Vanderbilt Law Review

Volume 6
Issue 5 *Issue 5 - August 1953*

Article 18

8-1953

Criminal Law and Procedure

William D. Warren

CRIMINAL LAW AND PROCEDURE

WILLIAM D. WARREN*

In the field of Criminal Law and Procedure, the Tennessee Supreme Court might be said to have completed a normal, even typical, year; some new law was announced, and much existing law was reiterated and reshaped. The Court's respect for local precedent persisted undiminished. No Tennessee case was directly overruled, and Tennessee precedents were closely adhered to when available. Not a single dissent appeared in the cases discussed in this article.

The brevity of appellate opinions — particularly their highly condensed fact paragraphs — makes critical analysis of them a difficult and somewhat risky procedure. Nevertheless, an attempt has been made in this article to add the analytical dimension to the descriptive one. Although one might like a somewhat more detailed treatment in some of the opinions, the holdings of the Court in this field — most of them written by Judge Prewitt — were usually sensible and desirable.[1]

SUBSTANTIVE LAW

Homicide: It should be of interest to Tennessee lawyers to note that the doctrine of *Keller v. State*,[2] with its unusually onerous burden of responsibility on the intoxicated driver, still has vigor in this State. In that well-known decision, the Court held that driving an automobile while intoxicated is an act *malum in se* and that, when one is killed by an auto driven by one in the commission of an act *malum in se*, the driver is guilty of a homicide without any showing of a causal connection between the death and the driver's wrongful act.[3]

* Assistant Professor of Law, Vanderbilt, University

1. Several Criminal Law cases not appearing in this article are treated in other articles in this Survey. Hicks v. State, 250 S.W.2d 559 (Tenn. 1952), is found in the Possession section of the article on Personal Property and Sales. Murphy v. State, 254 S.W.2d 979 (Tenn. 1953), and Monroe v. State, 253 S.W.2d 734 (Tenn. 1952), are discussed in the Evidence section of the Procedure and Evidence article. Manning v. State, 257 S.W.2d 6 (Tenn. 1953), is discussed in the Trial section of the Procedure and Evidence article. Allen v. State, 250 S.W.2d 539 (Tenn. 1952), and Helton v. State, 250 S.W.2d 540 (Tenn. 1952), are covered by the Appeal and Error topic of the Procedure and Evidence article.

2. 155 Tenn. 633, 299 S.W. 803, 59 A.L.R. 685 (1927), 41 HARV. L. REV. 669 (1928).

3. A recent restatement of the rule appeared in Whitlock v. State, 187 Tenn. 522, 525, 216 S.W.2d 22, 24 (1948): "Suffice it to say that if the act which causes death is Maluin in se, the criminal intent is supplied, and it is not necessary that it be shown that death was the natural and probable result of the act." The lack of any definite standard of which acts are *malum in se* and which are *malum prohibitum* makes such a rule necessarily an arbitrary and undesirable one. In Holder v. State, 152 Tenn. 390, 277 S.W. 900 (1925), the Court held that carrying a pistol in violation of a statute was an act *malum prohibitum*. Driving an auto in excess of the speed limit was also held

Despite the Court's insistence that "There is nothing radical or novel in this conclusion,"[4] the case has become standard fare in several of the nation's Criminal Law casebooks[5] as being one of the most extreme holdings in this area of law.

The *Keller* decision finds its latest adherence in *Davis v. State*,[6] where a driver, shown by the evidence to be drunk, killed a pedestrian. In answer to the defendant's contention that the evidence preponderated against the verdict, the Court held that the conviction of involuntary manslaughter could be sustained on either one of two theories. One theory was that the defendant was driving while intoxicated and was thus, under the *Keller* rule, in the commission of an act *malum in se* and responsible for the death which resulted.

Causation was again a factor in *Gray v. Smith*,[7] where a post-crap game melee, occasioned by the game's breaking up while the defendant was still a loser, resulted in the defendant shooting three of the other participants. Two survived, but one, though suffering only from flesh wounds not thought to be fatal, died of uremic poisoning which resulted from a rapid deterioration of his heart and kidneys following treatment of his wounds. One assignment of error questioned the soundness of the court's ruling in excluding the testimony of a physician to the effect that the attending surgeons were negligent in treating the deceased and that the immediate cause of death was uremic poisoning. The Supreme Court, finding "nothing . . . in the testimony of this witness that would tend to exonerate the defendant from the charge of murder,"[8] overruled the assignment.

In so holding, the Court followed the rule established in this State,[9] as elsewhere,[10] that one inflicting a dangerous wound is held for the consequences flowing from the injury whether the consequential harm "be direct or through the operation of intermediate agencies dependent

to be *malum prohibitum* in Copeland v. State, 154 Tenn. 7, 285 S.W. 565 (1926). The usual tests to determine whether an act is *malum in se* or *malum prohibitum* are listed in the *Whitlock* case as follows: "*Malum in se* is defined as: 'An act involving illegality from the very nature of the transaction, upon principles of natural, moral and public law.' 38 C.J., P. 520." "*Malum prohibitum* is: 'An act made wrong by legislation; a forbidden evil.' 38 C.J., P. 520." 187 Tenn. at 526, 216 S.W.2d at 24. It is submitted that, if the court may deprive the defendant of any defense he may have regarding causation or intent by finding him to have been in the commission of an act *malum in se*, is is desirable to have a much clearer definition of what an act *malum in se* is than that set out above.

4. 155 Tenn. at 637, 299 S.W. at 805.

5. The *Keller* case appears in HALL AND GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 139 (1951); in HARNO, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 192 (3d ed. 1950) (generally considered the most widely adopted Criminal Law casebook); and in MIKELL, CASES ON CRIMINAL LAW 218 (3d ed. 1933).

6. 250 S.W.2d 534 (Tenn. 1952).

7. 250 S.W.2d 86 (Tenn. 1952).

8. *Id.* at 90.

9. Odeneal v. State, 128 Tenn. 60, 157 S.W. 419 (1913). *See* Rucker v. State, 174 Tenn. 569, 574, 129 S.W.2d 208, 210 (1939).

10. MILLER, CRIMINAL LAW § 25 (1934).

upon and arising out of the original cause."[11] Perhaps the most common intermediate agency which a wrongdoer should foresee as the result of an act like the one in the *Gray* case is a surgical operation. The wrongdoer, therefore, takes the risk that the physicians may be negligent and becomes criminally responsible for the death even though competent treatment would have cured the deceased. The fact that the immediate cause of death in the instant case was uremia presented no problem since this ailment was a direct result of the deceased's wounds.[12]

False Pretenses: Two unusual false pretenses questions arose in *Ownbey v. State.*[13] There the defendant represented that he was *X*, a man of good credit, and induced several retailers to sell merchandise to him on conditional sale. The defense raised was that defendant was acting on *X*'s authority and that the goods were actually delivered to *X*. The Court refused to disturb the jury's verdict of guilty, pointing out that a defrauder is no less guilty of false pretenses when the pretense is made for the benefit of another.[14]

A second question, though not mentioned by the Court, is present in this case. It stems from the requirement that, for there to be a crime of false pretenses, the duped person must have intended to pass *title* to the goods, not merely *possession.*[15] But when goods are sold on a conditional sale contract, title is expressly reserved in the seller. Can it then be said that the conditional buyer has acquired a sufficient property interest in the goods so as to be adjudged guilty of obtaining property by false pretenses? The Court's holding is an implicit indication that it felt the conditional buyer had acquired the necessary property interest. What meager authority exists on the point is in accord with this view.[16] Since the conditional vendee becomes the beneficial owner, leaving only a security interest in the vendor, such a view seems sound.

Interpretation of Criminal Statutes: Mere possession or keeping of slot machines is not a crime in Tennessee,[17] despite the wording of sec-

11. Odeneal v. State, 128 Tenn. 60, 69, 157 S.W. 419, 421 (1913).
12. In Rucker v. State, 174 Tenn. 569, 129 S.W.2d 208 (1939), the Court endorsed the rule of causation set out in the *Odeneal* case, but reversed the conviction on the ground that the evidence failed to show that the death of the deceased was a consequence, direct or indirect, of the defendant's wrong.
13. 253 S.W.2d 726 (Tenn. 1952).
14. Rowe v. State, 164 Tenn. 571, 51 S.W.2d 505 (1932) (defendant's contention that a third party got the benefit of the money fraudulently obtained held not an adequate defense); People v. Cheeley, 106 Cal. App.2d 748, 236 P.2d 22 (1951).
15. There are literally hundreds of cases stating this proposition in the False Pretenses topic of the *Decennial Digests,* key number 12.
16. Chappell v. State, 216 Ind. 666, 25 N.E.2d 999 (1940); Whitmore v. State, 238 Wis. 79, 298 N.W. 194, 134 A.L.R. 872 (1941).
17. Burks v. State, 254 S.W.2d 970 (Tenn. 1953). (*Walden v. State* is also incorporated into this opinion.) In Cleek v. State, 189 Tenn. 302, 225 S.W.2d

tion 11276: "If any person . . . keep or exhibit any gaming table or device for gaming he is also guilty of a misdemeanor."[18] For there to be a violation of the Tennessee statutes on the subject, the machines must be used for gambling or for the enticement of persons to gamble. This construction apparently permits the storage of gambling devices in this State, so long as they are not actually in use.

Another interpretation problem was resolved when the Court held that a dog is a domestic animal within the meaning of a statute making it a crime willfully to kill a "domestic animal of another, of any value."[19]

A test case resulted in a holding that the use of gill nets in Tennessee by commercial fishermen is prohibited by the Code.[20]

PROCEDURAL LAW

Searches and Seizures: Although the major pronouncements of the Court during the past year on the subject of searches and seizures are to be found elsewhere in this Survey,[21] one further case, *Garrett v. State*,[22] deserves mention. The accused in that case first assailed the search warrant on the ground that it contained an inadequate and inaccurate description of the premises to be searched. Despite the Tennessee Constitution's prohibition against "general warrants,"[23] the rule is established in this State that a description is sufficient if it enables the officer to locate with reasonable certainty the place to be searched.[24] The Court reiterated this rule in finding this assignment of error to be without merit.

The defendant further contended that the search was illegal because the officers neither read nor exhibited the search warrant to him. The

70 (1949), the Court held that the mere possession of a gaming device in defendant's residence was not a violation of the gaming statutes.

18. TENN. CODE ANN. § 11276 (Williams 1934). In supporting the holding of the *Burks* case, the Court relied on the wording of §§ 5250 and 11282, TENN. CODE ANN. (Williams 1934). Section 5250 provides: "Gambling Devices. — No person shall have in his possession any gambling table or any device whatever for enticement of any person to gamble." Section 11282 provides: "Gaming device. — Any person convicted of having, or having had, in his possession any gambling table or other device for the enticement of any person to play or gamble. . . ."

19. White v. State, 249 S.W.2d 877 (Tenn. 1952). The statute construed is TENN. CODE ANN. § 10865 (Williams 1934). The word "beast" formerly appeared in the statute in lieu of "domestic animal." State v. Phillips, 1 Tenn. Cas. 34 (1850), held that a dog was not a beast within the meaning of Tenn. Acts 1803, c. 9, § 2.

20. Spicer v. State, 250 S.W.2d 913 (Tenn. 1952). The Court reached this result by reading §§ 5176.79 and 5176.83, TENN. CODE ANN. (Williams Supp. 1952), *in pari materia*.

21. See the section on Evidence, subsection on Illegally Obtained Evidence, in the article on Procedure and Evidence.

22. Garrett v. State, 250 S.W.2d 43 (Tenn. 1952).

23. TENN CONST. Art. I, § 7.

24. Webb v. State, 173 Tenn. 518, 121 S.W.2d 550 (1938); O'Brien v. State, 158 Tenn. 400, 14 S.W.2d 51 (1929); *cf.* Seals v. State, 157 Tenn. 538, 11 S.W.2d 879 (1928); Bragg v. State, 155 Tenn. 20, 290 S.W.1 (1927).

Court summarily disposed of this objection by noting that there is no statute in this State requiring an officer to exhibit the warrant at the time of search. Since the opinion does not disclose whether a demand to see the warrant was made or whether the search was resisted, the decision is a difficult one to evaluate. Admittedly the officer need not exhibit the warrant while the defendant actively resists the search;[25] nor perhaps need he do so if there is no demand on the part of the defendant.[26] But one wonders whether the Court intended its decision to deny a peaceful party, offering no resistance to the search, the right to see, upon reasonable demand, the authority by which his right to be secure in his person and possessions is abridged. The only authority cited by the Court in support of its holding is a passage from *American Jurisprudence* stating that one need not exhibit a search warrant at the time of the search.[27] Examination of this passage shows that the single case cited to uphold it was one in which a party "vigorously resisted" arrest.[28] It is usually said that upon demand an officer must exhibit a warrant for arrest, even though no statute requires it.[29] No reason for a different rule with regard to search warrants is readily apparent.

Indictments and Presentments: A point of law frequently resolved in other jurisdictions arose for the first time in the Tennessee state courts in *State v. Smith*.[30] One count of the presentment charged the defendants with conspiring to violate a lawful injunction by doing at least six different wrongful acts. The defendants demurred to the presentment on the ground that this count charged six separate and distinct crimes and was, therefore, duplicitous. The Supreme Court held that the trial court erred in sustaining the demurrer and remanded the case for a new trial. In doing so, the Court followed what appears to be the overwhelming weight of authority on the problem.[31] This view recognizes the fundamental proposition that the illegal agreement is the criminal act in conspiracy.[32] Since the wrongful agreement constitutes the act punishable by law, whether the object of that agreement is to commit one crime or six crimes, the agreement itself

25. See State v. Brown, 91 W. Va. 709, 114 S.E. 372 (1922).
26. *Ibid.*
27. 47 AM. JUR., *Searches and Seizures* § 39 (1943).
28. State v. Brown, 91 W. Va. 709, 114 S.E. 372, 374 (1922).
29. Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 555 (1949).
30. 253 S.W.2d 992 (Tenn. 1952). The Tennessee decision most closely approximating the *Smith* case is Thompson v. State, 105 Tenn. 176, 58 S.W. 213, 51 L.R.A. 833 (1900), but there the Court seemed to believe that the crux of the indictment was an unlawful attempt to do different criminal acts.
31. See, *e.g.*, Ford v. United States, 273 U.S. 593, 47 Sup. Ct. 531, 71 L. Ed. 793 (1927); United States v. Bogy, 16 F. Supp. 407 (W.D. Tenn. 1936), *aff'd*, 96 F.2d. 734 (6th Cir.), *cert. denied*, 305 U.S. 608 (1938); People v. Kahn, 256 Ill. App. 415 (1930). *See* Braverman v. United States, 317 U.S. 49, 54, 63 Sup. Ct. 99, 87 L. Ed. 23 (1942); Frohwerk v. United States, 249 U.S. 204, 209-10, 39 Sup. Ct. 249, 63 L. Ed. 561 (1919). For a welter of cases on the question of conspiracy to do a number of different acts, see Note, 87 L. Ed. 29 (1943).
32. MILLER, CRIMINAL LAW 107 (1934).

constitutes only one crime. Thus an allegation in a single count of a conspiracy to commit several crimes is not duplicitous.

Former Jeopardy: It is usually held that an accused is in jeopardy when, upon going to trial before a court of competent jurisdiction, with valid indictment and plea, the jury is sworn to try the issue.[33] However, an efficient administration of justice has required that exceptions be made to this rule, providing for such contingencies as the illness or disqualification of jurors.[34] Thus the cases have long held that the trial judge may discharge the jury for the misconduct or disqualification of one of its members whenever discharge is necessary to ensure a proper trial and that such discharge will not support a plea of former jeopardy when the defendant is tried again.[35] But discharge of the jury, over the objection of the defendant, for misconduct or disqualification not of such a serious nature as to render the discharge necessary, is generally held to be a sufficient basis for a plea of former jeopardy.[36]

In *Helton v. State*,[37] the day after the jury was sworn to try the defendant on a charge of first degree murder, the trial judge was informed by the district attorney general that Mr. Parker, one of the jurors, was infamous. After Parker admitted that he had been convicted of petit larceny some 25 years before, the judge excused him and ordered a new juror selected. On the third day of the trial, the attorney general questioned the qualifications of another juror, Mr. Brooks. Testimony was heard that Brooks had been friendly with the defendant; furthermore, an affidavit by Brook's divorced wife alleged that he was heard to say that he did not think Helton would "get a day" for the killing. The court then decided that the different challenges made to the qualifications of the jurors had created some misapprehension on the part of the other jurors and that this, together with Brook's statement and apparently friendly relationship to the defendant, necessitated a new jury. A mistrial was ordered.

The discharge of the first juror, Parker, seems to have been improper for the reason that infamy of a juror is a cause *propter defectum* — that

33. Etter v. State, 185 Tenn. 218, 205 S.W.2d 1 (1947); Green v. State, 147 Tenn. 299, 247 S.W. 84 (1923); MILLER, CRIMINAL LAW 535 (1934).

34. MILLER, CRIMINAL LAW 536-40 (1934).

35. "The general modern rule is that the court may discharge a juror without working an acquittal of the defendant in any case, where the ends of justice, under the circumstances, would otherwise be defeated." Green v. State, 147 Tenn. 299, 307, 247 S.W. 84, 86 (1922). Thompson v. United States, 155 U.S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146 (1894); Simmons v. United States, 142 U.S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (1891). This principle of law is found in Tennessee cases ranging in point of time from Mahala v. State, 18 Tenn. 532 (1837), through Etter v. State, 185 Tenn. 218, 205 S.W.2d 1 (1947).

36. Tomassón v. State, 112 Tenn. 596, 79 S.W. 802 (1903); State v. Connor, 45 Tenn. 311 (1868); Ward v. State, 20 Tenn. 253 (1839); State v. Thompson, 58 Utah 291, 199 Pac. 161 (1921).

37. 255 S.W.2d 694 (Tenn. 1953).

is, a defect which is not open to attack after the juror is sworn in.[38] On the other hand, the discharge of the second juror for prejudging the case is supported by the authorities.[39] However, the ground was abruptly cut from under the defendant's contention that the improper discharge of the first juror gave rise to double jeopardy when the Supreme Court overruled this assignment of error, apparently on the ground that the bill of exceptions did not show an exception to the trial court's ruling on this point.[40] The Court then affirmed the ruling that the second juror was properly discharged because of manifest necessity and upheld the conviction.

By relying on the omission in the bill of exceptions to negative the defendant's plea of former jeopardy with reference to the first juror, the Court avoided coming to grips with a problem as difficult as it is unusual. This is, does the later ordering of a mistrial for proper disqualification of a juror remove the former jeopardy objection on the part of the defendant with regard to the previous improper discharge of another juror? There are arguments of some weight on both sides of the problem. It is possible that a court might meet the somewhat technical argument of former jeopardy with the view that, since the jury was invalid all the while by reason of the presence of a juror who had prejudged the case, the defendant was not injured by the previous incorrect ruling. The defendant might well come back with the contention that, after the discharge of the first juror, the old jury came to an end, and despite the fact that the new jury had eleven of the same jurors it is actually a new and distinct body from the first jury.[41]

In *Littleton v. State*,[42] the defendant requested at his first trial that

38. "It is conceded by the state that a number of cases do hold that the infamy of a juror is properly a cause of propter defectum." *Id.* at 697. Tennessee cases have held the following causes of disqualification *propter defectum*: relationship of juror to defendant and nonresidency in the county, Tomasson v. State, 112 Tenn. 596, 79 S.W. 802 (1903); juror related to prosecutor, Hamilton v. State, 101 Tenn. 417, 47 S.W. 695 (1898); relationship of juror to defendant, Cartwright v. State, 80 Tenn. 620 (1883); juror not landowner in the county, Draper v. State, 63 Tenn. 246 (1874); jurors not freeholders, Ward v. State, 20 Tenn. 253 (1839). It would seem that infamy would fit into this class of cases. Section 10009, TENN. CODE ANN. (Williams 1934), renders those persons who are infamous incompetent to serve as jurors; but nonhouseholders were, at the time the cases cited above were decided, also prohibited by statute, § 10006, as are persons related within the sixth degree at the present time, § 10007.

39. Three Tennessee cases distinguish causes *propter defectum* from those where a juror has "prejudged" the case and indicate that in the latter case the juror can be discharged without giving rise to double jeopardy on a new trial. *See* Hamilton v. State, 101 Tenn. 418, 419, 47 S.W. 695, 696 (1898); Cartwright v. State, 80 Tenn. 620, 628 (1883); Draper v. State, 63 Tenn. 246, 253 (1874).

40. See the section on Appeal and Error in the article on Procedure and Evidence in this Survey for a critical comment on this ruling.

41. TENN. CODE ANN. § 8814 (Williams 1934) allows a juror to be discharged under certain circumstances and says "the vacancy may be filled and the trial commenced anew, or the court may, in its discretion, order the jury to be discharged and a new one impaneled."

42. 249 S.W.2d 894 (Tenn. 1952).

the jury fix the punishment. The jury found the defendant guilty but was unable to fix the punishment. On retrial, the plea of *autrefois convict* was properly overruled for the reason that there had been no complete verdict in the first case until the jury had both found the defendant guilty and agreed upon the punishment.

Joinder: In *Dykes v. State*,[43] three men were separately indicted for the felonious transportation of whiskey, the acts of each arising out of the same transaction. The trial judge overruled the defendants' motion for separate trials and consolidated the cases for trial. The defendants assigned this as error on appeal. The Supreme Court upheld the lower court's ruling.

Whether defendants may be jointly tried or are entitled to a severance lies in a large measure within the discretion of the trial court.[44] Where different defendants are jointly indicted, the trial judge may in his discretion refuse their application for separate trials, unless a joint trial would unduly prejudice the rights of the defendants.[45] Or, where a single defendant is charged in separate indictments with different offenses growing out of the same transaction, a consolidation of the indictments for trial is properly within the judge's discretion.[46] But the *Dykes* case falls in neither of these well-established categories, for it is a case in which *different* defendants were *separately* indicted for offenses arising from the same transaction. Should the ordering of a joint trial in this case lie within the judge's discretion? Although the Court's holding that this, too, is discretionary with the trial court has little direct authority to support it,[47] it has the distinct advantage of having virtually no authority against it.[48] It would seem in the best interests of a speedy and economical administration of justice to allow the trial judge to order a joint trial in a situation like the *Dykes* case, if in his discretion he finds that such a consolidation will not result in prejudice to the defendants.

---

43. 253 S.W.2d 555 (Tenn. 1952).

44. See, *e.g.*, Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937); People v. Eudy, 12 Cal.2d 41, 82 P.2d 359 (1938); State v. Blackley, 191 Wash. 23, 70 P.2d 799 (1937); *see* Woodruff v. State, 164 Tenn. 530, 538-39, 51 S.W.2d 843, 845 (1932). ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 316 (1947).

45. Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937).

46. People v. Duane, 21 Cal.2d 71, 130 P.2d 123 (1942); People v. Kittrelle, 102 Cal. App.2d 149, 227 P.2d 38 (1951); People v. Gryszkiewicz, 88 Cal. App.2d 230, 198 P.2d 585 (1948).

47. There is some federal authority which seems to allow the trial court this discretion, but these holdings are at least partially based upon a statute. Morris v. United States, 12 F.2d 727 (9th Cir. 1926), is probably the strongest holding on the point. This case contended that a trial judge has the discretionary power to compel a joinder in the *Dykes* situation even without statutory authority. *Id.* at 729. But this statement hardly seems necessary to the actual holding of the *Morris* case.

48. The Court in the *Dykes* case noted that the defense counsel was unable to find a single case to support his position.

Juries: In comparison with her neighboring states, Tennessee has had an unusually tranquil history with regard to racial discrimination in the selection of grand and petit jurors. While a great many cases on this subject have found their way into the appellate courts of the other Southern states, the Tennessee courts have entertained only a handful of proceedings of this nature.[49] The most recent holding on the subject, *Williamson v. State*,[50] arose out of the shooting of a deputy sheriff engaged in an ill-timed attempt to make an arrest during a colored picnic.

In appealing from a first degree murder conviction, the defendant contended that there was discrimination against the colored race in the manner in which the panel was selected and that Negroes should be represented on juries in the same proportion that the Negroes bear to the whites in the county. The record showed that the trial jury consisted of eleven whites and one Negro chosen from a panel containing 18 to 20 Negroes out of a total of 152 panel members. The testimony of one of the jury commissioners on the subject was as follows:

> "Q. Have you endeavored to select the same number of colored folks in proportion to the population as there are to the whites on the jury? A. We never made any selection of so many colored people and so many of the white people we just put a good many names of the colored people in there and a good many names of white people.
>
> "Q. Well in order to get the colored names in there you checked on certain colored folks in order to locate that—see whether or not you knew a colored man that would make a good juror and such as that, that's the method you used? A. That's right because the majority of colored people are not, I don' [sic] think, qualified for jury service."[51]

The Tennessee Supreme Court affirmed the conviction.

Since 1880 it has been repeatedly held that state discrimination against Negroes with respect to service on grand and petit juries solely because of their race denies Negro defendants in criminal cases the equal protection of laws required by the Fourteenth Amendment.[52]

49. In two of the older cases, Rivers v. State, 117 Tenn. 235, 96 S.W. 956 (1906), and Ransom v. State, 116 Tenn. 355, 96 S.W. 953 (1905), the Court was astute to decide the controversies on procedural technicalities without facing the merits of whether there was illegal segregation. In a more recent case, Kennedy v. State, 186 Tenn. 310, 210 S.W.2d 132 (1947), the Court did go into the merits of jury selection in Maury County and found there to be no illegal discrimination. The United States Supreme Court denied certiorari.

50. 250 S.W.2d 556 (Tenn. 1952). Neither this decision nor the *Kennedy* case, *supra* note 49, cited the *Rivers* or *Ransom* case, *supra* note 49.

51. 250 S.W.2d at 558.

52. The cases do not seem to distinguish between the constitutional rights involved with respect to grand juries and petit juries. The numerous cases supporting the text range from Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879), through Cassell v. Texas, 339 U.S. 282, 70 Sup. Ct. 629, 94 L. Ed. 839 (1950), and Shepherd v. Florida, 341 U.S. 50, 71 Sup. Ct. 549, 95 L. Ed. 740 (1951).

Such discrimination is invalid whether embodied in a statute or carried on in the administrative practices of state jury selection.[53] The constitutional right involved appears to be negative in nature. There is no affirmative right on the part of a colored defendant to have Negroes on the jury. His only right is that there be no systematic discrimination against Negroes in the selection of juries.[54]

The most troublesome problem in this area is the very one raised in the *Williamson* case. That is, what acts constitute discrimination in selecting juries and jury panels? The commissioner in the *Williamson* case said that he limited the number of Negroes on jury panels because he believed that few of them made good jurors. It is true that Negroes can be excluded from jury duty because of incompetency like anyone else,[55] but they cannot be excluded solely because of their race. In cases like *Williamson v. State,* which reason is really uppermost in a jury commissioner's mind? Does he limit the number of Negroes on the panel because they are Negroes or because they are not qualified to serve?

It is doubtful if complete *exclusion* over a period of time of Negroes from jury panels on the ground that the commissioners knew of none qualified to serve would be tolerated.[56] The inference would probably be drawn that they were excluded primarily because of their race. It may be possible over a relatively short period of time unofficially to *limit* the number of Negroes on each panel if the stated reason for the low Negro participation is that the commissioners were unable to find any more colored people capable of being good jurors.[57] This is so

53. The *Strauder* case, *supra* note 52, involved a statute. The other cases, such as the *Cassell* and *Shepherd* cases, *supra* note 52, Patton v. Mississippi, 332 U.S. 463, 68 Sup. Ct. 184, 92 L.Ed. 76 (1947), and Akins v. Texas, 325 U.S. 398, 65 Sup. Ct. 1276, 89 L.Ed. 1692 (1945), involved administrative discrimination.

54. See Kennedy v. State, 186 Tenn. 310, 317, 210 S.W.2d 132, 135 (1947), for a typical statement of this proposition.

55. "It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination in respect to such service, be made against any class of citizens solely because of their race." *In re* Shibuya Jugiro, 140 U.S. 291, 297-98, 11 Sup. Ct. 770, 35 L. Ed. 510 (1891). For cases where Negroes were to some extent excluded because they were not qualified, see note 57, *infra.* The Tennessee requirements for jury service are found in TENN. CODE ANN. §§ 10006-10014 (Williams 1934, Supp. 1952).

56. In Hill v. Texas, 316 U.S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942), the defendant charged that Negroes had been systematically excluded from juries in Dallas County. Evidence was introduced which showed no Negro had served on a grand jury for many years in that county. The jury commissioners insisted that they did not exclude Negroes because of their race, rather because they chose only people they knew to be qualified to serve and they were not acquainted with any Negroes whom they considered qualified. Chief Justice Stone, speaking for the Court, held that the evidence showed there were plenty of qualified colored people in the area and that the commissioners were under a duty to go out and familiarize themselves with these people.

57. A number of pre-1940 state decisions allowed either exclusion of Negroes or a very limited participation by them in juries and panels largely

for the simple reason that in a state like Tennessee, where officials have a great deal of discretion in selecting jury panels, it is almost impossible to prove a discriminatory limitation against Negroes, because officials can testify that in their discretion they thought the persons chosen for jury duty were the best qualified.[58] However, even here, if there is a pattern of limitation over a period of years and a showing that the jury commissioners choose only those Negroes whom they know without familiarizing themselves with other possible qualified Negroes in the community, a recent case, *Cassell v. Texas*,[59] indicates that the United States Supreme Court might find an illegal discrimination.

The defendant's insistence in the *Williamson* case that he was entitled to a jury on which Negroes were represented in the same proportion that the population of their race bears to the total population of the community involved was properly rejected by the Court. The Supreme Court of the United States has said: "Fairness in selection [of a jury] has never been held to require proportional representation of races on a jury."[60] In fact, the cases go so far as to assert that an important portion of a Negro defendant's rights is to have members of his own race considered for jury duty *without* numerical or proportional limitations.[61]

Extradition: The recently adopted Uniform Criminal Extradition Act[62] came under construction in *State* ex rel. *Hourigan v. Robinson*.[63] This was a habeas corpus proceeding for the release of the relator from custody under a rendition warrant issued by the Governor of Ten-

on the word of jury commissioners that they were unable to find many colored people qualified for jury service. See, *e.g.*, State v. Thomas, 250 Mo. 189, 157 S.W. 330 (1913); Bruster v. State, 40 Okla. Crim. 25, 266 Pac. 486 (1928); Langrum v. State, 128 Tex. Crim. 23, 78 S.W.2d 973 (1935); Ross v. State, 7 S.W.2d 1078 (Tex. Crim. App. 1928); State v. Cook, 81 W. Va. 686, 95 S.E. 792 (1918).

58. For a discussion of this and related problems, see Scott, *The Supreme Court's Control over State and Federal Criminal Juries*, 34 IOWA L. REV. 577, 597 (1949).

59. 339 U.S. 282, 70 Sup. Ct. 629, 94 L. Ed. 839 (1950). In this case, there had been a pattern of limiting the number of Negroes on grand juries to one on 16 of the last 21 juries and none on the other five. On the jury which indicted the defendant, there had been no Negroes. The jury commissioners testified that it was very difficult to find a colored person qualified to serve as a juror whose occupation did not preclude his serving. The Court assumed that a large percentage of the colored population of Dallas County met the statutory requirements and held that the commissioners here had failed to familiarize themselves adequately with those people. The Court overturned a conviction of murder on that basis. For a discussion of this case, see Sanders, *Criminal Law Administration Prior to Trial: Recent Constitutional Developments*, 4 VAND. L. REV. 766, 787 (1951).

60. Akins v. Texas, 325 U.S. 398, 403, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945).

61. *See* Cassell v. Texas, 339 U.S. 282, 287, 70 Sup. Ct. 629, 94 L. Ed. 839 (1950).

62. The Act was passed in 1951 and is found in TENN. CODE ANN. §§ 11935.1 - 11935.26 (Williams Supp. 1952). Thirty-nine states have now adopted the Act, 9 U.L.A. 35 (Supp. 1952).

63. 257 S.W.2d 9 (Tenn. 1953).

nessee for the relator's extradition to Kentucky. The rendition warrant of the Governor was attacked on the grounds that it was defective in authorizing a Kentucky sheriff to make the arrest instead of a Tennessee official, but the Court found this no ground for releasing the relator from custody.[64] The Court said: "Regardless of who arrested the relator he was properly before the trial judge on his petition for the writ of habeas corpus."[65]

Reduction of Imprisonment and Parole: An important clarification of the Tennessee statutes on reduction of imprisonment for good behavior resulted from *State* ex rel. *Jackson v. Brown.*[66] There Dr. Jackson had been sentenced to one to three years for abortion. After taking him into custody, prison officials set up as a credit to his sentence six month's "good time"[67] and six months "honor grade" time.[68] After serving half of the remaining 24 months, Dr. Jackson became eligible for, and was granted, a parole. Within a year, the parolee was indicted for abortion allegedly committed while he was on parole. The Board of Paroles revoked his parole and undertook to take from him his six months honor grade time. The State, although conceding that the Board had no power to take from the prisoner his good time, successfully urged before the Supreme Court that the honor time must be restored to his sentence. The Supreme Court held that the 1943 amendment[69] to section 12209.2[70] invalidated the granting of honor grade time in Tennessee; hence, the grant of honor time to Dr. Jackson was a nullity, and the six months were still a part of his sentence and must be served.

Legislation providing reduced time credit for good behavior has been in force in Tennessee since 1870.[71] A 1931 version of it set up the honor grade and provided:

> "So long as any prisoner who is placed in the 'honor grade' remains therein, he shall, in addition to the good time allowed by this act have deducted from the time for which he may have been sentenced two months for each year of his term of imprisonment, or the fractional part thereof."[72]

64. The defendant's contention that the arrest must be made by Tennessee officers is based on § 7 of the Uniform Act, TENN. CODE ANN. § 11935.7 (Williams Supp. 1952), which simply provides that a governor may sign a warrant and direct it to "a sheriff, marshal, coroner, or other person whom he may think fit to entrust with the execution thereof. . . ."

65. 257 S.W.2d at 11.

66. 256 S.W.2d 713 (Tenn. 1953).

67. TENN. CODE ANN. § 12209.1 (Williams 1934) allows credits for good behavior to the extent of deductions of one month from the first year, two months from the second year, three months from the third through ninth year and four months from each remaining year. This is called "good time."

68. TENN. CODE ANN. § 12209.2 (Williams 1934) allows a two-month per year deduction for those prisoners in "honor grade."

69. TENN. CODE ANN. § 12209.2 (Williams Supp. 1952).

70. TENN. CODE ANN. § 12209.2 (Williams 1934).

71. Tenn. Acts 1870, c. 59.

72. TENN. CODE ANN. § 12209.2 (Williams 1934).

The 1943 amendment contained provisions establishing the honor grade and taking away honor time for misbehavior, but entirely omitted the paragraph quoted above. The Court apparently relied on this omission as the basis of their decision abrogating honor time.

Either through misinterpretation of the 1943 amendment or lack of knowledge of this significant omission, prison officials had continued to grant honor grade time until the *Jackson* case. The embarrassment to prison authorities and the grief to the prisoners themselves occasioned by this decision were soon ended by the passage of a public act by the 1953 Legislature empowering the Commissioner of Institutions to allow honor time once more.[73]

Another statute which came before the Court for interpretation was section 11802.1,[74] which authorizes trial judges to parole defendants "convicted of a misdemeanor or convicted of any felony, the maximum punishment for which does not exceed five years' confinement in the state penitentiary. . . ." In *State v. Croft*,[75] the defendant was convicted of voluntary manslaughter; his punishment was fixed by the jury at confinement in the penitentiary for not more than three years. The defendant filed a petition for parole which the trial judge granted in the belief that the "maximum punishment" referred to in section 11802.1 meant the maximum fixed by the jury rather than that allowed by law for the offense committed — ten years in the case of voluntary manslaughter. On petition for certiorari by the State seeking an adjudication avoiding the parole order, the Supreme Court held that the authority of the trial judge to parole is determined by the maximum punishment enumerated by the statute.[76] It would seem clear that the legislative intent was to withhold the power of parole from the trial judge when the offense is a major felony and that a rational classification of major and petit felonies must rest on the seriousness attached to each by the legislature as reflected by the statutory maximum punishment affixed to each crime.

Another interpretation of the Code sections[77] regulating parole and suspension of sentence by the trial judge resulted from *Arney v. State*.[78] There it was held that the trial judge himself can initiate the procedure for revoking a suspended sentence without having his attention called to the alleged violation by the district attorney general or a third party.

73. Tenn. Pub. Acts 1953, c. 164.
74. TENN. CODE ANN. § 11802.1 (Williams 1934).
75. 253 S.W.2d 748 (Tenn. 1952).
76. A quotation from Letner v. State, 156 Tenn. 68, 81, 299 S.W. 1049, 1052 (1927), which says, "When the jury fixed a definite period, that became the maximum time for which the defendant could be imprisoned," is not good authority for a view contrary to that taken by the Court. In the *Letner* case, the Court was dealing only with the question of when the defendant became subject to parole under the indeterminate sentence law.
77. TENN. CODE ANN. §§ 11802.1-11802.3 (Williams Supp. 1952).
78. 256 S.W.2d 706 (Tenn. 1953).

NEW LEGISLATION

A number of acts authorized increases in the penalties of various crimes. These offenses were burglary in the second[79] and third degrees,[80] robbery,[81] usury,[82] setting forest fires,[83] jailbreaking[84] and driving while under the influence of intoxicants.[85] This latter offense is now punishable by a mandatory 60 days to 11 months and 29 days jail sentence. The so-called "bad check" law has been ameliorated somewhat by allowing the maker of the check 10 days' notice to make payment instead of the previous three days' notice.[86] Possession of barbitàl without written prescription was made a misdemeanor.[87] Immunity from prosecution was granted to all members of the Armed Forces of the United States who have been tried by a military court martial and either convicted or acquitted.[88]

79. Tenn. Pub. Acts 1953, c. 63.
80. *Id.*, c. 65.
81. *Id.*, c. 66.
82. *Id.*, c. 67.
83. *Id.*, c. 143.
84. *Id.*, c. 68.
85. *Id.*, c. 202.
86. *Id.*, c. 64. This amends TENN. CODE ANN. § 11157 (Williams 1934).
87. *Id.*, c. 52.
88. *Id.*, c. 108.