court so emphatically stated

33. See Kizer v. Ward, *supra* note 25.
34. 195 Tenn. 228, 258 S.W.2d 770 (1953).
35. TENN. CODE ANN. § 6648.24 (Williams Supp. 1952).
36. 267 S.W.2d 106 (Tenn. 1954).
37. 264 S.W.2d 815 (Tenn. 1954).

that it did not intend to overrule the previous cases on the point that one is at a loss to understand why the court saw fit to express its disapproval of the existing rule at all. The case could have been decided without more than a passing reference to an inapplicable rule. It contributes only to confusion in the law when a court by way of dictum criticizes an existing rule and then emphatically denies any intention to depart from it.

Extradition: The case of *State* ex rel. *Bryant v. Fleming*[38] presented the question of the right of Tennessee to arrest and extradite to another state a fugitive who was not in the demanding state when the alleged offense occurred. The fugitive was charged in Indiana with the offense of non-support of a minor child. The Supreme Court stated that Tennessee would not have had authority to extradite the fugitive under these circumstances prior to the enactment of the Uniform Reciprocal Support Act[39] and the 1950 Supplement to the Tennessee Code.[40] The court took judicial notice that Indiana has adopted a substantially similar statute.

The alleged offense occurred prior to the date of the enactment by the Tennessee Legislature of the relevant statutes. The court ruled in what seems to be a correct interpretation that these statutes are procedural in nature, and that procedural law as of the time of the demand, rather than as of the time of the commission of the offense, will control.

Evidence: Though naked possession of beer will not support an inference of a purpose of sale,[41] the surrounding circumstances may be such as to support an inference that the beer is held for sale, and thus to sustain a conviction of illegal possession of beer for the purpose of sale. The Supreme Court so held in *Farmer v. State*,[42] where the surrounding circumstances were that, in addition to possessing 23 cases of beer, all of which was refrigerated or on ice, defendant had near the beer a cigar box in which were several dollars in currency and change, and there were several stacks of half-dollars in an adjoining room.

Tennessee's Age of Consent statute[43] provides that no one shall be convicted of the offense on the unsupported testimony of the female in question. In *Binnion v. State*[44] the only corroborative evidence

38. 195 Tenn. 419, 260 S.W.2d 161 (1953).
39. Tenn. Pub. Acts 1951, c. 234.
40. TENN. CODE SUPP. § 11935.5 (1950).
41. Beasley v. State, 193 Tenn. 327, 246 S.W.2d 32 (1951).
42. 265 S.W.2d 555 (Tenn. 1954).
43. TENN. CODE ANN. § 10786 (Williams 1934).
44. 264 S.W.2d 795 (Tenn. 1954).

consisted of the testimony of three witnesses who testified that the defendant had courted the complaining female for a period apparently terminating some nine and one-half months prior to the birth of her child. None of these witnesses offered anything to suggest any impropriety in the relationship between defendant and prosecutrix. The Supreme Court reversed the conviction and held that the evidence offered was not sufficient corroboration of the prosecutrix' testimony. Although there is language in the earlier case of *Ross v. State*[45] to the effect that the relations of the parties and their opportunities for meeting may be shown in corroboration, an examination of this case reveals that the supporting testimony at least raised an inference of improper conduct.[46] Any other holding than that of the court in the *Binnion* case would render the corroboration requirement virtually meaningless.

Notwithstanding the various Women's Emancipation Acts it is still true that articles found on residential premises are presumed to belong to the husband as head of the family.[47] However, this is a rebuttable presumption which may be overcome by proof of circumstances indicating possession on the part of the wife. Thus in *Morrison v. State*[48] officers searched premises and found under the wife's wardrobe a trapdoor which led to a cache of whiskey. The defendant wife was present at the time and did not deny that she was owner of the whiskey; indeed, she remarked that she had been expecting a raid. These circumstances were held sufficient to overcome the presumption of possession in the husband, and were sufficient to sustain a conviction of the wife for unlawful possession of intoxicating liquor.

Determination of Sanity of Accused: In Ross v. State,[49] defendant was confined to Western State Hospital for the Insane at the time of trial. By what authority he was committed to the hospital does not appear in the opinion. Defendant's attorneys submitted affidavits to the trial court to the effect that their client could not go to trial on a manslaughter charge because of his physical and mental condition. Despite this objection the trial was held and defendant was convicted. On appeal the Supreme Court did not reverse the conviction but postponed execution of the judgment until it could obtain the certificate of a competent psychiatrist as to the competence of defendant to advise with counsel and to testify in his own behalf. After obtaining this

45. 130 Tenn. 387, 185 S.W. 1073 (1914).

46. The correspondence between the parties was "vibrant with sexual emotion." *Id.* at 395.

47. Crocker v. State, 148 Tenn. 106, 251 S.W. 914 (1922).

48. 263 S.W.2d 504 (Tenn. 1953).

49. 265 S.W.2d 553 (Tenn. 1954).

certificate the Supreme Court will decide whether to execute the judgment or to order a new trial. In this way the Supreme Court is performing a function normally exercised by the trial jury—that of determining the sanity of the defendant. This may well be dangerous precedent. The appellate court is assuming a basic fact-finding function, and the trial court is encouraged to proceed with a trial without requiring the issue of sanity to be determined by the trial jury.