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Criminal Law and Procedure -- 1962 Tennessee Survey

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I. Substantive Criminal Law

1. *Offenses Against the Person*—(a) *Homicide.*—The American states have generally codified in one form or other the common law "felony-

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murder rule" to the effect that homicide committed while perpetrating or attempting a felony, and as a consequence thereof, is murder.[1] Tennessee's statute in this regard,[2] which largely follows the most widely adopted version of the rule in limiting it to specified felonies and in classifying homicides committed in connection therewith as first degree murder,[3] was applied in two cases decided by the state supreme court during the survey period.[4]

In *Smith v. State*,[5] the court found that the defendant had entered a store, demanded money of the store's proprietor, and drawn a gun to facilitate his purposes; that the proprietor had responded by getting a gun and snapping it at the defendant; and that the defendant in turn had shot to death the proprietor. The defendant's conviction of murder in the first degree under the statutory felony-murder provision was affirmed. The court held that the only defense seriously advanced, self-defense, was not available to him, citing a New York decision[6] holding that one who kills another while engaged in committing a felony cannot escape conviction of murder in the first degree by showing his intent was not to kill but to defend his own life or person. This seems to be a correct interpretation and application of the rule under the circumstances. By embarking upon a felony which common experience indicates involves substantial human risk, the felon hazards the guilt of murder from loss of life caused by the risk he created.[7]

The defendant in the *Smith* case tried to bring his situation under the accepted principles that the mere coincidence of felony and homicide is insufficient; rather it is necessary to show causation, that "death ensued in consequence of the felony,"[8] to make the felony-murder rule applicable. He argued that the homicide was not committed in pursuance of the robbery but collateral to it. The court rejected this contention, holding that the killing had a sufficiently close connection with the attempt to commit robbery. This conclusion, too,

1. The common law background of the doctrine is sketched in MORELAND, HOMICIDE 14, 42-48 (1952); and a rather complete categorization, by states, of statutory variations of it is given in the same source. *Id.* at 217-25.

2. "Every murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, is murder in the first degree." TENN. CODE ANN. § 39-2402 (1956).

3. However, the Tennessee statute adds to the usual list of specified felonies of violence and great danger (arson, rape, robbery, and burglary) the not-as-dangerous felony of larceny, and, uniquely, murder in the first degree. MORELAND, *op. cit. supra* note 1, at 217, 219.

4. Previous felony-murder decisions include: Sims v. State, 348 S.W.2d 293 (Tenn. 1961); Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879 (1956); Mullendore v. State, 183 Tenn. 53, 191 S.W.2d 149 (1945); Sullivan v. State, 173 Tenn. 475, 121 S.W.2d 535 (1938); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932).

5. 354 S.W.2d 450 (Tenn. 1961).

6. Cox v. People, 19 Hun 430 (N.Y. Sup. Ct. 1879), *aff'd*, 80 N.Y. 500 (1880).

7. PERKINS, CRIMINAL LAW 34 (1957).

8. *Id.* at 35.

follows the general judicial attitude that the felon is responsible for the consequences flowing from the cone of violence created by his deliberate commission of the felony, and the fact that the victim of the felony attempted to protect himself and thereby immediately brought on his own death at the hands of the felon is not an intervening agency such as will interrupt the causal relationship.[9]

The court also invoked the felony-murder rule in *Dupes v. State*[10] in affirming the first degree murder conviction of defendant Dupes, one of three defendants found to have conspired to rob a certain individual, who was shot and killed by another of the defendants in the course of the robbery while Dupes waited nearby in an automobile for the return of his co-conspirators. It was held that when the three defendants entered upon a common design to commit a felony, the natural and probable consequences of which involved the contingency of taking human life, all were responsible for the acts of each committed in furtherance of the design, though such acts were not specifically contemplated and even though Dupes did not personally commit the act that killed. This was nothing more than applying the law of parties[11] that an accessory before the fact or a principal in the second degree is liable for the commission of a crime different from the one instigated or agreed upon if the crime committed was likely to be caused by such instigation.[12] Dupes was a principal in the second degree by being present, albeit constructively, when a felony was being committed and by aiding and abetting its commission through situating himself so as to be able to aid his associates, with a view, known to them, to insure success in the accomplishment of their common enterprise.[13] Thus, at common law he was equally guilty and subject to the same punishment as was the principal in the first degree who actually fired the shot that killed the robbery victim;[14] and by statute he was an aider and abettor deemed a principal offender and punishable as such.[15] The felony-murder rule, therefore, was just as applicable to Dupes as if he had been the principal in the first degree.

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9. 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 252 (Anderson ed. 1957); People v. Perry, 14 Cal. 2d 387, 94 P.2d 559, 124 A.L.R. 1123 (1939); Aikin v. Commonwealth, 24 Ky. L. Rep. 523, 68 S.W. 849 (1902).

10. 354 S.W.2d 453 (Tenn. 1962).

11. The court cited Williams v. State, 164 Tenn. 562, 51 S.W.2d 482 (1932), Irvine v. State, 104 Tenn. 132, 56 S.W. 845 (1900), and Moody v. State, 46 Tenn. 299 (1869).

12. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 69 (1956).

13. CLARK & MARSHALL, CRIMES 449-50 (6th ed. 1958).

14. *Id.* at 461.

15. "All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such." TENN. CODE ANN. § 39-109 (1956).

Bostick v. State[16] raised again the question of voluntary intoxication as a defense in a homicide prosecution. There, the supreme court affirmed a judgment of conviction of involuntary manslaughter under a murder indictment in spite of (a) testimony by law enforcement officers and a physician who had seen the defendant immediately after she had committed the homicide that she was drunk, (b) a finding by the supreme court that she "had been upon a continuous and prolonged drunk,"[17] and (c) her own testimony that she had been drinking and could not remember what happened. The court said that "it is well settled that voluntary drunkenness is no mitigation of crime, except where specific intent, or deliberation and premeditation is an essential ingredient of the offense; and such drunkenness is no excuse or defense to a finding of murder in the second degree or lesser included offenses."[18] It is probably generally true throughout Anglo-American jurisdictions that voluntary drunkenness is not a valid defense to the crime of manslaughter[19] and that a conviction of manslaughter under circumstances similar to those in the instant case would therefore normally be affirmed in such jurisdictions.[20] It is difficult to justify, however, the court's dictum that voluntary drunkenness is not a defense to murder in the second degree, in view of the requirement of malice as an essential ingredient of murder, whatever the degree, and the fact that intoxication, even if voluntary, may be of such character and degree as to render the mind incapable of malice.[21]

2. *Offenses Against the Habitation*—(a) *Burglary.*—The requirement of common law burglary that the offense be committed in the "nighttime" came to be interpreted as referring to that period after sunset one day and before sunrise the next day when there is not enough daylight to permit the discernment of the countenance of a human being.[22] *Trentham v. State*[23] presented the question of whether

16. 360 S.W.2d 472 (Tenn. 1962).

17. *Id.* at 476.

18. *Id.* at 476, citing Harper v. State, 206 Tenn. 509, 334 S.W.2d 933 (1960); Lewis v. State, 202 Tenn. 328, 304 S.W.2d 322 (1957); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941).

19. WILLIAMS, CRIMINAL LAW § 182 (2d ed. 1961).

20. Professor Jerome Hall contends that one whose previous experience forewarns him that he will probably become intoxicated if he drinks and that he is dangerous when intoxicated acts recklessly when he drinks intoxicating liquor and is therefore guilty of manslaughter if he kills a human being while grossly intoxicated. Conversely, he argues persuasively that one who has not had such prior experience and who commits harms while grossly intoxicated should not be punished for them, inasmuch as the principle of *mens rea* limits penal liability to normal persons who intentionally or recklessly commit harms forbidden by penal law. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 556-57 (2d ed. 1960).

21. For a fuller discussion on this point, see Kendrick, *Criminal Law and Procedure*—1961 *Tennessee Survey*, 14 VAND. L. REV. 1220, 1220-28 (1961).

22. BLACKSTONE, COMMENTARIES *224; PERKINS, *op. cit. supra* note 7, at 165.

23. 358 S.W.2d 470 (Tenn. 1962).

proof that defendant's activities took place during the "evening" was sufficient concerning the nighttime requirement to support a conviction of burglary in the first degree. The supreme court held that it was, "evening" in common speech being understood to include the early part of night or from after supper until the usual bedtime.[24]

Section 39-906 of the Tennessee Code Annotated reads as follows:

> Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive, shall be deemed guilty of burglary with explosives. Any person duly convicted of burglary with explosives shall be punished by imprisonment for a term of not less than twenty-five (25) years nor more than forty (40) years.

Section 39-904, concerning "burglary in the third degree," provides in a paragraph enacted subsequent to the enactment of section 39-906 as follows:

> Any person who, with intent to commit crime, breaks and enters, either by day or by night, any buildings, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by any means, shall be punished by imprisonment for a term of not less than three (3) nor more than twenty-one (21) years.

State ex rel. *Wooten v. Bomar*[25] presented the court with a problem in statutory construction. With a "safe-cracking" burglary statute already on the books (39-906), specifying as a means the use of explosives, did the subsequent enactment of another "safe-cracking" burglary statute (amended 39-904), not specifying particular means but rather "by any means," and providing less severe penalties than the previously existing statute, repeal the first statute? The answer to this question was very important to the plaintiff in error in the *Wooten* case, because he had been convicted of burglary with explosives, allegedly occurring in 1957, and sentenced to twenty-five years imprisonment under section 39-906,[26] after the enactment in 1955 of amended section 39-904. Although he had apparently overlooked raising the problem in the original trial and appeal, he had now petitioned for a writ of habeas corpus on the ground that he had been indicted and convicted under a statute that had at the time been impliedly repealed by the legislature and therefore was now being held without lawful authority by the warden in the state penitentiary.

24. The court cited Golay v. Stoddard, 60 Idaho 168, 89 P.2d 1002 (1939) and State *ex rel.* Martin v. Foley, 89 Vt. 193, 94 Atl. 841 (1915).

25. 352 S.W.2d 5 (Tenn. 1961).

26. Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1 (1958).

If his theory was correct, of course, the jurisdictional question was a proper subject of inquiry by habeas corpus at any time.[27]

The conclusions reached by the supreme court in its decision on the *Wooten* appeal from denial of the petition below and on petition to rehear were that, in the code chapter entitled "Burglary," the state legislature had at various times (as it had a right to do) caused to be placed a series of sections creating a number of degrees of burglary; the classification was (as it should be) natural, not arbitrary, and made with reference to the heinousness of the crimes and not to disconnected matters; the legislature had in section 39-906 treated burglary with explosives, in view of the particular danger therefrom to human life, as done under the most aggravating circumstance under which burglary could be committed and, in line with other states, had imposed for it the most severe penalties of any form of burglary; in section 39-904 a different class or degree of burglary, burglary in the third degree, had been created with less severe penalties; the 1955 amendment to section 39-904 does not refer nor relate to the previously enacted more serious offense of burglary with explosives; and "an examination of the House Journals, etc."[28] shows that the 1955 enactment was merely an amendment to the definition and penalty for burglary in the third degree in section 39-904 and was limited in its application to that section. The court, on the basis of these conclusions, found that "there could not in our judgment be any implied repeal of the heinous crime by an amendment to the statute covering a lesser crime."[29]

Probably the court in the *Wooten* case correctly interpreted the legislative intent behind the two statutes in question; but the Criminal Code, most of all the parts of the state code, should be clear in its provisions. With little revision any doubt could, and should, be here removed.

3. *Offenses Against Property*—(a) *Larceny.*—The Tennessee Code provides that grand larceny consists of taking and carrying away personal goods having a value in excess of $100, and petit larceny, of goods having a value of not more than $100;[30] it provides more severe penalties for grand larceny.[31] If *D*, with an intent to steal, on several different occasions trespassorily takes and carries away *X*'s personal property, the value of which on no one occasion amounts to as much as $100 but altogether amounts to more than $100, is *D* guilty of grand larceny or a series of petit larcenies? The first reported case raising this question in Tennessee was a fraudulent breach of

27. 5 WHARTON, *op. cit. supra* note 9, § 2225.
28. 352 S.W.2d at 7.
29. *Id.* at 8.
30. TENN. CODE ANN. § 39-4203 (Supp. 1962).
31. TENN. CODE ANN. § 39-4204 (1956); TENN. CODE ANN. § 39-4205 (Supp. 1962).

trust prosecution wherein the court in 1960 adopted the following general rule: If each taking is the result of a separate independent impulse or intent, it is a separate crime; but if the "successive takings are actuated by a single, continuing, criminal impulse or intent or are pursuant to the execution of a general larcenous scheme . . . such successive takings constitute a single larceny regardless of the extent of time which may have elapsed between each taking."[32]

Miller v. State,[33] decided during the survey period, is the first reported Tennessee case presenting the question stated in the preceding paragraph, in a strict larceny context. There, the defendant confessed to having stolen from his employer at various times drug tablets (referred to as "Bennies") in most instances in bottles of 1,000 tablets each, which the evidence showed had a fair market value at the time of $7.00 per bottle. There was evidence that the tablets were taken in July, September, November, and December of 1957. Defendant in his confession also stated that shortly after he went to work for his employer in April, 1957, he was approached by an individual who offered to pay him $15 per thousand for the tablets, and that subsequently he delivered 92,000 tablets to that individual, and 12,000 to another individual, getting them from his employer's plant each time one of the two individuals got in touch with him with a request for more tablets. Law enforcement officers found a total of 27,000 of the tablets in the possession of one, and 46,000 in the possession of the other, of defendant's two "customers." On this evidence, the supreme court concluded that the taking of the tablets for sale as needed was pursuant to the execution of a general larcenous scheme; it accordingly affirmed a conviction for grand larceny.

(b) *Robbery*.[34]

(c) *Receiving Stolen Property*.[35]—In Tennessee the elements of the offense of receiving or concealing stolen goods are specified by statute to be: (a) fraudulently receiving, buying, concealing, or aiding in concealing, (b) goods feloniously taken or stolen from another, or goods obtained by robbery or burglary, (c) knowing such goods to

32. Nelson v. State, 208 Tenn. 179, 183, 344 S.W.2d 540, 542 (1960), quoting from Annot., 136 A.L.R. 948, 950 (1942). The general attitude of American courts is reflected in a New York decision involving an individual who over a period of years had stolen thousands of dollars in nickels from subway turnstiles at a rate of about $25 a day, for which he was convicted of grand larceny (over $100). Said the court: "Logic and reason join with all the authorities that have considered the question, in holding that the people may prosecute for a single crime a defendant who, pursuant to a single intent and one general fraudulent plan, steals in the aggregate as a felon and not as a petty thief." People v. Cox, 286 N.Y. 137, 145, 36 N.E.2d 84, 87 (1941).

33. 358 S.W.2d 324 (Tenn. 1962).

34. See discussion concerning Mowery v. State, 352 S.W.2d 435 (Tenn. 1961), *infra*, p. 724-26.

35. Instructive on the general subject of receiving stolen property is HALL, THEFT, LAW, AND SOCIETY 155-232 (2d ed. 1952).

have been so obtained, (d) with intent to deprive the true owner thereof.[36]

The Tennessee Supreme Court, in *Powell v. State*,[37] affirmed a conviction for receiving and concealing stolen property on finding, contrary to the defendant's contention, that there was evidence of receiving and concealing in addition to that of theft, while recognizing authority[38] that such a conviction would be invalid if the only evidence was of theft. The court noted evidence that the defendant had been arrested while driving an automobile occupied by himself and an associate, without knowledge by the automobile's owner that the automobile had been taken; that the automobile at that time was "hot wired" (wires being run from one part of the automobile to another so that it would operate without the use of an ignition switch key), which fact the defendant denied knowing; and that, when the officers had inquired of the defendant as to the owner of the automobile, his associate had told the officers that the defendant owned it, but the defendant had said that it belonged to a friend whose name he did not know. The court also recounted the defendant's testimony that his associate, prior to coming to the defendant's home in the automobile at around midnight to pick up the defendant, had invited him to go riding in a car which the associate had said he would "borrow"; that the associate had driven the automobile to within two blocks of the point where they were apprehended by the officers; and that he had taken the wheel for those two blocks at the associate's request in order to enable the associate to check the automobile's volt meter. Based on this evidence, the court held that the jury below could have properly concluded that the defendant had had possession[39]

36. TENN. CODE ANN. §§ 39-4217, -4218 (Supp. 1962).

37. 352 S.W.2d 224 (Tenn. 1961).

38. Franklin v. State, 202 Tenn. 666, 308 S.W.2d 417 (1957).

39. The court cited, for the proposition that even constructive possession is sufficient to satisfy the "receiving" element of the offense, Edmondson v. State, 151 Tenn. 214, 268 S.W. 881 (1924). It is not clear how this principle is applicable to the instant case, however, because if the defendant here had any kind of possession at all, it was actual possession since he physically had the wheel of the automobile and was driving it about. A more interesting question, apparently not raised, is whether instead, the defendaut had only custody of the automobile, with the associate retaining possession; and, if so, whether one who accepts only custody of stolen goods (assuming all other necessary elements) is guilty of the offense of "receiving" stolen property. A preliminary survey of textbooks, encyclopedias, and case reports turned up only discussions as to sufficieney of various forms of possession for "receiving," the only mention of custody being an occasional reference to control or dominion over custody as "potential possession," which presumably is considered by some writers as sufficient possession for the purpose of "receiving." The statement that "it is enough if the accused has the control over the custodian or control over the property in the hands of the thief" [People v. Poncher, 358 Ill. 73, 80-81, 192 N.E. 732, 735 (1934)], has been used as a basis for the further statement that "the accused, if he has not the actual physical possession of the property, must have some means of control or dominion over its custody." People v. Mulford, 385 Ill. 48, 52 N.E.2d 149, 152 (1943); People v.

of the automobile, knowing it to be stolen, and in his statement to the officers had been trying to "cover up" the fact of wrongful possession. The court might also have pointed out, although it did not, that the word "conceal" as used in statutes such as the Tennessee statute is not limited to literal hiding or secreting, but includes any act or conduct which assists the thief in converting another person's property to his own use or which may prevent or render more difficult its discovery by the owner;[40] and that there was room here for concluding, from the defendant's statement to the officers, that he, with guilty knowledge, was at the time concealing stolen property.

One other statement by the court in the *Powell* decision merits comment. Having said that the defendant "was very much under the influence of an intoxicant"[41] at the time of his arrest, the court remarked that "the fact that the plaintiff in error was in an intoxicated condition when he was found in possession of this property under these circumstances is no defense to a crime of the kind. *Thomas v. State*, 201 Tenn. 645, 301 S.W.2d 358."[42] In the cited case the court had approved the following statement concerning intoxication as a defense to a charge of larceny:

> That the accused may have been drunk, in the ordinary sense of that word, is not sufficient. He must have been so drunk as to be incapable of consciousness that he is committing a crime or of discriminating between right and wrong. If this fact does appear, however, or if there is a reasonable doubt that he was capable of forming or entertaining the necessary felonious intent, he is not guilty of larceny, unless the intent to steal was formed while still in possession of his reasoning powers.[43]

This is a correct statement of principle, of course, and certainly applies to Tennessee's statutory offense of receiving and concealing stolen property, one element of which the code specifies as being "with intent to deprive the true owner thereof"[44] (which the supreme court has held to be "the essence of the offense"[45]), for this is a requirement of a specific intent;[46] it is well-settled that even voluntary intoxication may be so gross as to make one accused of a crime requiring specific

Piszczek, 404 Ill. 465, 89 S.E.2d 387, 390 (1949). This is not the same, it will be observed, as saying that it is sufficient for the accused to have only custody of the goods involved.

40. 2 WHARTON, *op. cit. supra* note 9, § 570; CLARK & MARSHALL, *op. cit. supra* note 13, at 865.

41. 352 S.W.2d 224 at 225.

42. *Id.* at 226.

43. Thomas v. State, 201 Tenn. 645, 651, 301 S.W.2d 358 (1957), citing 32 AM. JUR. *Larceny* § 42 (1941).

44. TENN. CODE ANN. §§ 39-4217, -4218 (Supp. 1962).

45. Rice v. State, 50 Tenn. 215, 226 (1871).

46. PERKINS, *op. cit. supra* note 7, at 281.

intent incapable of such intent and therefore entitled to an acquittal.[47]

Also relevant is the rule that "voluntary drunkenness may be shown to negative the existence of a knowledge of particular facts, when such knowledge is an essential element of the offense charged"[48] in view of the code's further requirement, on the part of one who receives or conceals stolen property, that he do so "knowing the same to have been so obtained."[49]

It follows that the court's statement in the *Powell* case, quoted above, concerning defendant's intoxication as a defense should have been expanded to make it clear that intoxication was not a defense in the instant case in the absence of a showing that it was so gross as to render him incapable of (a) consciousness that he was committing a crime or of discriminating between right or wrong, (b) having the specific intent to deprive the true owner of his property, as required by statute, or (c) knowing that the goods involved had been feloniously taken or stolen or were goods obtained by robbery or wrongdoing. Certainly an accused in a receiving and concealing prosecution is entitled to an affirmative charge to the jury that he is entitled to an acquittal if at the time of the alleged offense he was under such an incapacity, and it would be error to refuse to give such an instruction.

4. *Offenses Against Morality and Decency*—(a) *Keeping a Bawdy House—Defense of Entrapment.*—In appealing from a conviction of operating a bawdy house and engaging in assignation, the defendant in *Roden v. State*[50] contended that the trial court had erred in not sustaining her plea in abatement and in not directing a verdict for defendant upon the completion of the state's proof, in that the proof showed that the defendant had been entrapped. The state's proof indicated that the defendant lived in and operated a certain motel in Hamilton County; that men, alone, in pairs, or in small groups, and men and women in couples, many arriving and departing in automobiles bearing Hamilton County license plates, were observed from time to time at all hours of the day or night to enter and leave the motel after a stay of from thirty minutes to two hours; that the motel

47. *Id.* at 790. Among such crimes are assault with intent to kill, to wound, to rape, or to rob; burglary (specific intent to commit a felony); larceny and robbery (specific intent to steal); and attempt to commit any crime for which it must be shown that there was a specific intent to commit the crime charged to have been attempted. CLARK & MARSHALL, *op. cit. supra* note 13, at 388-89. See also Steele v. State, 189 Tenn. 424, 430, 225 S.W.2d 260 (1949); Walden v. State, 178 Tenn. 71, 77, 156 S.W.2d 385, 387 (1941).

48. CLARK & MARSHALL, *op. cit. supra* note 13, at 389. This principle would likewise be applicable to prosecutions for passing counterfeit money or uttering a forged instrument, in which it must be proved that the accused had knowledge that the money was counterfeit or the instrument forged. *Ibid.*

49. TENN. CODE ANN. §§ 39-4217,-4218 (Supp. 1962).

50. 352 S.W.2d 227 (Tenn. 1961).

had a reputation in the community where it was located of being a bawdy house; that a city police department employee had registered in his own name and lived at the motel for five days, during which time the defendant had told him she "dated," and could supply "dates" for his friends at about $15 each; that on a certain date the police department employee had brought two men, one of whom was a police officer, to the motel, where they had paid the defendant and another woman, whom defendant then called in, $60 as the price for retiring to separate rooms with them; and that, subsequently, two additional police officers with search warrants had entered the bedrooms occupied by those parties and found the defendant completely disrobed and the other woman partially so.

In affirming the conviction, and overruling the assignments in error, the court emphasized that the police department employee "registered at the motel under his own name, gave his correct home address and acted in perfect good faith for the purpose of discovering or detecting a situation that had been going on apparently for sometime, according to other witnesses, and he in no way induced or lured by deception, trickery or artifice the commission of the crimes charged in the indictment. He did, while acting in good faith, furnish the opportunity for the commission thereof by the defendant who had the requisite criminal intent as evidenced by prior acts and deeds."[51] And it quoted with approval the following statement:

> One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing *may avail himself of the defense of "entrapment."* Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent.[52]

One could hardly quarrel with a conclusion that the defense of entrapment is unavailing as regards a set of circumstances such as the court found to have been proved in the *Roden* case. But one may certainly disagree with the court's reversion to the position that "entrapment is not a defense in Tennessee."[53] If entrapment is not a defense, why did the court not say so and stop right there, instead of going on to some lengths in the instant case to recount and lay emphasis on facts that would be important only if entrapment is a defense in Tennessee? That the defendant operated a bawdy house is clear from the state's proof without the necessity of showing also

51. *Id.* at 229.

52. The quotation is from 22 C.J.S. *Criminal Law* § 45(2), at 138 (1961). (Emphasis added.)

53. 352 S.W.2d at 228.

that the police agent obtained the proof "in perfect good faith," that "he in no way induced or lured by deception, trickery or artifice the commission of the crimes charged," and that all he did was to "furnish the opportunity for the commission thereof" to one whose criminal intent was already evidenced by prior acts. Further, the court in the instant case cited with approval, as before noted, the principle that under stated conditions "one . . . may avail himself of the defense of 'entrapment.'" Furthermore, the only case cited by the court here for the proposition that entrapment is not a defense in Tennessee is a 1960 decision[54] wherein it reversed a criminal conviction after therein saying that "there is only one question before us and that is the court below erred in not allowing these defendants the defense of entrapment,"[55] pointing out as to one of its previous decisions on entrapment[56] that "the court did not say that it would not recognize the defense of entrapment where the whole machinery to violate the law originated in the minds of the officers of the law, or their agents,"[57] and citing with approval the statement that "entrapment is shown where it appears that officers of the law or their agents . . . lured [the] accused into committing an offense,"[58] and determining that "under the facts in this particular case these defendants were lured into the commission of the offense."[59]

It continues to be clear, therefore, that the defense of entrapment is, in substance, recognized in Tennessee. It is not at all clear, on the other hand, why the Tennessee Supreme Court does not now unequivocally recognize the defense by name. We repeat the suggestion made in previous articles:[60] defense attorneys should not hesitate to raise the defense of entrapment in cases in which the state has used its own officers or informers to instigate crime, it being unthinkable that in the event of such circumstances the defense should then be ruled out.

5. *Offenses Against the Public Peace*—(a) *Carrying Concealed House-breaking Tools.*—In *McDonald v. State*[61] a conviction for possessing burglary tools, under a statute providing that any one who "carries concealed about the person" articles intended for effecting

54. Hagemaker v. State, 208 Tenn. 565, 347 S.W.2d 488 (1961); Kendrick, *Criminal Law and Procedure—1961 Tennessee Survey* (II), 15 VAND. L. REV. 860, 863-65 (1962).

55. 208 Tenn. at 566, 347 S.W.2d at 489.

56. Thomas v. State, 182 Tenn. 380, 187 S.W.2d 529 (1945).

57. 208 Tenn. at 568, 347 S.W.2d at 489.

58. 208 Tenn. at 570, 347 S.W.2d at 491, quoting from 22 C.J.S. *Criminal Law* § 45(2), at 138 (1961).

59. 208 Tenn. at 571, 347 S.W.2d at 491.

60. Kendrick, *Criminal Law and Procedure—1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1062-63 (1960); *id., 1961 Tennessee Survey* (II), 15 VAND. L. REV. 860, 863-65 (1962).

61. 358 S.W.2d 298 (Tenn. 1962).

secret entrances into houses, for the purpose of committing theft, or other violations of the law, is guilty of a felony,[62] was appealed from, the contention apparently being that no such tools had been found concealed about the defendant's person. Based upon evidence that police saw the defendant, behind a store at 1:10 a.m., run to and crouch behind a trash can, that he was wearing gloves and had a flashlight in his pocket, that, lying at his feet, were found a bolt cutter, a screw driver, and a pry bar, and that next door was another store secured by a chain and lock, the court held that the jury could properly find defendant guilty as charged in that the tools were concealed along with his person behind the trash can and, being at his feet, were sufficiently about his person.

(b) *Drunken Driving.*—In *Williams v. State*[63] the defendant appealed from a conviction of drunken driving of an automobile[64] contending that the proof concerning his alleged conduct showed that he had been neither drunk nor driving. The court reviewed the evidence to the effect that although the defendant was not drunk and was not behind the wheel personally driving the automobile, he, the owner, was present on the front seat of the automobile with an individual, whom he, not having a driver's license of his own, had allowed to drive, and who was so "wobbley" that he was noticeably drunk. This evidence, the court held, warranted the jury below in finding the defendant guilty of participating in the commission of the offense of drunken driving. In this connection the court invoked common law to the effect that one who aids and abets in the commission of a misdemeanor is deemed to be a principal,[65] and that one who sits by a driver whom he knows to be intoxicated and permits him without protest to operate an automobile aids and abets in the offense of driving while intoxicated.[66] Moreover, a Tennessee statute provides that a person who aids and abets the commission of any act "declared in chapters 8 or 10 of this title [title 59] to be a crime" [the drunken driving statute (section 59-1031) being in chapter 10] "shall be guilty of such offense" and that one who willfully causes, permits, or directs another "to violate any provision of chapters 8 or 10 of this title is likewise guilty of such offense."[67]

6. *Offenses Affecting Sovereignty*—(a) *Abuse of Elective Franchise.*

62. TENN. CODE ANN. § 39-908 (1956).
63. 353 S.W.2d 230 (Tenn. 1961).
64. TENN. CODE ANN. § 59-1031 (Supp. 1962).
65. Swift v. State, 108 Tenn. 610, 612, 69 S.W. 326 (1902); Atkins v. State, 95 Tenn. 474, 477, 32 S.W. 391 (1895).
66. Eager v. State, 205 Tenn. 156, 169, 325 S.W.2d 815, 821 (1959). See also Story v. United States, 57 App. D.C. 3, 16 Fed. 342 (D.C. Cir. 1926), *cert. denied*, 274 U.S. 739 (1927); 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2930 (perm. ed. 1954); 3 WHARTON, *op. cit. supra* note 9, § 990.
67. TENN. CODE ANN. § 59-1016 (1956).

—The supreme court in *Mowery v. State*[68] was faced with the problem of what to do when two state statutes appear to prohibit the same wrong and prescribe different degrees of punishment for that wrong. The defendant in that case had been indicted and convicted under a statute making his alleged conduct a felony, and he appealed on the ground that the indictment and prosecution should have been under another statute making his alleged conduct a misdeameanor.

There was evidence that the defendant had on the occasion of the holding of an election in a certain place entered therein, threatening to blow out the brains of the election officials if they interfered, and had then at pistol point taken a ballot box containing ballots of voters and voter registration books. The indictment charged the defendant with statutory armed robbery[69] in that he, by force and violence accomplished by the use of a deadly weapon, had taken from the person and custody of the named election officials and against their will one ballot box, lock, and registration book of a value of ten dollars.

The statute under which the defendant contended the indictment and prosecution should have been brought provides punishment for breaking up an election.[70]

The supreme court's starting point was the code's statutory construction section providing that "if provisions of different titles or chapters of the Code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject-matter of that title or chapter."[71] Inasmuch as title 2 of the code is wholly devoted to elections, and chapter 22 thereof is designed to cover the entire subject matter of penal provisions as to the holding of elections, the court reasoned that the statute (under that title and chapter) providing punishment for breaking up an election had peculiar applicability to matters growing out of elections and that the legislature had had such particular matters as presented by the facts of this case in mind when it was enacted. On the other hand, the court was of the opinion that the robbery

68. 352 S.W.2d 435 (Tenn. 1961).

69. "Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years." TENN. CODE ANN. § 39-3901 (Supp. 1962).

70. "If any person by force or violence break up or attempt to break up any legalized political convention, primary or final election, by assaulting the officers thereof, or by destroying or carrying off the ballot box, or by the use of other forcible or violent means to prevent a nomination being fairly made, or election from being fairly and legally conducted, he shall be guilty of a misdemeanor." TENN. CODE ANN. § 2-220 (1956).

71. TENN. CODE ANN. § 1-303 (1956).

statute relates to robberies in general and has no particular reference to elections. The court then invoked the rules of construction that "a special provision in a statute will control a general provision which would otherwise include that mentioned in the particular provision"[72] and that in such cases the special provision must be taken as intended to constitute an exception to the general provision,[73] which will continue to be operative on all subjects except as to the particular one which is the subject of the special provision.[74] The court therefore concluded as to the facts of this case that "since the legislature has spoken in specific terms as to the penalty to be inflicted for breaking up or in-specific terms as to the penalty to be inflicted for breaking up or interfering with an election . . . . Then the general statute having to do with armed robbery has no application."[75] Therefore, since the acts of the defendant accordingly were punishable only under the breaking-up-of-elections statute, the court held that he should have been indicted under the latter statute instead of that under which he had been convicted, and it reversed and dismissed the case.

II. CRIMINAL PROCEDURE

1. *Limitations of Prosecution*—(a) *Jurisdiction.*—Juvenile court jurisdiction was at issue in *State ex rel. Hyatt v. Bomar.*[76] Hyatt, at about age seventeen, entered a plea of guilty in juvenile court to a burglary charge and was thereupon committed to a state juvenile vocational school until he should become "21 years of age." After a few months in the school he escaped and was away for about 13 months, including a period of confinement at the direction of a Kentucky juvenile court. Upon his return to the Tennessee juvenile correction school in April, 1960, pursuant to statutory authority[77] he was formally declared an incorrigible youth by the state commissioner of correction and was transferred to the state penitentiary. In January, 1962, Hyatt reached the age of twenty-one and applied for a release from the penitentiary on the ground that the term of confinement ordered by the juvenile court had expired on that event; but the warden denied the application on the theory that Hyatt was required to serve thirteen months beyond the date originally set for his release, in order to make up the thirteen months that he as an escapee had

72. State *ex rel.* v. Safley, 172 Tenn. 385, 112 S.W.2d 831, 833 (1938). See also Woodroof v. City of Nashville, 183 Tenn. 483, 192 S.W.2d 1013 (1946).

73. Keefe v. Atkins, 199 Tenn. 183, 285 S.W.2d 338 (1955); Atlas Powder Co. v. Leister, 197 Tenn. 491, 274 S.W.2d 364 (1954); Woodroof v. City of Nashville, 183 Tenn. 483, 192 S.W.2d 1013 (1946).

74. State *ex rel.* v. Safley, 172 Tenn. 385, 112 S.W.2d 831 (1938).

75. 352 S.W.2d at 440.

76. 358 S.W.2d 295 (Tenn. 1962).

77. TENN. CODE ANN. § 41-817 (1956).

remained away from the school. Hyatt then petitioned criminal court for a writ of habeas corpus, which was denied.[78] On appeal the criminal court judgment was reversed, and Hyatt's application for release under writ of habeas corpus was ordered granted. The court pointed to the statute governing juvenile court jurisdiction stating that "such jurisdiction shall continue for the purposes of this chapter, until the child shall have attained its majority" and that "in no case shall a child be committed by a juvenile court beyond the age of twenty-one (21) years,"[79] and to a previous decision of its own that the provision in the juvenile court statute for the transfer of incorrigibles to the penitentiary "was a matter of wise administration of an institution erected for the betterment of wayward young people, and not an added punishment for crime."[80] Since Hyatt's detention could be based solely on authority vested in the juvenile court by the statute creating it, and since that court had no authority of commitment for penal purposes and therefore had no further jurisdiction of the person of Hyatt after he became twenty-one, the court held that the warden, whose only authority derived from lawful jurisdiction exercised by the juvenile court, likewise could not extend Hyatt's detention beyond his twenty-first birthday.

In another case involving jurisdiction of a juvenile, *Greene v. State*,[81] the defendant, a fifteen-year-old boy, was indicted and tried in criminal court on separate counts respectively charging rape and assault with intent to carnally know a female under twelve years of age. After the state had completed its proof, Greene's counsel moved that the entire indictment be quashed, apparently on the theory that the state had failed to introduce any evidence of penetration, an essential element of rape, and that the criminal court had no jurisdiction at all over Greene with respect to the other count. The motion was denied, the trial court withdrew the rape count from the jury,

78. The criminal court based its judgment on the theory that Hyatt's continued confinement was pursuant to the statutory requirement that "Any person lawfully confined in any county jail or in the penitentiary upon conviction for a criminal offense, who escapes therefrom, may be pursued, taken, and again imprisoned . . . and the period elapsing between his escape and arrest shall not be computed as any portion of the term of imprisonment for which he was sentenced." TENN. CODE ANN. § 89-3811 (1956). In its reply brief on appeal, however, the state conceded that this section was not applicable to this case.

79. TENN. CODE ANN. § 37-263 (Supp. 1962).

80. Harwood v. State *ex rel.* Pillars, 184 Tenn. 515, 521, 201 S.W.2d 672, 674 (1947). The court also went behind the juvenile court statutes and considered their underlying purposes—not to try children for criminal offenses but to undertake to remedy the delinquency of minors, to reform and educate them (citing Childress v. State, 133 Tenn. 121, 123, 179 S.W. 643, 644 (1915)). When one ceases to be a juvenile, the court reasoned further, then the sole object for which the juvenile court was created no longer applies to him and confining him in the penitentiary thereafter could only be for a purpose not contemplated by the statute—punishment as an adult for something he had done while an infant. 358 S.W.2d at 298.

81. 358 S.W.2d 306 (Tenn. 1962).

and Greene was found guilty of the other charge and sentenced to a ten-year prison term. Apparently, the trial judge also denied a motion in arrest of judgment and for transfer to juvenile court. On appeal both the defendant's own counsel and the state filed briefs in his behalf. Taking an over-all view of the code chapter on "Juvenile Courts,"[82] the supreme court stated that juvenile courts have been vested with exclusive jurisdiction of all offenses, except rape and murder, committed by persons under eighteen years of age.[83] The court pointed to its prior decision[84] that, except where the indictment of a minor below the statutory age is for murder or rape, a plea in abatement to the jurisdiction of a criminal court is good in view of the otherwise exclusive jurisdiction of the juvenile court. Treating the finding of the jury below of guilty of assault with the intent to carnally know a female under twelve years of age (an offense separate and distinct from rape and not a lesser included offense[85]) as a finding that the defendant had not committed rape, the court held that when it was concluded that some offense other than murder or rape had been committed, the trial judge should have sustained the defendant's motion and transferred the case to juvenile court.

Does a criminal court have jurisdiction to decree forfeiture of office of a general sessions judge on a finding that he has violated the provisions of a criminal statute one of the penalties of which is forfeiture of office? That question was at issue in *Sams v. State*,[86] where the defendant judge had been found guilty in criminal court of violating statutory prohibitions[87] against returning to an arrested person a weapon that the latter had been convicted of carrying concealed, for which offense of returning, penalties of a $25 fine and forfeiture of office were provided.[88] The supreme court affirmed the assignments of error challenging the jurisdiction of the criminal court to oust the defendant from office, holding that the general sessions court is an inferior court under state constitution provisions[89] and that the judge thereof is accordingly protected from removal from office except by impeachment as provided in the constitution,[90] but it affirmed the judgment of conviction and fine.

(b) *Agreement Not To Prosecute.*—The Code provides that after an indictment is found a criminal prosecution cannot be abandoned

82. TENN. CODE ANN. tit. 37, ch. 2 (Supp. 1962).
83. TENN. CODE ANN. § 37-265 (Supp. 1962).
84. Howland v. State, 151 Tenn. 47, 268 S.W. 115 (1925).
85. Bowmer v. State, 157 Tenn. 124, 6 S.W.2d 326 (1928); Sydney v. State, 22 Tenn. 478 (1842).
86. 356 S.W.2d 273 (Tenn. 1962).
87. TENN. CODE ANN. §§ 39-4911, -4912 (1956).
88. TENN. CODE ANN. § 39-4913 (1956).
89. TENN. CONST. art. 6, § 1.
90. TENN. CONST. art. 5, § 4.

without leave of the court.[91] In the *Powell* case[92] the trial court denied such leave, although, according to the defendant's allegation on appeal from his conviction of receiving and stealing stolen property, the assistant district attorney general had agreed to *nolle prosequi* the indictment charging that offense, in exchange for the defendant's agreeing to plead guilty to drunk driving. While not stated in the report of the case, the defendant apparently contended on appeal that he had by this agreement obtained immunity to prosecution for receiving and concealing and that his conviction therefor was invalid. The supreme court, however, affirming the conviction, held that such an agreement is not binding on the trial court and is no defense to the prosecution.[93]

In reaching this conclusion, the court referred to a previous decision[94] wherein it had held that one who gave evidence to law enforcement officers concerning an offense committed by other parties, with the understanding that in return for such cooperation on his part he would not be prosecuted for another offense, did not thereby acquire immunity to such prosecution. At the close of the opinion in the previous decision is the remark that "normally where such a promise is made in good faith and the party who then cooperates and gives the state the necessary assistance the district attorney general may with the consent of the trial court take care of the matter."[95] And the court in the instant decision indicated that such procedure might have been proper under the circumstances of this case had the trial court been convinced that the defendant in fact had fulfilled his end of the bargain and thereupon had given leave for abandonment of the prosecution under the indictment count in question.[96] Also in the instant decision, after quoting a reference to "authority that such an agreement [of accused to plead guilty to one charge and of the state not to prosecute on others] when approved by the court and fulfilled by the accused, should be given effect,"[97] the supreme court said, "We accept the quoted statement above as the applicable rule

91. TENN. CODE ANN. § 40-2101 (1956).

92. Powell v. State, *supra* note 37.

93. The court quoted and accepted the following statement as the applicable rule: "An agreement by a prosecuting official or a law enforcement officer to dismiss the charge against accused or grant him immunity from prosecution in return for a plea of guilty, or certain co-operative measures by accused, is not binding on the court and is no defense to the prosecution. Thus, an agreement between a prosecuting attorney and an accused charged with several offenses that if he pleads guilty to one charge he will not be prosecuted on the other charges is not a binding agreement, it has been held, so as to bar a later prosecution on one of such other charges . . . ." 22 C.J.S. *Criminal Law* § 53, at 192 (1961).

94. Bruno v. State, 192 Tenn. 244, 240 S.W.2d 528 (1951), *cert. denied*, 342 U.S. 840 (1951).

95. 192 Tenn. at 250, 240 S.W.2d at 531.

96. 352 S.W.2d at 227.

97. 352 S.W.2d at 227, quoting 22 C.J.S. *Criminal Law* § 53, at 192 (1961).

to apply under such situations."[98]

In summary, the supreme court's attitude seems to be that it is proper for a trial court to give leave for abandonment of a prosecution under an indictment when there has been a good faith agreement that such would be done by the state in exchange for defendant's undertaking (which he has since fulfilled) to plead guilty to another charge or to give other requested cooperation but that such an agreement is not binding on the trial court and is no defense to prosecution unless the agreement shall have been first approved by the court and afterwards fulfilled by the defendant.

2. *Proceedings Preliminary to Trial*—(a) *Searches and Seizures Without Warrants.*—In a burglary prosecution an arresting officer testified that he and other officers, upon receiving information that the defendant's trailer contained stolen goods, went there without a search warrant, knocked on the door, and, when the defendant opened it, greeted him by his first name. The officer testified further: "So he opened the door, said 'come on in' [not recognizing the entrants as officers]. . . . I said 'Kenneth, we came out here to talk to you. We have information that you have some stolen stuff. . . . [W]e want to look around, if you request it, we'll have to get a warrant, and if you request the warrant some of us are going to stay here and let the others go get the search warrant to search.' I had done seen enough I knew it was necessary to search. So he said, 'well, I don't know what you're looking for but if you insist you're going to get a warrant anyway, just go ahead and search.'" On the basis of evidence turned up in the ensuing search, the defendant was convicted on a burglary charge; and he appealed.

The supreme court, in *Simmons v. State*,[99] affirmed the conviction, citing authority to the effect that a search without a warrant may be valid where the officers' entry is made without coercion[100] and where the defendant also waives his constitutional rights concerning searches and seizures.[101] The court detailed two previous search and seizure without valid warrant cases similarly raising coercion and waiver questions. In one, *Hampton v. State*,[102] it had held that a defendant acted of necessity and not of volition in submitting to a search without a valid warrant when he disclosed to officers the location of goods sought by them, upon their assertion that they had a warrant (in fact, invalid) and that he might as well disclose location of the goods and thereby avoid the consequences of search. In the other, *Frix v.*

98. 352 S.W.2d at 227.
99. 360 S.W.2d 10 (Tenn. 1962).
100. Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930).
101. United States v. Jones, 204 F.2d 745 (7th Cir. 1953); Frix v. State, 148 Tenn. 478, 256 S.W. 449 (1923).
102. 148 Tenn. 155, 252 S.W. 1007 (1923).

State,[103] from evidence that arresting officers had asked the defendant if they would be required to go to town and obtain a search warrant to search his premises or whether he would be willing to let them search without a warrant and that the defendant had responded, "Mr. Brown [one of the officers], you are welcome to go anywhere on my place you want to and search. Go to it," the court in *Frix* had distinguished the *Hampton* case and held that in the case before it there had been a waiver, not evoked by coercion, of the defendant's right to require a warrant.[104] The supreme court in the instant case was of the opinion that the facts therein were controlled by the *Frix* holding. While conceding that the defendant, Simmons, confronted as he was with officers who declared their readiness (while keeping him under surveillance) to obtain a search warrant if he did not consent to search without a warrant, had little choice but to let them search, the court stated that this situation was not produced by coercion on the officers' part, but was of his own making.

The general rule in this regard is said to be that "for an occupant to waive his rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search, being cognizant of his rights in the premises; whether such a consent was freely given is a question of fact."[105] Without quarreling with the court's determination of this question in the *Simmons* decision, one may observe that it may not always *clearly* appear that a defendant in such a situation was cognizant of his rights and yet *freely* or *voluntarily* relinquished them.

3. *Trial*—(a) *Consolidation for Trial.*—The general rule is that several indictments against the same defendant (or defendants) charging related offenses may be consolidated for trial, and that it is immaterial in this connection that one of the offenses charged is a felony and another is a misdemeanor.[106] The Tennessee Supreme Court, which has long held[107] that separate counts for felonies and misdemeanors of the same nature and growing out of the same transaction may be joined in a single indictment, sensibly held in *Hardin v. State*[108] that

103. 148 Tenn. 478, 256 S.W. 449 (1923).

104. "The facts in the instant case are not at all analogous to the facts in the Hampton Case. Here, instead of announcing their intention to search whether permission was given or not, the officers informed defendant that unless permission was given they would be compelled to go back to town and procure a search warrant. There was no coercion about the defendant's subsequent agreement and consent that the search be made without a warrant. He therefore waived his right to require that the officers obtain a search warrant before searching his premises." 148 Tenn. at 488, 256 S.W. at 452.

105. 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1578 (Anderson ed. 1957), and cases cited.

106. 5 *id.* § 1942; ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 320 (1947).

107. See, *e.g.*, Tenpenny v. State, 151 Tenn. 669, 270 S.W. 989 (1924).

108. 355 S.W.2d 105 (Tenn. 1962).

it was not error for the trial court to permit the defendant therein to be tried in a single trial on one indictment charging second degree murder for killing with an automobile and on a second indictment charging driving while under the influence of an intoxicant, in view of the fact that the two charges were based on the same transaction and were not repugnant or inconsistent.

(b) *Selection of Jurors.*—In a trial of a criminal case, may a juror be peremptorily challenged after he has been accepted but before he has been sworn?[109]

A number of years ago, two days after a juror had been selected but before the jury had been sworn, a defendant in a criminal prosecution in Tennessee asked leave of the trial court to challenge peremptorily that juror, although stating that he had no ground to challenge for cause. The supreme court held[110] that the trial court did not err in refusing to permit such a challenge. Noting that under the state's system for jury selection an accused is given every opportunity to inform himself about individuals summoned for jury service and to exercise his challenges before the jurors are selected, the court declared that "to establish the right of peremptory challenge at any time before the swearing of the jury would be the defeat of fair and impartial trials in many instances."[111]

Because of the fact that publication of the foregoing decision was not authorized, the supreme court some seventy-five years later said that evidently the court had not wished to be bound by its opinion therein.[112] The court in the case before it at that later date held that a trial court had not erred, after a juror had been expressly accepted by both sides but before the jury had been sworn, in permitting the state peremptorily and without stated cause to challenge that juror when both sides had peremptory challenges remaining.[113]

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109. On the question as it relates to peremptory challenges, see Annot., 3 A.L.R.2d 499 (1949).

110. McLean v. State, 1 Tenn. Cas. (Shannon) 478 (1875). A federal court sitting in Tennessee refused to follow the *McLean* decision and held instead that no error was committed in allowing the district attorney after the jury box was full to challenge peremptorily a juror who had been accepted by both sides. United States v. Davis, 103 Fed. 457 (W.D. Tenn. 1900).

111. McLean v. State, *supra* note 110, at 483.

112. Estep v. State, 193 Tenn. 222, 245 S.W.2d 623 (1951), 22 TENN. L. REV. 574 (1952).

113. "Where twelve veniremen have been passed by the State and accepted by the defendant there is no injustice to the latter for the trial court to permit the State to peremptorily challenge a juror where the defendant has not exhausted his peremptory challenges, and provided the defendant is granted the same privilege. In most cases, if not in all, such a rule would be advantageous to the accused. It is a matter of common knowledge that in many instances it requires days and sometimes weeks to secure twelve unbiased jurors. During that time and before the jury is completed and sworn, the defendant and his friends may have learned facts which would justify a challenge for cause, or a peremptory challenge of a juror already accepted, but not sworn. There

During the 1962 survey period, the supreme court in the *Dupes* case[114] was faced with the question again when the defendant therein assigned for error the refusal of the trial court to allow him, while he had peremptory challenges remaining and before the jury had been sworn, peremptorily to challenge a certain juror who had been accepted by both sides. "We think this ruling was correct," the court concluded after referring to the trial court's holding as to the challenged juror that "there was no ground to disqualify him and no ground for peremptory challenge of him after he had been accepted by both sides."[115]

The common law rule that a juror could be peremptorily challenged at any time prior to being sworn[116] has been adopted by a number of American jurisdictions,[117] while others have held that a juror cannot be challenged peremptorily as a matter of right after his acceptance by the party challenging or by both sides.[118] And in some states, usually by statute, a trial court may for good cause allow the peremptory challenge of a juror who has been accepted and sworn, "good cause" being interpreted to pertain to something which has arisen subsequent to the acceptance of the juror or which would not ordinarily be discovered by the *voir dire* examination.[119]

The Tennessee Supreme Court has held that the availability of peremptory challenges is a privilege granted by the legislature as a matter of grace, rather than a constitutionally secured right,[120] and that the "mode of exercising challenges" rests within the sound discretion of the trial judge.[121] With no statutory provision on the point, the supreme court apparently considers the question of proper time for exercising peremptory challenges as one subject to the trial court's discretionary authority to determine the "mode of exercising challenges."

The *Dupes* case indicates that whether a trial court will exercise its discretion in this regard, in favor of allowing a peremptory challenge of a juror after both sides have accepted him, may be influenced by the extent to which the party who wishes to challenge has a good cause shown, although, again, there is no specifically

is no reason why the trial judge should not allow such a challenge. Since the State is entitled to a fair, impartial and unprejudiced jury, the same as the defendant, its right of challenge under the same circumstances should be granted." 193 Tenn. at 227, 245 S.W.2d at 625.

114. Dupes v. State, *supra* note 10.

115. 354 S.W.2d at 457.

116. Favoring this rule is Baugh, *Selecting a Trial Jury in Tennessee*, 22 TENN. L. REV. 220, 223 (1952).

117. 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 1993 (Anderson ed. 1957).

118. *Id.* § 1994.

119. *Ibid.*

120. Mahon v. State, 127 Tenn. 535, 546, 156 S.W. 458, 461 (1912).

121. Estep v. State, *supra* note 112, at 227, 245 S.W.2d at 625.

applicable statute in point. In *Dupes* the defendant stated to the trial court that only after *voir dire* examination did he learn that the juror whom he now wished to challenge peremptorily had viewed the body and scene of the homicide and there conversed with an individual later subpoenaed, but not used, as a witness by the state. Upon determining that no material fact had been stated to the juror in the conversation, however, the trial court found no ground for disqualification and presumably no good cause for allowing a peremptory challenge; its ruling to disallow the challenge was on appeal permitted to stand.

(c) *Evidence.*—Evidentiary questions involved in some of the criminal cases decided during the past year are treated elsewhere in this survey,[122] but they are footnoted here[123] as a convenience to the reader.

122. Morgan, *Procedure and Evidence—1962 Tennessee Survey*, 16 VAND. L. REV. 817 (1963).

123. *Burden of proof:* Terrell v. State, 361 S.W.2d 489 (Tenn. 1962) (burden on defendants to show that they came within statutory exceptions, such being defenses). *Circumstantial evidence:* Hardin v. State, 355 S.W.2d 105 (Tenn. 1962) (sufficient for conviction where consistent with defendant's guilt and excludes every reasonable theory of innocence). *Coerced statements:* Hardin v. State, *supra* (defendant's pre-trial statement after prolonged questioning was admissible as not coerced in view of his age, experience as a former police officer, and friendship with interrogating officers); Dupes v. State, 354 S.W.2d 453 (Tenn. 1962) (admission of defendant's pre-trial statement taken after 48 hours dentention not a violation of constitutional rights). *Corpus delicti:* Miller v. State, 358 S.W.2d 325 (Tenn. 1962) (confession may be admitted before proof of); Jamison v. State, 354 S.W.2d 252 (Tenn. 1962) (proved by circumstantial evidence, fingerprints). *Corroboration:* King v. State, 357 S.W.2d 42 (Tenn. 1962) (not required to support testimony of prosecutrix in rape case, but admissible to confirm her credibility as wituess). *Cross examination:* Sissom v. State, 360 S.W.2d 227 (Tenn. 1962) (defendant's testimony, thereby obtained, as to a pending indictment is incompetent). *Hearsay:* King v. State, *supra* (statements made by prosecutrix in rape case shortly after commission of offense may be proved by person to whom made). *Impeachment of witnesses:* Hardin v. State, *supra* (evidence of statements made out of court, allegedly inconsistent with testimony given at trial, not admissible to impeach witness until proper foundation made therefor). *Incompetent evidence, admission of:* Terrell v. State, *supra* (not reversible error in trial without jury where other ample evidence to sustain conviction). *Presumptions and inferences:* Bostick v. State, 360 S.W.2d 472 (Tenn. 1962) (use of deadly weapon resulting in death raises presumption of malice, to sustain murder in second degree); Nance v. State, 358 S.W.2d 302 (Tenn. 1962) (unexplained possession and claim of interest in forged instrument raises presumption that possessor forged it or procured it to be forged and satisfies requirements of knowledge of forgery and intent to defraud); Roe v. State, 358 S.W.2d 308 (Tenn. 1962) (a fact inferred from circumstantial evidence may be the basis of a further inference); Evans v. State, 354 S.W.2d 263 (Tenn. 1962) (presumption that owner of premises is in possession of liquor found there is not raised when there is evidence that premises are occupied by others). *Rebuttal evidence:* Hardin v. State, *supra* (discretionary with trial judge as to whether to allow evidence again on rebuttal where already received on direct). *Reputation:* Chaffin v. State, 354 S.W.2d 772 (Tenn. 1962) (evidence in homicide prosecution of deceased's reputation for peace and violence is admissible, but exclusion of evidence of specific act of deceased toward third persons is proper). *Sufficiency of evidence:* Jamison v. State, *supra* (evidence of defendant's fingerprints on a machine moved from one part of a burglarized room to another on the night of burglary, sufficient to establish guilt).

(d) *Sequestration of Witnesses.*—It is generally accepted in this country that the presiding judge in the trial of a criminal prosecution may, when it shall seem to him necessary for the due administration of justice, order a separation of the witnesses and an exclusion of all other witnesses (except the accused) from the courtroom while any witness is testifying. In the absence of a statute, such an order is not a matter of right, but largely one of judicial discretion which appellate courts do not disturb in the absence of manifest prejudice or abuse.[124]

In *Nance v. State*[125] the trial judge put the witnesses under "the rule," that is, sequestered them, and subsequently barred three of the state's witnesses from the stand when it appeared they had been taken into the office of the assistant district attorney general for consultation during a recess of the trial. However, after the close of the defendant's proof, including testimony of the defendant on cross examination denying certain facts to which he had admitted in a written statement, the court permitted one of the three barred witnesses to testify in rebuttal for the state. The supreme court, citing Tennessee precedents[126] to the effect that trial judges have a large discretion with respect to "the rule" and that their actions in applying it will not be reversed in the absence of abuse of discretion, held that the record justified the action of the trial court in the instant case and that such action had not been abusive.

(e) *Verdict.*—The Tennessee Code provides in sections dating back to 1858 that "upon an indictment against several defendants, any one or more may be convicted or acquitted"[127] and that "in an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they agree on which a judgment shall be entered."[128]

In *State ex rel. Myers v. Brown*[129] the state supreme court was called on for the first time to construe the above two sections. The relator had been tried with five other men jointly indicted upon three indictments. The jury, at the conclusion of the trial, had first announced separate verdicts as to each defendant, finding two of them guilty of specified charges and finding the other four not guilty. It appearing that the jury had failed to fix the punishment as to the two defendants found guilty, the judge had then caused the jury to

124. 2 UNDERHILL, CRIMINAL EVIDENCE § 510 (5th ed. 1956) and cases cited therein.

125. 358 S.W.2d 302 (Tenn. 1962).

126. Bass v. State, 191 Tenn. 259, 231 S.W.2d 707 (1950); Pennington v. State, 136 Tenn. 533, 190 S.W. 546 (1916). See also Ray v. State, 108 Tenn. 282, 67 S.W. 533 (1902); Pile v. State, 107 Tenn. 532, 64 S.W. 477 (1901); Nelson v. State, 32 Tenn. 237 (1852).

127. TENN. CODE ANN. § 40-2523 (1956).

128. TENN. CODE ANN. § 40-2524 (1956).

129. 351 S.W.2d 385 (Tenn. 1961).

retire for further deliberation. At this point he had entered on the court docket "not guilty" as to the relator. The next day, the jury had returned to the courtroom and reported that they were then in complete disagreement not only as to punishment but as to guilt or innocence of the defendants, including those whom they had earlier found not guilty. The trial judge thereupon had declared a mistrial and, erasing the "not guilty" entry by the relator's name in the court docket, substituted "mis-trial." Afterwards, relator had sought release through a petition for a writ of habeas corpus, the trial court sustained it, and the state appealed from it.

The supreme court affirmed, holding that as to the relator the jury had rendered a final, complete, and unanimous verdict of not guilty and had discharged their duty to him in full; that the verdict had been accepted by the trial court; that, even though the jury remained undischarged for the purpose of considering punishment for the defendants previously found guilty, they could not retract the verdict of not guilty as to the relator; that a judgment of acquittal should have been entered as to him, pursuant to the above-quoted statute; and that he was therefore entitled to be released and discharged. The court's decision in this case, concerning which it noted that it had found none other analogous, seems eminently correct.

Two matters relative to the verdict were involved in the *Nance* case.[130] As to one, the court held that the trial court had not erred in overruling the defendant's motion for a directed verdict since "we in this State have never approved the granting of a directed verdict in a criminal case,"[131] a position which has been criticized in previous survey articles.[132] Perhaps hope that a different position may some day be adopted by the court can be derived from its added remarks that "there is sufficient evidence in this case, as determined by the court below, for the questions here presented to be passed upon by a jury. Thus the motion for a directed verdict was properly overruled."[133]

The other verdict matter in *Nance* concerned the interpretation to be given the statutory provision that "The trial judges in all courts of record in which suits are tried by juries, in both criminal and civil cases, shall be required to poll the jury on application of either the state or the defendant in criminal cases and either the plaintiff or the defendant in civil cases, without exception."[134] The court, properly,

130. Nance v. State, *supra* note 125.
131. 358 S.W.2d at 328.
132. Morgan, *Procedure and Evidence—1960 Tennessee Survey*, 13 VAND. L. REV. 1197, 1224 (1960); Kendrick, *Criminal Law and Procedure—1960 Tennessee Survey*, 13 VAND. L. REV. 1059, 1091 (1960).
133. 358 S.W.2d at 329.
134. TENN. CODE ANN. § 1324 (Supp. 1962).

we think, held that the failure of the trial court in that case to poll the jury was not error, as defendant claimed, when the defendant had not made application for polling, because the wording of the statute shows a clear intent that polling is required only upon application of one of the parties. Undoubtedly, however, in the absence of an application by one of the parties, the trial judge may still in his discretion poll the jury.

(f) *Motions After Verdict.*—Two cases decided during the survey period had to do with the proper interpretation and application of code section 27-201, which reads as follows:

> A rehearing or motion for new trial can be applied for within thirty (30) days from the decree, verdict, or judgment sought to be affected, subject, however, to the rules of court prescribing the length of time in which the application is to be made, but such rules in no case shall allow less than ten (10) days for such application. The expiration of a term of court during said period shall not shorten the time allowed.[135]

In *Shettles v. State*[136] the state moved to dismiss the appeal from a judgment of conviction, contending that the defendant had failed to file her motion for a new trial within thirty days of the verdict. The supreme court, reviewing the record, determined that immediately after a notation that the verdict of the jury was entered on June 29, 1960, there followed the words, "thereupon the defendant, through her counsel of record, moves the Court for a new trial herein, which motion is set for hearing on August 2, 1960"; that by subsequent entries hearing on the motion was reset for, and had on, December 2, 1960; and that the motion was not put into writing, together with the allegations of errors in the trial, until November 25, 1960. The state's contention that the defendant's motion for a new trial was untimely seems to have been based on the theory that in effect the motion was not made until put into writing, which was more than thirty days following the verdict.

The supreme court noted that many of the trial courts in Tennessee, pursuant to their statutory authority to make rules of practice deemed expedient and reasonably necessary for the proper trial of cases,[137] have adopted rules requiring a motion for a new trial to be reduced to writing and to state specifically the grounds alleged therefor. However, the record herein did not contain the rules of the trial court below, and the supreme court refused, following precedent,[138] to take judicial notice of them and assumed that the defendant's motion had originally been filed within the rules prescribed by the trial court.

135. TENN. CODE ANN. § 27-201 (1956).
136. 352 S.W.2d 1 (Tenn. 1961).
137. TENN. CODE ANN. § 16-514 (1956).
138. Brewer v. State, 187 Tenn. 396, 215 S.W.2d 798 (1948).

There being no statutory requirement that one at the time he moves for a new trial do so in writing and state his grounds therefor, the court overruled the state's motion.

In *Neely v. State*[139] the state likewise moved to dismiss the appeal therein from a judgment of conviction, contending that the defendant had not met the requirement of section 27-201 that a motion for new trial be filed within thirty days of the verdict. From the minute entries of the trial court as they appeared in the record on appeal, the supreme court determined that the verdict in the case had been recorded on May 5, 1960, with a statement immediately following that "thereupon the Defendant through his counsel of record, moves the Court for a new trial herein, which motion is set for hearing on June 17, 1960," but that no judgment had at that time been entered on the verdict; that the hearing had been reset for, and held on October 21, 1960, on which date the motion had been overuled and judgment entered on the verdict; and that the defendant had filed on October 21, 1960, a bill of exceptions incorporating his motion for a new trial. From this, the state argued that the defendant's motion had not been filed until October 21, 1960, or 168 days after entry of the verdict, whereas under section 27-201 the motion should have been filed within thirty days from entry of the verdict.

The supreme court in *Neely* rejected the state's contention in this regard and overruled its motion to dismiss the appeal. The court pointed out that code section 27-312[140] (enacted prior to the enactment of section 27-201), making judgments final if no motion for a new trial is filed within thirty days from their entry, had been construed not to apply to a verdict alone without a judgment[141] and that thereunder "the losing party is not required to enter his motion for a new trial until after a judgment is entered."[142] Construing them together, the court held that the intent of section 27-201 was to conform to, rather than to change, the well-established practice under section 27-312 that if a judgment is not entered when the verdict is recorded the losing party may wait until after entry of the judgment and file his motion for a new trial within thirty days following such entry. At any rate, the court seems to have concluded, since section 27-201 says that a motion for a new trial can only be applied for "within thirty (30) days from the decree, verdict or *judgment*[143] sought to be affected," the motion which the defendant in the instant case incorporated in the bill of exceptions on October 21, 1960, the day that the judgment was entered, was filed in time under the statutory requirement.

139. 356 S.W.2d 401 (Tenn. 1962).
140. TENN. CODE ANN. § 27-312 (1956).
141. Prince v. Lawson, 167 Tenn. 319, 321, 69 S.W.2d 889 (1934).
142. McCall v. State, 167 Tenn. 329, 333, 69 S.W.2d 892, 894 (1934).
143. TENN. CODE ANN. § 27-201 (1956). (Emphasis added.)

4. *Penalties.*—The relator in *State ex. rel. Goss v. Bomar*[144] upon conviction of the crime of burglary in the third degree had been given a five year prison sentence and also a sentence of life imprisonment as a habitual criminal. From a denial of a petition for a writ of habeas corpus, he appealed to the state supreme court, contending that the habitual sentence was void because three separate prior convictions are called for in the definition of a habitual criminal[145] in the Tennessee Habitual Criminal Act,[146] whereas the three prior convictions upon which the habitual sentence against him was based had been rendered on the same day, in the same court, and at the same term of the court, and should therefore be considered for habitual criminal purposes as only one conviction as a matter of law. The court, however, upon the determination that the relator had been convicted of three different felonies occurring on three different dates, approved the interpretation that it is not necessary for an application of habitual criminal provisions under these circumstances that the defendant should have been tried on separate days.[147]

In the *Hardin*[148] case, based upon a single transaction, the defendant had been convicted both for second degree murder for killing with an automobile and for driving while under the influence of an intoxicant, and had been sentenced to imprisonment for not more than ten years on the homicide charge and to a workhouse term of eleven months and twenty-nine days and a ten dollar fine on the driving while intoxicated charge. The supreme court ordered the judgment modified so as to limit the conviction and sentence to the homicide charge only, basing its decision on the principle that "two or more separate offenses which are committed at the same time and are parts

144. 354 S.W.2d 243 (Tenn. 1962).

145. "Any person who has either been three (3) times convicted within this state of felonies, not less than two (2) of which are among those specified in §§ 39-604 [assault with intent to commit murder], 39-605 [assault with intent to commit rape], 39-609 [mayhem], 39-610 [malicious shooting or stabbing], 39-3708 [abduction of female from parents or guardian] or 40-2712 [miscellaneous felonies, disfranchisement by conviction of], or were for a crime punishable by death under existing law, but for which the death penalty was not inflicted, or who has been three (3) times convicted under the laws of any other state, government or country of crimes, not less than two (2) of which, if they had been committed in this state, would have been among those specified in said §§ 39-604, 39-605, 39-609, 39-610, 39-3708 or 40-2712, or would have been punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this chapter, and is declared to be an habitual criminal, provided that petit larcency shall not be counted as one of such three (3) convictions, but is expressly excluded; and provided, further, that each of such three (3) convictions shall be for separate offenses, committed at different times, and on separate occasions." TENN. CODE ANN. § 40-2801 (1956).

146. TENN. CODE ANN. tit. 40, ch. 28 (1956). See Note, *Out of Sight, Out of Mind: The Plight of the Habitual Criminal,* 26 TENN. L. REV. 259 (1959).

147. 354 S.W.2d at 243, citing Canupp v. State, 197 Tenn. 56, 270 S.W.2d 356 (1954).

148. Hardin v. State, *supra* note 108.

of a single continuing criminal act, inspired by the same criminal intent, which is essential to each offense, are susceptible to but one punishment," not to cumulative punishments.[149]

149. Patmore v. State, 152 Tenn. 281, 285, 277 S.W. 892, 893 (1925).