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I. CRIMINAL LAW

A. *Substantive Criminal Law*

The substantive criminal law receives little attention from the Tennessee appellate courts. No doubt this observation would be equally true of most jurisdictions. To one who received his legal training in a common law system of criminal law and who yet has had some experience with Canada's federal code of criminal law, the emphasis on criminal procedure is surprising. Does this mean that the state codes of substantive law have reached such heights of perfection and expertise that the efforts of the Model Penal Code draftsmen are unnecessary or, at best, academic? It is unlikely. The position rather reflects a preoccupation with constitutional rights and a criticism of the present law of criminal procedure. This accentuation is not unexpected in the light of the great activity of the United States Supreme Court in the field of constitutional criminal procedure in recent years.

The American law is more pragmatic than its British counterpart and the niceties of substantive criminal law are not treated as analytically in American courts.[1]

A few cases decided in the state in the past year have, nevertheless, examined some substantive problems in the criminal law.

1. *Involuntary Manslaughter.*—In *Grindstaff v. State*,[2] the accused had been charged with second degree murder and was convicted of involuntary manslaughter. The defendant had been driving his automobile on the wrong side of the road and so collided head-on with a car in which the deceased was a passenger. There was no question of excessive speed as the defendant was travelling at less than twenty-five miles per hour. The prosecution was not able to prove that the accused had been drinking. (The strong smell of alcohol at the scene of the collision was explained by beer bottles which were smashed in the impact.) The defendant admitted that he was feeling tense and to relieve his nervous state had taken a sedative which, he claimed, made him drowsy.

The defendant could not deny that he had driven on the wrong side of the road or that he was drowsy. These factors explained the collision but did they support a conviction of involuntary man-

and do not necessarily represent those of the Department of Commerce.

Professor Parker prepared the Criminal Law section of this article while Mr. Kendrick prepared the sections on Criminal Procedure.

1. A comparison of the quantity and quality of casebooks in the United States and England would substantiate this generalization. See also the amusing remarks of R. E. Megarry in 1964 PROCEEDINGS OF THE ASS'N OF AM. LAW SCHOOLS, Part 2, 22-24.

2. 377 S.W.2d 921 (Tenn. 1964).

slaughter? The Supreme Court of Tennessee upheld the conviction. Neither the trial judge's instruction to the jury nor the opinion of White, J., shed additional light on the definition of the amorphous crime of involuntary manslaughter. The trial judge's definition, which was approved by the appellate court was:

> Involuntary manslaughter is where it plainly appears that neither death nor bodily harm was intended by the party killing and that death was accidentally caused by some unlawful act, or by some act not strictly unlawful in itself, but done in a reckless and unlawful manner and without due caution, and that death was the natural or probable result of such act. Involuntary manslaughter neccssarily negatives any intent on the part of the accused to kill another, but does not negative an intent to do an unlawful act, or an act not unlawful in itself but done in an unlawful manner and without due caution.[3]

Most of the above can be reconciled with the statutory definition of the crime.[4] Yet, involuntary manslaughter seems incapable of precise definition. While the trial judge's reference to "reckless and unlawful" conduct would find strong supporting authority, there are inherent inconsistencies. The trial judge also refers to "intent to do an unlawful act." Presumably, he is not using "intent" in its technical sense because the code provides that manslaughter is committed "without malice, either express or implied." Furthermore, the conventional definition of recklessness (with its concomitant advertence, as compared with the inadvertence of negligence) suggests that not only must the conduct of the defendant fall below the standard of "due care" but, in addition, the defendant must know that it is increasing the risk of harm.[5] This entails a form of mens rea which was not present in the instant case. Therefore, "reckless" is being used in a loose nontechnical sense which will either mean that the crime requires much more than "ordinary" or "civil" negligence or it will qualify the "unlawful act."

The facts of *Grindstaff* seem to show that the defendant's conduct was reckless in the broad sense of the term. Judge White reviewed the defendant's acts and found that he was "guilty of such gross, reckless, and careless conduct as to evince a disregard for the rights of others who were properly and lawfully upon the highway."[6]

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3. *Id.* at 925-26.

4. TENN. CODE ANN. § 39-2409 (1955).

5. *Cf.* Holmes, J., in Commonwealth v. Pierce, 138 Mass. 165 (1884), when he defined recklessness as including "a certain state of consciousness with reference to the consequences of one's acts." *Id.* at 175.

6. 377 S.W.2d at 926. See similar fact-situations with similar results in Hynum v. State, 222 Miss. 817, 77 So. 2d 313 (1955); State v. Gooze, 14 N.J. Super., 277, 81 A.2d 811 (1951); People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956). *Cf.* Maxey v. State, 64 So. 2d 677 (Fla. 1953).

This evaluation of the defendant's behavior, along with the fact that he was driving on the wrong side of the road and, therefore, committing the necessary unlawful act, should have been sufficient to dispose of the case. Judge White gratuitously qualified the finding of involuntary manslaughter based on a high degree of criminal negligence bordering on a crime attracting the mens rea of recklessness. Judge White decided that the driving of the defendant made him guilty of an act malum in se.[7] This statement is subject to three principal objections. First, it was unnecessary because the defendant had been engaged in an unlawful act as defined by section 39-2409 of the Tennessee Code—so long as the additional "criminal negligence" was proved. Secondly, the category of malum in se is likely to lead to confusion and uncertainty; outside the commission of the common law crimes, the decision as to what is malum in se is subject to the unfettered discretion of subjective and moralistic judgments. Finally, it is doubtful whether the act of the defendant in *Grindstaff* can be properly categorized as malum in se.[8]

On the other hand, there might be one compensating factor. Future cases might result in convictions for involuntary manslaughter only when the defendant's acts are truly malum in se. Such an outcome would be greatly superior to decisions based on causation of death by any unlawful act with little regard to the dangerousness of the act or the recklessness or other state of mind of the accused.[9]

2. *Self-Defense.*—The Supreme Court of Tennessee also examined the defense of self-defense. The law involved in these cases is uncomplicated. Clear rules were enunciated: that the question of self-defense is one for the jury,[10] and that evidence that the defendant had threatened his victim some months previously was competent in proving his mens rea on the occasion in question.[11]

The defense of self-defense was denied in all three cases because the evidence of violence by the victim was insufficient or the defendant had retaliated with more force than was necessary. In only one case, *Douglas v. State*, was the defendant's violent act fatal to the victim. Under strict law, an unsuccessful self-defense plea should result in a

7. Citing Whitlock v. State, 187 Tenn. 522, 216 S.W.2d 22 (1948). The other cases cited in the judgment make no mention of malum in se.

8. The court in State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905), defined an offence malum in se as "one which is naturally evil as adjudged by the sense of a civilized community." *Cf.* State v. Reitze, 86 N.J.L. 407, 92 Atl. 576 (1914); Commonwealth v. Samson, 130 Pa. Super. 65, 196 Atl. 564 (1938); White, J., also cited BLACK, LAW DICTIONARY 1112 (4th ed. 1951).

9. *E.g.*, State v. Hupf, 48 Del. (9 Terry) 254, 101 A.2d 355 (1953).

10. Hawkins v. State, 378 S.W.2d 777 (Tenn. 1964); Douglas v. State, 378 S.W.2d 749 (Tenn. 1964).

11. Bromley v. State, 378 S.W.2d 780 (Tenn. 1964). *Cf.* Freeman v. State, 385 S.W.2d 156 (Ark. 1964).

conviction for murder. In all three charges, the final verdict was not murder but voluntary manslaughter (or its non-fatal equivalent) which is in accord with the more enlightened view that excessive self-defense should result in a criminal homicide conviction for something less than murder. This trend has received strong support in the British Commonwealth[12] although the common law English courts have not recognized it. Ironically, the Australian and Canadian courts which have accepted this principle have relied on early English cases[13] and, more specifically, American decisions.[14]

These verdicts were based on the Tennessee Code's definition of voluntary manslaughter which is defined as a killing without malice "upon a sudden heat."[15] This is in accord with the old authorities of Hale, Hawkins, and East who would have described such a homicide as committed upon chance medley.[16] This section has also been used to justify a reduction of a criminal homicide where the defendant had been provoked.

Gann v. State,[17] provides an excellent illustration of "classic" self-defense. The defendant was estranged from his common law wife, the deceased's daughter. He visited the deceased's house and an argument ensued. The deceased asked the defendant to leave his premises, but the defendant refused. The deceased, who was seventy-four years of age, armed himself with a shotgun and approached the defendant's automobile. His wife, armed with a pistol, accompanied him. They were fired upon by the defendant. The deceased's son also joined the shooting affray. In a struggle which ensued, during which the defendant was pistol-whipped by the son, the deceased was fatally shot. Gann claimed self-defense. He was convicted of second degree murder and the Supreme Court of Tennessee refused to disturb the verdict. The court held that an aggressor, who produces fear or apprehension of death or great bodily harm in the mind of his adversary, cannot lawfully defend his life against the deadly defensive act of his adversary by taking the latter's life, until he has restored his right of self-defense, lost by his initial fault, by abandoning and withdrawing from the contest and giving notice of the fact to the adversary.

12. *E.g.*, R. v. McKay [1957] Vict. L. R. 560; R. v. Howe [1958] So. Austl. St. 95; R. v. Barilla [1944] D.L.R. (B.C.) 344; R. v. Jackson, [1962] R. & N. 157.

13. *E.g.*, R. v. Rose [1884] 15 Cox Crim. Cas. 540.

14. State v. Thomas, 184 N.C. 757, 114 S.E. 834 (1922); Commonwealth v. Collandro, 231 Pa. 343, 80 Atl. 571 (1911). See Commonwealth v. Beverley, 237 Ky. 35, 34 S.W.2d 941 (Ct. App. 1931).

15. TENN. CODE ANN. § 39-2409 (1955).

16. 1 Hawk, (Pleas of the Crown) P.C. 83, s.24; 1 Hale P.C. 482; Foster, CROWN Law, 276; 1 East P.C. 280 (Amer. ed. 1806); 4 BLACKSTONE, COMMENTARIES 184, 188.

17. 383 S.W.2d 32 (Tenn. 1964).

On the particular facts of this case, the "castle" doctrine in addition to the retreat rule persuaded the court that self-defense was unavailable. The court also considered, on its own initiative, the principle in *Hunt v. State*,[18] where the court reduced a homicide from second degree murder to voluntary manslaughter. A recital of the facts will show the clear distinction made by the court in *Gann*. In *Hunt*, the defendant was met at a friend's house by the deceased and his companions who believed the defendant had very recently attacked the deceased's wife. The defendant voluntarily entered into mutual combat but did not originate the fight, in which the deceased was fatally stabbed.

In the present case, for most purposes, the position was reversed. The defendant had initiated the fight although he no doubt argued that it soon developed into a mutual affray. One of the strongest points against him was the fact that he was on the deceased's territory, if not invading the deceased's "castle" which has been granted special sanctity in the law of self-defense. Also of prime importance in the eyes of the Supreme Court of Tennessee was the lack of retreat by Gann. This rule has always been strictly observed in the criminal law. No doubt it had great significance when gentlemen fought with swords or knives, but it appears to have little relevance in a gun fight where the weapons have a far greater range than swords and equal potency whether a man is at four feet or four hundred feet. Furthermore, the crime was committed "upon a sudden heat" and the jury's interpretation of the facts seems to be arbitrary and hair-splitting.

3. *Entrapment.*—In *Warden v. State*,[19] the Supreme Court of Tennessee has held that the doctrine of entrapment is not recognized in Tennessee. This state is one of two states (the other being New York) which purportedly do not recognize entrapment as a means of impeaching evidence or challenging a conviction.

The statement in *Warden* may be a little too sweeping. In that case, three cases are cited. The first, *Hyde v. State*,[20] was decided in 1915 before the United States Supreme Court had made a pronouncement in favor of the doctrine. Reference was made in *Hyde* to the "overwhelming weight of authority" against entrapment as a defense, at least in liquor offenses. This last qualification makes the general statement in *Warden* applicable to the facts of that case, but it is doubtful whether the defense of entrapment has been fully considered in this state.

Thomas v. State,[21] the second case cited in *Warden*, is only authority

18. 202 Tenn. 227, 303 S.W.2d 740 (1957).
19. 381 S.W.2d 247 (Tenn. 1964).
20. 131 Tenn. 208, 174 S.W. 1127 (1915).
21. 182 Tenn. 380, 187 S.W.2d 529 (1945).

for excluding entrapment in liquor offences. The court in *Thomas* referred to "reasonable behavior" by an investigating police officer and cited *Sorrells v. United States*,[22] as holding that the defense is only recognized where there is "undue inducement."

The opinion in *Hyde*[23] held that in larceny and burglary cases, it would not be trespass to goods where the owner of the goods or his agent had induced or assisted the thief. Such a problem does not raise a question of entrapment, but can be solved on basic principles of the law of larceny and burglary. The defense of entrapment will arise where the inducer or assistant is a law enforcement officer or his agent or informer. This question arose in *Hagemaker v. State*,[24] the third case cited in *Warden*. The Supreme Court in the latter case simply cited *Hagemaker* as supplemental authority. The case seems to go further. Chief Justice Prewitt cited and applied a principle of law which makes it difficult to take at face value the statement by the Chief Justice that the doctrine of entrapment is not recognized in Tennessee. The applicable law stated that:

> 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 entrapment is shown where it appears that officers of the law or their agents incited, induced, instigated, or lured accused into committing an offense which he otherwise would not have committed and had no intention of committing.[25]

The Chief Justice concluded his judgment by declaring that the defendant had been induced by the police informer and an employee of the owner of the goods. Therefore, the defendants were not trespassers and could not be guilty of burglary. Although the trespass point could be decided on the basis of the law of burglary in relation to the employee, there seems little doubt that the court was applying the doctrine of entrapment in Tennessee.

The least that can be said is that the doctrine of entrapment is not recognized in Tennessee because it has never called for full consideration.[26]

B. *Criminal Law and Corrections*

1. *Referral for Psychiatric Examination.*—Some of the cases decided in the past year have raised interesting problems relating to treatment

22. 287 U.S. 435 (1932).
23. *Supra* note 20.
24. 208 Tenn. 565, 347 S.W.2d 488 (1961).
25. 22 C.J.S. *Criminal Law* § 45 (1961).
26. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Palmer v. State, 187 Tenn. 527, 216 S.W.2d 25 (1948). These cases add nothing to the discussion.

and correction of criminal offenders. In *United States v. Day*,[27] for instance, the defendant had been convicted on two counts of bank robbery and sentenced to serve, concurrently, five years and twenty years. On a motion to vacate sentence the defendant claimed, inter *alia*, that insufficient consideration had been given to his mental condition at the time of the offence and trial. Day admitted that he had been arrested seventy-five times for drinking. During the ten days preceding the crime, he had been drinking heavily and taking barbiturates.

The district court had asked the defendant whether he wished to be referred to a mental institution for further examination. The defendant had little doubt that he had problems and welcomed help. The court sought the advice of the Chief Probation Officer as to the advisability of sending Day to Nashville for a psychiatric examination. In due course, the Chief Probation Officer reported back that "there wasn't any question about Day being sane either at the time of the robbery or at the time the investigation was made."[28] The defendant pleaded guilty and was sentenced.

The United States Court of Appeals for the Sixth Circuit consulted authorities, both in the behavioral sciences[29] and the law reports,[30] and decided that there was sufficient evidence for the court to suspect that the accused was mentally unfit to stand trial. Therefore, the case was remanded to the district court for further consideration.

The authorities showed that there is little doubt that excessive and prolonged drinking can cause alcoholic dementia. The court also cited many authorities which showed the uselessness of repeatedly jailing drunks with no provision for treatment. The law has never taken a constructive attitude toward the habitual drunkard. Most of those charged with public drunkenness, disorderly conduct and vagrancy (arising out of drunkenness) are from a low socio-economic class and have not aroused the interest of the higher appellate courts in matters pertaining to their constitutional rights—unless they committed serious offences similar to those committed by Day in the present case. The medical profession has similarly failed. On many occasions, the intake personnel of hospitals have tried unsuccessfully to have drunks admitted to mental institutions, but meager budgets,

27. 333 F.2d 565 (6th Cir. 1964).

28. *Id.* at 567.

29. BOGUE & SCHUSKY, THE HOMELESS MAN ON SKID ROW; RADIZINOWICZ & TURNER, MENTAL ABNORMALITY AND CRIME (1964). See 25 Federal Probation, No. 2, p. 42 (June 1961); 23 Federal Probation, No. 4, p. 76 (December 1959); 22 Federal Probation, No. 2, p. 36 (June 1955), for discussions of the present unsatisfactory treatment of the chronic alcoholic and skid row drunk.

30. United States v. Walker, 301 F.2d 211 (6th Cir. 1962); Krupwiek v. United States, 264 F.2d 213 (8th Cir. 1959).

inadequate treatment facilities and overworked personnel are usually unable to offer intensive treatment for the thousands of skid-row types who obviously need help.

It might well be that the probation officer in the present case was well aware of the inadequacies of treatment for the alcoholic and therefore made a realistic report to the district court. Whatever the reason for the probation officer's action, the court had relied too heavily on a probation service which was not equipped to make a professional report on Day. Many courts are too ready to delegate extraordinary power to the probation officer when that court officer is only one member of the correctional team. The probation officer is designated as an officer of the court, but his status is ambiguous. Similarly his report to the court, whether it is a conventional presentence report or a specialized referral as was sought in *Day*, becomes part of the court record. This term is equally ambiguous. The probation officer and the reports he makes are meant to assist the court. In most cases, the work of the probation staff is exemplary, but many judges, through ignorance of correctional matters, the press of a heavy docket or disinterest in post-conviction proceedings, rely too heavily upon the probation officer.[31]

The influence of the probation officer will depend entirely on his relationship with the judge. A probation officer who over-extends himself is prejudicing a criminal offender in two ways: his extrajudicial report is likely to be given too much weight and this is dangerous if it is incompetent, biased or based on insufficient evidence. Secondly, the subject of the report does not have the usual guarantees of rebuttal or cross-examination because the probation officer's report is, in many jurisdictions, privileged or at least confidential. The United States Supreme Court has recognized that to apply stringent evidentiary and procedural rules to court social workers "would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."[32] That a defendant's rights can be similarly undermined is shown by the remedy which the appellate court in *Day* has had occasion to adopt.

Unfortunately, few cases receive the careful consideration accorded the defendant in *Day*. The fact that he was assigned counsel is a further reminder of the advantages of such a system.

In *Anderson v. State*,[33] the Supreme Court of Tennessee also looked toward treatment as opposed to retribution. The court recommended,

31. For a more extensive discussion of this problem, see Parker, *Legal & Social Role of the Probation Officer in the Sentencing Process* 1964 CAN. B. REV. 621.

32. Williams v. New York, 337 U.S. 241 (1949) (Black, J.,).

33. 383 S.W.2d 763 (Tenn. 1964).

on the advice of psychiatrists, that the punishment of the defendant who was convicted of first degree murder should be commuted to life imprisonment. The court relied on medical advice that the defendant should be transferred to a mental institution as he "would get along in a regular psychiatric hospital environment as he was no longer dangerous."

2. *Probation Revocation.—Rodifer v. State*[34] also provides some valuable insights into the relationship of corrections and law. This case is a clear example of the less rigorous constitutional standards which are applied to a person after his conviction. Rodifer had been convicted of possession of intoxicating beverages.[35] He was sentenced to imprisonment for a year and a day. "Parole"[36] was granted and he was placed on probation for ten years. He violated his probation by an alleged second liquor offense and was ordered to serve the original sentence.

A "full, open" hearing of the violation was held and Rodifer was represented by counsel. His main complaint on appeal was that he had received insufficient notice to the "charge" of probation violation. The court denied his request, holding that notice was sufficiently conveyed by the warrant further "charging" the defendant with possession of intoxicating beverages.

The procedure for revoking a probation order in Tennessee had once provided that notice had to be given to the defendant with a brief statement of the charges against him.[37] A 1961 amendment dispensed with this notice.[38] Furthermore, it is also no longer necessary for the probation officer to obtain a warrant for the arrest of the probationer. The law was therefore clear. The defendant had "clear" notice of the further offences he was alleged to have committed and his counsel had ample opportunity to cross-examine witnesses who provided evidence tending to show the defendant's implication in these offences.

Of more importance in the present discussion, an earlier case[39] had decided that the hearing on parole violation may be brought without filing formal charges relating to the acts which constitute the violation. In that case, Judge White had said that the hearing of an alleged parole violation may be summary and that the defendant "is not entitled to the same guarantees as a person who is not con-

34. 379 S.W.2d 763 (Tenn. 1964).
35. TENN. CODE ANN. § 39-2507 (1955).
36. "Parole" and "probation" are frequently used interchangeably in the reports. In this instance "parole" signifies suspension of sentence on probation.
37. TENN. CODE ANN. § 40-2907 (1955).
38. Tenn. Pub. Acts 1961, ch. 95, § 7.
39. Finley v. State, 378 S.W.2d 169 (Tenn. 1964).

victed and is merely on trial upon an accusation of crime"; the judge went on to say that on such a hearing, the court is not bound by the rules of evidence and that proof beyond a reasonable doubt is unnecessary.

This decision gave little or no consideration to the concept of probation. In all fairness, *Rodifer* is decided in accordance with precedent, although no court, including the Supreme Court of the United States, has given a clear answer to the problem, mainly because the courts have never given a clear exposition of what they mean by probation. The concept of probation, like that of the juvenile court, is vague because the rationale of both institutions reflects a desire to help a person who deserves a second chance and whose fate should not be subjected to the vagaries of legalistic reasoning. It is a discretionary matter. Until recently, the juvenile court had not been overly concerned with the protection of constitutional rights; it had relied on its equitable jurisdiction to do justice and sometimes more than justice. It was more accessible to a non-legal approach because the entire concept of juvenile justice operated within the circumscribed and peculiar institution of the juvenile court. Ironically, while the juvenile court is tending to become more legalistic and circumscribed by demands for adherence to constitutional safeguards,[40] the adult courts are not examining probation in a similar light.

If a man is given the extraordinary chance of being placed on probation so that his sentence of imprisonment is suspended, a great variety of conditions may be imposed on him. These conditions can be stipulations which limit his personal or work habits, his choice of companions, his freedom to marry, to drink intoxicants or drive an automobile. In contrast to these minor, irritating restrictions, the defendant will have his suspended sentence enforced as the result of his violation of probation if he commits another criminal offense. On the one hand, the probationer may violate his probation if he disobeys his probation officer's advice or instructions. On the other, he will have his probation cancelled if, to take an extreme example, he commits murder. In the first instance, of course, the probation officer will not, in practice report the defendant for every minor infraction. At least one hopes that he will not do so, and if he insists on so doing, that the judge will refuse to cancel probation. The decision to report an alleged violation of this type is totally within the discretion of the probation officer. The trial judge will make the final decision on

40. See Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Geis, *Juvenile Justice: Great Britain and California*, 7 CRIME AND DEL. 111 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

some quantum of proof less than a measure beyond a reasonable doubt. What standard should be applied if the probation officer reports to the court that the probationer is accused or suspected of some crime? No one suggests that the probation officer will report a probationer on flimsy evidence or mere suspicion. Should the violation of probation be postponed until the probationer has been convicted of the later crime? If his probation is cancelled prior to conviction, what probative value has the parole violation in a subsequent trial? The courts have never satisfactorily answered these questions for the reasons already outlined. The highest courts are in reasonable agreement that a jury trial is not necessary,[41] that the proof of violation is less rigorous than that required for a trial[42] that the rules of evidence may be relaxed,[43] that representation by counsel is not guaranteed[44] and, most important, that the concept of probation is a discretionary one and is "conferred as a privilege and cannot be demanded as a right."[45]

Does this satisfactorily answer the problem? Why should the constitutional rights of the probationer be discounted in these circumstances? This problem has not really been answered by the United States Supreme Court although they have examined the concept of probation on more than one occasion. Mr. Justice Hughes described probation in *Burns v. United States*,[46] as a "matter of favor, not of contract." He stressed the fact that the probationer already stood convicted and that his dereliction in violating his probation now places him in a position where the court must decide whether the suspension of his punishment will be revoked. He is in no position to "strike a bargain." The Federal Probation Act authorized the courts to suspend sentence so "that the ends of justice and the best interests of the public, as well as the defendant will be subserved."

41. *E.g.*, Strickland v. United States, 114 F.2d 556 (4th Cir. 1940); Wilson v. State, 156 Tex. Crim. 228, 240 S.W.2d 774 (1951).

42. *E.g.*, United States v. Van Riper, 99 F.2d 816 (2d Cir. 1938); Brill v. State, 159 Fla. 682, 32 So. 2d 607 (1947); Hooper v. State, 201 Tenn. 156, 297 S.W.2d 78 (1956); Cist v. State, 60 Tex. Crim. 169, 267 S.W.2d 835 (1934).

43. Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937); People v. Yarter, 138 Cal. App. 2d 803, 292 P.2d 649 (Dist. Ct. App. 1956); People v. McClean, 130 Cal. App. 2d 439, 279 P.2d 87 (Dist. Ct. App. 1955); Moye v. Futch, 207 Ga. 52, 60 S.E.2d 137 (1950); *Cf.* Robinson v. State, 62 Ga. App. 539, 8 S.E.2d 698 (1940); *Ex parte* Medley, 73 Idaho 474, 253 P.2d 794 (1953); *In re* Bobowski, 313 Mich. 521, 21 N.W.2d 838; (1946); People v. Oskroba, 305 N.Y. 113, 111 N.E.2d 235, 122 N.Y.S.2d 61 (1935); People v. Hill, 164 Mise. 370, 300 N.Y. Supp. 532 (1937); State v. Nowak, 91 Ohio App. 401, 108 N.E.2d 377 (1952); Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945); State v. Bonza, 106 Utah 553, 150 P.2d 970 (1944).

44. People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912); *Ex parte* Banks, 74 Okla. Crim. 1, 122 P.2d 181 (1942) (this appears to be a minority view).

45. Burns v. United States, 287 U.S. 216, 220 (1932).

46. *Id.* at 220-21.

Hughes, J., saw no indication that the court's discretion was any less fettered when modification or revocation of probation was being considered. The probationer is a person convicted of an offence and the suspension of his sentence remains within the control of the court. Such arbitrary control was necessary, in the Supreme Court's view, because it provided a lever so that the probationer would be reformed under its sanctions and privileges.

The rights which exist in the present Tennessee case seem to be described by Mr. Justice Hughes when he says,

> The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.[47]

Despite this seemingly unequivocal statement, the case should not be taken as laying down the basic rule on the subject. The facts of *Burns v. United States* should be sufficient to distinguish it. Burns' "crime" was abuse of prison privileges with the connivance of a prison official.[48] It would have been difficult to convict him of a criminal offense on the facts of the case.[49] Therefore, the authority of this case is limited. The Supreme Court may well decide differently in a case of a probationer who is charged with a serious crime.

Not all state jurisdictions agree with this rule of the Supreme Court, but, on the other hand, it appears that no court has gone so far as to say that there must be clear proof of guilt of the alleged crime which has led to probation violation. The Supreme Court of South Carolina has approximated this position. *State v. Sullivan*[50] raises most explicitly the problem of the probationer charged with violating his probation by allegedly committing a further substantive criminal offense. Sullivan had been convicted of liquor offenses and sentence had been suspended. Evidence was introduced on the revocation hearing "tending to show" that, during the probationary period, the defendant had further violated the prohibition laws. The majority held that the defendant was not entitled to prior notice of the hearing, holding that the very presence of the probationer and his attorney at the revocation hearing showed conclusively that he had knowledge of the nature of the hearing and that the revocation was proper.

47. *Id.* at 221.

48. This was an unusual case in which the defendant was sentenced to imprisonment and was to serve a further suspended sentence on his release from prison.

49. Hughes, J., who refers to Act of May 14, 1930, cir. 274, § 9, 46 Stat. 325, 18 U.S.C. § 753h (1958).

50. 127 S.C. 186, 121 S.E. 47 (1923).

A strong dissent contended that the probationer's constitutional rights had been violated. While Justice Cothran agreed that the court had, by imposing suspended sentence, retained jurisdiction over the defendant, he also believed that the defendant had retained his right to due process of law and any infringement of that right was an affront to his personal liberty. He said:

> I do not regard [the queston of revocation] as a matter to be determined by the judicial estimate of what is fair and just, a criterion that in time of trial . . . may vary with the temper or the interest of the judge, but a legal, constitutional right, as immovable as a lighthouse on solid granite fixed.[51]

Justice Cothran believed that in the case of a supposed violation based on the alleged commission of another offense, the court reviewing the suspended sentence should leave the issue in abeyance until the court trying the probationer had decided on his guilt. Three years later this dissent persuaded the Supreme Court of South Carolina to overrule *Sullivan*.[52]

Later decisions (in other jurisdictions) have not adhered to the Cothran rule. In a Georgia case,[53] the court rejected the defendant's contention that probation should not be revoked unless he had been convicted of the new offense. The court decided that this contention was unsound on the extraordinary basis that,

> it is not the record of convictions, but the fact of guilt, which determines whether the probation should be revoked and in determining this question the trial judge is not bound by the same rules of evidence as a jury in passing upon the guilt or innocence of the accused in the first instance. It is not necessary that the evidence support the finding beyond a reasonable doubt or even by a preponderance of evidence.[54]

The court was prepared to accept, for the purpose of revocation, inferences arising from the evidence of police officers who had raided the defendant's house and found lottery equipment there.[55]

The federal courts have decided cases in the same manner.[56] The discretionary quality of probation revocation was described more accu-

51. *Id.* at 199, 121 S.E. at 51.

52. Renew v. State, 136 S.C. 302, 132 S.E. 613 (1926). This case is clearly in the minority. See Slayton v. Commonwealth, 185 Va. 357, 366, 38 S.E.2d 479, 483 (1946), and the cases cited therein.

53. Bryant v. State, 89 Ga. App. 891, 1 S.E.2d 556 (1954).

54. *Id.* at 894, 81 S.E.2d at 559.

55. See also Allen v. State, 78 Ga. App. 526, 51 S.E.2d 571 (1949); Waters v. State, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

56. Campbell v. Aderhold, 36 F.2d 366 (5th Cir. 1929); Riggs v. United States, 14 F.2d 5 (4th Cir. 1926).

rately by District Judge Sibley in *Campbell v. Aderhold* when he said that:

> If the judge becomes satisfied that the probation is a failure and the best interests of the public and the defendant are not being subserved, and that different treatment is required, he has the right and the duty to terminate the experiment and let the law take its original course. It may be that the probationer cannot be proven beyond a reasonable doubt to have committed a particular crime, and yet his course of conduct along that line may be such as to satisfy the judge that the probation ought to be revoked.[57]

The judge also mentioned another most persuasive reason for taking such a view of revocation. He pointed out that a stricter rule would result in less frequent resort to probation which, in itself, would be disadvantageous.[58]

In practice, the problem of possible infringement of constitutional rights is not likely to arise very frequently. The probation officer usually will follow the better procedure of waiting until the probationer has been convicted of the substantive crime before filing complaint of a probation violation.

In those cases, of course, where the probationer has breached a condition of his probation order such as drinking intoxicating liquor, associating with known criminals, quitting his job without seeking the permission of his probation officer or changing his address without notifying the probation officer, no criminal charge will arise and the probation officer will use his good judgment in deciding whether to make a formal report to the sentencing judge.

The only difficult case will be one where the probationer denies that he has committed any criminal offense which would constitute a breach of his probation.[59] Few cases have examined this problem closely. Most courts have been satisfied to refer to the privilege of probation and the discretionary quality of the decision to revoke.[60]

A perceptive concurring judgment by District Judge McDowell in *Riggs*[61] provides one of the most exhaustive discussions of this problem which, presumably, has never called for explicit decision in Tennessee. The judge construed the Federal Probation Act as giving ex-

57. Campbell v. Aderhold, *supra* note 56, at 367.

58. See also Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921), where the defendant's probation was revoked because it appeared that he was unlikely to refrain from further criminal acts. He had possession of a valuable automobile and could provide no satisfactory explanation for his sudden affluence. He was also in the constant company of a law-breaker.

59. *E.g.*, Richardson v. Commonwealth, 131 Va. 802, 109 S.E. 460 (1921).

60. Riggs v. United States, *supra* note 56, at 6. It was claimed, unsuccessfully, that the Federal Probation Act was unconstitutional because it encroached on the pardoning power of the President.

61. *Id.* at 10.

press authority to determine the truth of any alleged breach of condition of probation, including a crime which was alleged to have been committed during the probationary period. "If the charge is too trivial," said Judge McDowell, "or too ill-supported, to justify prosecution in such court, it might properly be ignored by the court which granted probation."[62] Although the decision of the court revoking probation may not agree with a subsequent trial, the Congress had provided for a duplication (and possible variance) and the power of the original court must stand. The judge pointed out that the revocation of probation does not necessarily have to be consistent because the revocation does not excuse the new crime.

The judge also intimated that the premature determination regarding probation may prejudice the prosecution or defense, depending on the outcome, but he felt that it was inevitable. The only suggestion which the judge made was that the federal court judge deciding on probation revocation should refrain from presiding over the trial of the new crime.

Judge McDowell advised that these difficulties called for caution in exercising the power of revocation so that justice might be done and abuses minimized. This is an enigmatic statement at best. The learned judge recognized the "delicacy" of the problem. He cited the Cothran dissent in *Sullivan v. State*,[63] and the judgment in *Renew*.[64] Furthermore, the judge rationalized this "premature" power of revocation as an expression of the best administration of the probation system. He said:

> The majority of probationers are and will be youthful, or at least of less than normal adult intelligence, and to such persons a power that can be very promptly exercised is much more respected and efficacious than a power that can be exercised only after the (frequently slow) processes of the criminal law have been finally completed.[65]

The deterrent effect of a prompt reaction to misbehavior by the probationer is certainly the experience of most social workers in the field of probation. Can the law be satisfied with this admittedly admirable aim in correctional theory and practice? Is this not the equivalent of saying that "you may not have committed the crime but we think you were up to something?" Constitutional guarantees are absent and this was eloquently clear when Judge McDowell said:

> The possibility of an acquittal at the criminal trial of a probationer whose probation has already been revoked may exist in any case. But juries are

62. *Id.* at 11.
63. *Supra* note 50.
64. *Supra* note 52.
65. *Supra* note 56, at 11-12.

> so frequently influenced by sympathy, or by other improper reasons, that a subsequent acquittal does not nccessarily show that the revocation of probation was erroneous. . . .[66]

In Tennessee, the duty of the court which is asked to revoke probation on the alleged commission of a new crime has had its task made a little easier, although the propriety of the procedure is, it is submitted, equally open to objection on constitutional grounds. Section 40-2907 of the Tennessee Code provides that a judge may revoke a probation order when the probationer has "been guilty of a breach of the laws of this state, or shall have been guilty of a breach of the peace, or any other conduct inconsistent with good citizenship." This procedure enables the court, on less evidence than would be required in a regular trial, to revoke probation by choosing the category (in this case, "conduct inconsistent with good citizenship") which best suits its purpose.[67]

Varela v. Merrill[68] is an illustration of the stringent viewpoint which seems to be the majority rule.[69] The probation law of Arizona is very sinnilar to that of California from which it was fashioned; consequently, the Supreme Court of Arizona found support for its findings in California cases.[70] The court, therefore, adopted the view that the authority to revoke probation was purely discretionary and a matter of grace and did not even depend on violation of the specified conditions of probation. In the problem case of the alleged commission of a second crime, this viewpoint is, of course, of great importance. The court can act on "the report of the probation officer, or otherwise" in cases where the "continued enjoyment of probation may depend upon the effect which the prisoner's liberty may have upon the peace or morals of society."[71] The court adds that trial by jury or other manifestations of due process are unnecessary because the probationer's vulnerable and precarious status subjects him to the dangers of discretionary action by the original sentencing court. The court hastens to point out that the decision must be subject to "sound judgment." Whether such a debonair attitude to the exercise of the rehabilitative ideal can be countenanced is another matter. The courts seem to have no difficulty in justifying the wide exercise of power

66. *Id.* at 12.

67. Finley v. State, 378 S.W.2d 169 (Tenn. 1964). See also Hooper v. State, 201 Tenn. 156, 297 S.W.2d 78 (1956); Thompson v. State, 198 Tenn. 267, 279 S.W.2d 261 (1955); Galyon v. State, 189 Tenn. 505, 226 S.W.2d 270 (1949).

68. 51 Ariz. 64, 74 P.2d 569 (1937).

69. It must be remembered, of course, that the view will change from jurisdiction to jurisdiction, depending on the wording and construction of the legislation relating to probation, but the Arizona statute does not seem atypical.

70. *E.g.*, *In re* Young, 121 Cal. App. 711, 10 P.2d 154 (1932).

71. Varella v. Merill, *supra* note 68, at 574.

and discretion by both probation officer and judge. The court condones the lack of constitutional safeguards by categorizing the revocation hearing as something other than a criminal proceeding; the probationer has agreed to enter into an agreement the terms of which are made known to him and he assumes the liability of being treated to a summary proceeding. The courts say that a probationer is not being tried for an offense but simply confronted with violation of an agreement. Such legalistic reasoning hardly satisfies a probationer who has abided by the terms of his suspended sentence and has been unjustly accused of a new crime.

The short answer is that the probationer is a felon who, in many respects, has the same rights in the legal process relating to his crime as a man serving his sentence in prison. Jurisdictions which have held otherwise have reiterated the pleas for safeguards where liberty is threatened but, of course, it is only a conditional liberty.[72]

3. *Juvenile Court.*—In *State ex rel. Jackson v. Bomar*,[73] the defendant, aged seventeen years, was convicted in the Criminal Court of Davidson County of assault with intent to commit murder and rape. The defendant was originally brought before the Juvenile Court of Shelby County so that that court might ascertain whether the nature of the charges were within the jurisdiction of the Juvenile Court. The court found[74] that there was probable cause to believe that the said minor has been guilty of the crime of rape and assault with intent to commit murder in the first degree, which would be felonies if committed by an adult. The court also found that the "minor is not insane or feeble minded, that said minor is not reasonably susceptible to corrective treatment in any available institution or facility within the State designed for the treatment and care of children."[75] Consequently, the court remanded the defendant for trial in the criminal court with the results mentioned above.

The defendant contended on appeal that his conviction was void because he had neither been granted nor offered the aid of legal counsel when he appeared in the juvenile court. He relied on *Hamilton v. Alabama*[76] and *Gideon v. Wainwright*.[77]

72. But see cases where the legislation has aided these minority courts in coming to this conclusion. Escoe v. Zerbst, 295 U.S. 490 (1935); *Ex parte* Lucero, 23 N.M. 433, 168 Pac. 713 (1917); Howe v. State *ex rel.* Pyne, 170 Tenn. 571, 98 S.W.2d 93 (1936) (the Tennessee statute has since been changed); State v. O'Neal, 147 Wash. 169, 265 Pac. 175 (1928); State v. Zolantakis, 70 Utah 296, 259 Pac. 1044 (1927).

73. 383 S.W.2d 41 (Tenn. 1964).

74. *Id.* at 42.

75. *Ibid.*

76. 368 U.S. 52 (1961).

77. 372 U.S. 335 (1963).

Judge Clement, citing many prior decisions,[78] held that the rationale of the two United States Supreme Court cases was inapplicable because the proceeding in the juvenile court was not a criminal proceeding. Everyone knows that the juvenile court is an emanation of the *parens patriae* principle of equity so that the juvenile court is concerned with the welfare of the child rather than his guilt or innocence. Is this principle to override the rights of a minor who, if he fails in his attempt to keep his case in the juvenile court, will be facing criminal charges? One would think that the very essence of the juvenile court proceeding is concerned with protecting a child against the dangers of being subjected to the brutalization of the adult criminal court. Are his rights properly protected when he cannot present his case through counsel? The Tennessee courts have consistently held that a minor's rights are not thereby infringed. The rationale is that the judge of the juvenile court and his staff are sufficiently trained so that they can properly assess the merits of the juvenile court retaining jurisdiction over a minor who has performed acts which would be criminal offenses if committed by an adult. There are some weaknesses in this formulation. As has been previously mentioned, there is a growing concern for a protection of the rights of juveniles,[79] and if this is a proper trend, despite the concept of *parens patriae*,[80] then this case is an important and perhaps disturbing exception to it. Secondly, the decision of the Supreme Court of Tennessee presupposes that a juvenile court judge is adequately advised by treatment personnel and has the necessary expertise for his job. Unfortunately, juvenile court judges in most jurisdictions are not trained for their very important and specialized functions. Finally, even if the provision of counsel is generally unacceptable or considered inappropriate in the "non-criminal" proceeding of the juvenile court, a good argument can be made for allowing the juvenile to be represented when he is in danger of serious punishment if transferred to and convicted of adult offences in the adult criminal court. A revision of the law deserves close consideration. Then again, perhaps the whole concept of juvenile justice, particularly for those who are more than sixteen years of age, is in drastic need of re-evaluation.

78. Swan v. District of Columbia, 152 A.2d 200 (D.C. Cir. 1959); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); Juvenile Court v. State *ex rel.* Humphrey, 139 Tenn. 549, 201 S.W. 771 (1918); Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915).

79. See text accompanying note 40 *supra.*

80. *E.g.,* The policy of *parens patriae* is described in the Tennessee juvenile court law in these words "that the care, custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and that so far as practicable any delinquent shall be treated not as a criminal, but as misdirected and misguided and needing aid, encouragement and assistance." TENN. CODE ANN. § 37-240 (1955).

Even if juvenile courts are not dealing in matters of a criminal nature, there is every reason for proper presentation of the juvenile's case. In many courts the investigating staff of juvenile courts are so over-worked that only meager resources are available for the full investigation and consideration of a case whereas the provision of counsel might make a proper presentation possible. Such a view is not meant to encourage the coddling of juvenile delinquents, but to protect fundamental rights which may be threatened.

4. *Habitual Criminal Laws.—In State ex rel. Ves v. Bomar*,[81] some novel points in Tennessee law were settled by the Supreme Court of Tennessee. These points concerned the Habitual Criminal Act and the court relied on interpretations of similar legislation in other states.

The petitioner claimed that his conviction as an habitual criminal was void because one of the prior convictions taken into account occurred before the 1950 amendments to the act. This point had been previously examined by Tennessee courts[82] and the Supreme Court of the United States. The court held in this case that the conviction which preceded the 1950 amendment did not render his present conviction as an habitual criminal ex post facto. The court relied on the remarks of the Supreme Court in *Gryger v. Burke*,[83] that the conviction as an habitual criminal cannot be viewed as "either a new jeopardy or additional penalty for the earlier crimes." The habitual criminal status and punishment is to be treated as a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

The petitioner also failed in his contention that he was denied due process when he was indicted as an habitual criminal before the trial for the fourth felony. The mere wording of the statute[84] excluded this assignment of error.

He also claimed that the first felony of which he had been convicted, *viz*, grand larceny in 1947, was commuted to petit larceny and threfore did not come within section 40-2801 of the Tennessee Code and should not be counted as a prior conviction. There is little doubt that the court's rejection of this contention is in accord with past law. The same decision would have been reached if the first offence (or any offence) had been pardoned. The United States Supreme Court has previously held that such holding does not violate the requirements of due process. This view of habitual criminal

81. 213 Tenn. 487, 376 S.W.2d 446 (1964).

82. *E.g.*, Conrad v. State, 202 Tenn. 36, 302 S.W.2d 60 (1957); McCummings v. State, 175 Tenn. 309, 134 S.W.2d 151 (1939).

83. 334 U.S. 728 (1948).

84. TENN. CODE ANN. § 40-2801 (1955).

laws shows clearly the policy behind these laws. As was clear in the examination of probation revocation, the law's preoccupation with constitutional safeguards ends when a proper finding of guilt is pronounced. After that stage, the criminal offender is divested of many rights besides those encompassed in the term "due process." They include some manifestations of citizenship. Therefore, the policy of the habitual criminal laws come into effect. The felon who has been convicted on four occasions has shown society that it must protect itself from his depredations, that no further principles of the rehabilitative ideal can be applied to him. This would certainly apply to a felon who has been convicted of felonies on four occasions even if one of the convictions was later reduced to a misdemeanor. Should it apply equally to a man who has not been convicted of the requisite four felonies prior to being charged as an habitual criminal? If the executive has pardoned him, the relevant crime is no longer a conviction against him and therefore he does not technically come within the habitual criminal statute. The overwhelming weight of authority is in favour of holding that a conviction as an habitual criminal is proper in such circumstances.[85]

C. *Procedural Considerations*

1. *Search and Seizure.*—In recent years, the Supreme Court of the United States has re-examined many criminal law problems.[86] Some of the most crucial have re-evaluated the role of the police officer in the administration of criminal law. These decisions have been controversial and yet, in many instances the Supreme Court has simply been applying the best procedures, for arrest, search and seizure and the reception of confessions, which have been in operation in many jurisdictions for a number of years.[87]

There seem to be basic flaws in the law and procedure of arrests and searches and seizures which befog the constitutional issues surrounding these common police practices. On the one hand, the laws tend to be extremely technical, with false, imprecise and illogical distinctions drawn between searches and arrests with a warrant and those

85. Carlesi v. People, 233 U.S. 51 (1914).

86. *E.g.*, Jackson v. Denno, 378 U.S. 368 (1964); Gideon v. Wainwright, *supra* note 77; Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Mallory v. United States, 354 U.S. 449 (1957).

87. An excellent illustration is fonnd in a decision of the United States Court of Appeals for the Third Circuit where it was held that the appellants' murder convictions could not stand because before taking their confessions the police did not advise the appellants of their right to counsel and their right to remain silent. The Federal Bureau of Investigation had been using this procedure for some time. In Tennessee, (as well as California, Idaho, Massachusetts, Oregon and Rhode Island), the courts have made the same holding as the Court of Appeals for the Third Circuit. See N.Y. Tnnes, May 22, 1965, p. 1, col. 3, p. 24, col. 3.

without, between searches incidental to arrest and others, between searches on suspicion of commission of a felony and similar searches in the belief that a misdemeanor has been committed. Not all the fault lies on the side of the laws as laid down by statute and court decision. Admittedly, the laws are difficult to understand but the common and sometimes unforgiveable mistakes made by police officers have led to the quashing of otherwise just convictions. The administrators of our police departments must ensure that their officers are better versed in the applicable law.

More cases in the reports concern searches and arrests than any other topic in the criminal law (with the exception of the current right to counsel cases). The basic problem is one of public protection versus personal rights. Our democratic society does not believe that criminals should be apprehended and punished at any price. Instead, we believe that the police and other members of the law-enforcement team have the final onus of proving the crime and if their modus operandi is of dubious legality, the law must release the accused. Yet, society has experienced an increase in criminal activity and the United States has the unfortunate distinction of having a greater crime problem than any other country. Therefore, the need for efficient police forces is all the more necessary. Efficiency should not, however, be equated with officiousness—whether this latter quality is bred by ignorance of the proper procedure or by some more sinister motive. These confusions persist despite the guarantees of the fourth amendment and the *Mapp v. Ohio* decision.[88]

In *Fox v. State*,[89] the accused had been arrested when a police officer had reasonable cause to believe that a felony had been committed or was about to be committed. On this routine basis, the arrest was legal. Therefore, one would assume that any search made would be similarly lawful. The evidence produced by search of the automobile of the defendant Fox was inadmissible for two reasons. The court held that the search was illegal because the consent he gave to have his car searched was given under circumstances suggesting "an act of necessity rather than of volition."[90] If an accused voluntarily consents to a search, he may thereby waive his constitutional right,[91]

88. *Supra* note 86.

89. 383 S.W.2d 25 (Tenn. 1964).

90. *Id.* at 28.

91. *E.g.*, Simmons v. State, 210 Tenn. 443, 360 S.W.2d 10 (1962). See Simmons v. Bomar, 230 F. Supp. 226 (M.D. Tenn. 1964). In the United States District Court, Judge Miller pointed out that mere acquiescence or consent in the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. See also Amos v. United States, 255 U.S. 313 (1921); Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Evans, 194 F. Supp. 90 (D.C. Cir. 1961).

but in these circumstances the consent was held not to be voluntary. Dyer, J., relied on the 1923 case of *Hampton v. State*,[92] where a search had been made on a warrant declared illegal because of its generality. With respect, it is difficult to see how the facts of *Fox* can produce the same result. The facts of *Hampton* were different because the search warrant was illegal, whereas, in the present case, there is no evidence of any flaw in the warrant. Therefore, the question of consent can only arise where there is no valid warrant. Coercion certainly cannot be used when the police officers have no warrant,[93] but that was not the case here.

The second point raised by the appellant Fox shows that the search warrant was probably illegal for some reasons not described in the report. Fox contended that the search (presumably without warrant) was illegal because, contrary to state argument, it was not incidental to the arrest. The automobile was not searched at the time or place of arrest. There is clear authority from United States Supreme Court decisions that an arrest is not incidental unless it is "substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."[94]

Searches sufficiently incidental to arrests are clearly legal in Tennessee.[95] In *Warden v. State*,[96] the court held that a search without a warrant, even if it precedes the arrest, may still be legal if the search and arrest were approximately simultaneous and could be regarded as part of the same transaction.[97] A different conclusion was reached in *Larkins v. State*[98] where the State claimed that two searches were in fact one transaction, the second search being a mere continuation of the first. The search was declared illegal. A first search warrant which was executed on December 8th was declared illegal because a supporting affidavit was dated December 11th. A second search warrant was sworn out and executed on December 12th. The court held that the evidence produced by both searches was inadmissible despite the fact that a presumably valid arrest of the defendant had been made in the meantime. The court cited the remarks of Mr.

92. 148 Tenn. 155, 252 S.W. 1007 (1923).

93. *E.g.*, Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930).

94. Stoner v. California, 376 U.S. 483 (1964); Preston v. United States, 376 U.S. 364 (1964).

95. See Shafer v. State, 381 S.W.2d 254 (Tenn. 1964); White v. State, 210 Tenn. 78, 356 S.W.2d 411 (1962); Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856 (1955); Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1946); Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938); Dittberner v. State, 155 Tenn. 102, 29 S.W. 839 (1926); Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922).

96. 379 S.W.2d 788 (Tenn. 1964).

97. *Cf.* State v. Duffy, 135 Ore. 290, 295 Pac. 953 (1931); State v. Daniel, 115 Ore. 187, 237 Pac. 373 (1925).

98. 376 S.W.2d 459 (Tenn. 1964).

Justice Cardozo in *People v. Defore*,[99] when he said: "Means unlawful in their inception do not become lawful by relation when suspicion ripens into discovery."[100]

The limits of the search warrant are well shown in *State v. Sircy*.[101] The police had obtained a search warrant authorizing immediate search of premises at a particular address including any outhouse or automobile found upon or in the premises. The police were seeking contraband narcotic drugs. The Supreme Court of Tennessee held that the search of the defendant's automobile was illegal because Sircy was not named in the warrant and therefore was "a stranger to the process." The police officer swearing out the warrant had no probable cause to believe that the present defendant was connected with the immediate activities which the police sought to prevent by means of the search warrant.

In any event, the terms of the warrant issued were very broad which, in itself, may have been sufficient to strike down search warrants in other courts and jurisdictions. Once again *Sircy* raises difficult questions for police officers working in the field. What is the proper balance between the apprehension of criminals and the invasion of personal freedoms? The police officers undoubtedly found unlawful objects (*viz.* burglary instruments) secreted in Sircy's car, but they had no reason to believe that he was connected in any criminal enterprise with those named in the search warrant. Would the result have been the same if the police had found contraband narcotics instead of lock picks? The court gives no hint. Technically, of course, the police had no probable cause concerning Sircy's activities but perhaps the court would have inferred the necessary connection in these circumstances to bring the defendant's automobile within the warrant's legal boundaries. Alternatively, would the defendant have been similarly successful if he had in fact been working with the suspected criminals named in the warrant? Obiter dictum in *Sircy* gives us some indication of the disposition on this point. The court might have decided the case differently if there was evidence that the defendant had been under the control of the persons named in the

99. 242 N.Y. 13, 150 N.E. 585 (1926).

100. *Id.* at 19, 150 N.E. at 586.

The decision in United States v. Williams, 230 F. Supp. 47 (1961), also raises some interesting related points. The district court recognized Tennessee law that arrest for misdemeanor does not give an officer the right to search the defendant's automobile. It was held, however, that if officers observed moonshine whiskey in the automobile before arrest of the driver for traffic violations, or simultaneously with or incident to such arrest, it was not necessary for them to have made a search of the automobile to warrant taking possession of the whiskey. The further general point was made that a search is not necessary when the goods searched for can be observed with the naked eye.

101. 383 S.W.2d 37 (Tenn. 1964).

warrant or if the police had reasonable cause for so believing.[102]

An analogous problem was facing the court in *Fox v. State*.[103] The court held that the evidence obtained by an illegal search of the automobile of Fox was admissible against Fox's co-defendant. The co-defendant was, presumably, not a "stranger to the process." He was not mentioned in the search warrant, but that was not the criterion accepted by the court. He was a co-defendant in the subsequent trial and that was held to be a sufficient connection. There was little discussion of the point[104] and no mention was made of the exclusionary rule of *Mapp v. Ohio*.[105] Presumably, the court believed that the *Mapp* rule did not apply because the co-defendant's property rights or privacy, exclusive of the illicit goods actually seized, had not been invaded.[106]

Surely, the application of the *Mapp v. Ohio* rule should not be restricted by technicalities of tenure. The exclusionary rule laid down by that case is meant to protect private citizens from the possible abuses of police power. The defendant escapes punishment for the simple reason that "the constable has blundered."[107] In *People v. Cahan*,[108] the Supreme Court of California adopted the exclusionary rule. Judge Traynor observed that in a case where the "very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced."[109] The judge also cited Wigmore[110] who said: "any system of administration which permits the prosecution to trust habitually to compulsive self-disclosure as a source of proof must itself morally suffer thereby." The aftermath of the *Cahan* decision does not show an appreciable increase in California crime. The Attorney General for the state reported that the overall effects of the decision were "excellent." He hoped that it would result in better education and training for police officers.[111]

Shafer v. State[112] also raised some important points in relation to

102. *Id.* at 40.
103. 383 S.W.2d 25 (Tenn. 1964).
104. Templeton v. State, 196 Tenn. 90, 264 S.W.2d 565 (1954), and Moody v. State, 159 Tenn. 245, 17 S.W.2d 919 (1929), were cited.
105. *Supra* note 86.
106. See cases cited in DAHL & BOYL, PROCEDURE AND THE LAW OF ARREST, SEARCH AND SEIZURE, 129-31 nn.34-38 (1961).
107. People v. Defore, *supra* note 99, at 21 (Cardozo, J.,); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
108. People v. Cahan, *supra* note 107.
109. *Id.* at 445, 282 P.2d at 912.
110. 8 WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940).
111. Note, 9 STAN. L. REV. 515, 538 (1957).
112. 381 S.W.2d 254 (Tenn. 1964).

search and seizure. This case provided a clear example of the difficulty of deciding what is a "reasonable" search, not only in terms of facilitating police work, but in relation to the protection of fundamental rights. First, police authority was challenged on the basis of the ambiquities in the items which may be seized in a search. The appellants claimed that Code sections 39-908 and 39-909 were unconstitutional under federal and Tennessee law because they are vague and ambiguous. The appellants claimed that the "possession of burglars' tools" was vague and would cast a net so wide that a law-abiding citizen could not escape involvement. Their objection failed. The court gave little consideration to the problem outside the citation of a few cases and an announcement that it was a novel point in Tennessee. Nevertheless, the appellants were making an important point although it had little merit in their case.[113] The description of "burglars' tools" is necessarily vague and we must rely on the integrity, good judgment and discretion of judges and police officers to use their power wisely.

The appellants also contended that the search of their belongings and automobile was illegal and, therefore, the evidence was excluded under the rule in *Mapp v. Ohio*.[114] In short, the court decided that, on the facts, their submission had no merit. Two reasons were given for this ruling. The appellants had invited the police officers (who had properly identified themselves) into the motel room where the appellants were staying and where some of the burglars' tools were found. Secondly, the search was incidental to the arrest which was declared lawful. Undoubtedly, the defendants had invited the police into their motel room. There is clear authority[115] that the constitutional right to demand a search warrant may be waived under such circumstances. The recent United States District Court case of *Simmons v. Bomar*,[116] showed this. The appellant claimed that he did not immediately recognize the police officers who called at his home. The police had not announced their authority or purpose before entering the dwelling. They did not use force or fraud to make the entry as their knock on the door was answered by an invitation to enter. Very soon Simmons knew their identity and the purpose of the visit. The police had offered to return later with a warrant, but the appellant acquiesced. The court held that mere acquiescence would

113. In the circumstances, the court's attitude was understandable because the police search produced the following items: a drill, a sledge hammer, nitroglycerin and other explosives, a crowbar, a deputy sheriff's badge, one pair of handcuffs, 85 automobile keys, 4 flashlights, adhesive tape, chisels, pliers, 12 drills, an oxygen tank, acetylene tank, hoses, gauges for use on the tanks, goggles and gloves.

114. *Supra* note 86.

115. *Supra* note 91.

116. 230 F. Supp. 226 (M.D. Tenn. 1964).

not have been sufficient waiver, but the offer of the police to get a search warrant (which was waived) made the transaction properly consensual.

The only other circumstances under which the search would have been illegal would arise if the police officer's announcement that he had information had been a falsehood or based on less than probable cause.

Judge Miller said in *Simmons v. Bomar* that:

> if in fact at the time permission was given to search without a warrant, the officers would not have been able to obtain a search warrant, then it might be argued that the waiver was based upon misrepresentation or mistake and was therefore invalid.[117]

In *Shafer*, it seems most unlikely that the police officers could have obtained a search warrant. Does the mere fact that the defendants acquiesced in the officers' entry into the motel room to discuss a possible charge of assault or rape, make all subsequent inquiries and searches permissible in evidence against the defendants? None of the evidence linked the defendants with the assault, but led to charges of carrying a pistol with intent to go armed and possession of burglarious tools. The case cited by the court as "most nearly like" the present one is, with respect, very different. Although the police in *Honig v. United States*[118] did not have a warrant to search or arrest, but simply to make inquiries, the evidence discovered (with the consent of the accused) was directly related to the complaint about which they were inquiring. Presumably, the consent of Shafer was sufficient to make the evidence, of whatever nature, admissible against them. The law would appear to be clear on this point despite apparent injustices. The United States Supreme Court has said, in the case of a search under warrant, that although the warrant did not cover the articles seized, the arrest for the offense being committed in the presence of the officers authorized the search and seizure of the articles.[119] More specifically, the same court has held that if an entry upon premises is authorized (which was no doubt the case in *Shafer*), "there is nothing in the fourth amendment which inhibits the

117. *Id.* at 229.

118. 208 F.2d 916 (8th Cir. 1953).

119. Morron v. United States, 275 U.S. 192 (1927). See also United States v. Rabinowitz, 339 U.S. 56 (1950). In the latter case, Mr. Justice Minton added a practical note when he said: "It is fallaeious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant . . . . The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be awarded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." *Id.* at 65.

seizure [of goods] the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."[120] Yet, the United States Supreme Court has consistently held (and *Mapp v. Ohio* has probably strengthened rather than weakened the rule) that a search, whether incident to arrest or not, cannot be justified by what it turns up.[121] The only difficulty for Shafer is that he consented to an entry of his motel room by police officers. Should he be able to claim that his consent was more one of necessity than volition?[122] At least one federal case would agree that his consent was not freely given.[123] Furthermore, the defendant's motel room could be treated as his "castle."

The second basis for holding that the search was a proper one was that the search was incidental to an arrest. This ground is extremely doubtful because the original police actions were purely inquiries[124] on information which amounted to less than probable cause. The complaint made had no relation whatsoever to the goods which were found in the motel room and, subsequently, in the automobile. The authorities are clearly against declaring such searches valid.[125] To allow such searches would invite police officers to go on "fishing expeditions."

The problem is one of cause and effect.[126] If we admit that the

120. Harris v. United States, 331 U.S. 145, 155 (1941). See the forceful dissent of Frankfurter, J., *id.* at 167. *Cf.* United States v. Coots, 196 F. Supp. 775 (E. D. Tenn. 1961).

121. See People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955) (Traynor, J.,) (dictum). See also People v. Verrette, 224 Cal. App. 2d 638, 36 Cal. Rptr. 819 (1964); Parker v. State, 177 Tenn. 380, 150 S.W.2d 725 (1941).

122. See *Fox, supra* note 103.

123. Channel v. United States, 285 F.2d 217 (9th Cir. 1960) (involving the search of an apartment).

124. Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509 (1949), points out that "in searches *properly incidental to a lawful arrest*, an officer may seize weapons or tools [Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938); Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922)], contraband the very possession of which is criminal [Reynolds v. State, 136 Miss. 329, 101 So. 485 (1924)], the fruits of crime such as stolen property [Harris v. United States, 331 U.S. 145], the instrumentalities and means by which crime is committed, and any article which 'might tend to evidence his guilt of the offense for which the arrest has been made.' (Elliott, *supra;* Hughes, *supra*)." *Id.* at 623.

125. *E.g.*, Benge v. Commonwealth, 321 S.W.2d 247 (Ky. App. 1959); Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953). *Cf.* Carroll v. United States, 267 U.S. 132 (1925).

126. Hughes v. State, *supra* note 124: "An officer cannot lawfully arrest a person without a warrant and search his person for the purpose of ascertaining whether or not he has violated the law. Even if the person arrested were in fact violating the law, the offense was not in legal contemplation committed in the presence of the officer, and such an arrest is unauthorized, where the facts constituting the offense are incapable of being observed or are not observed by the officer." *Id.* at 569, 238 S.W. at 595. *Cf.* Goodwin v. State, 148 Tenn. 682, 257 S.W. 79 (1923). This case, however, is less satisfactory than the former. See also People v. Shelton, 60 Cal. 2d. 740,

defendant in *Shafer* waived his rights to invoke the *Mapp v. Ohio* rule, then the search would be reasonable and, therefore, lawful. The search produced the evidence for the arrest to which part of the seized goods were incidental. The best solution one can hope for is a proper judicial disposition of the problems. In light of this dilemma, the application of a rule analogous to *Jackson v. Denno*,[127] (relating to confessions) is desirable. Tennessee has always used this rule in testing the voluntariness of confessions, *viz*, the judge hears all the evidence and then rules on voluntariness for purposes of the admissibility of the confession and the jury considers the voluntariness as affecting the weight or credibility of the confession. The supreme court in *Shafer* upheld the defendant's contention that the same rule should be applied to an examination of the legality of a search and the admissibility of the evidence so obtained. This seems the best solution because it is impossible to lay down rigid, a priori tests in such circumstances. There is no "litmus paper test" which can be applied.

In the examination of any problem relating to search warrants, the searching police officer's conduct must be examined. The primary question that must be answered is: Did the officer have the probable cause? What, then, is "probable cause"? This term defies strict definition and must be decided on the facts of each case. In *Batchelor v. State*,[128] there was no difficulty. Information received by the police from an unidentified informer that the defendant had "some whiskey" in his automobile was held not sufficient cause to arrest the defendant without a warrant on this ground alone.[129] In *United States v. Plemmons*,[130] the United States Court of Appeals for the Sixth Circuit makes some useful comments on probable cause. They relied on the remarks of the Supreme Court in *Dumbra v. United States*[131] that in the determination of probable cause, the court is "not called upon to determine whether the offence charged has in fact been committed." The court is solely concerned with examining the reasonableness of the grounds upon which the warrant is issued. In *Simmons v. Bomar*,[132] the court said that the information on which a policeman relies need not be proved accurate but the officer should have no reason to doubt

36 Cal. Rptr. 433 (1964); People v. Ruhman, 22 Cal. App. 2d 284, 36 Cal. Rptr. 493 (1964); Taylor v. Commonwealth, 386 S.W.2d 480 (Ky. App. 1964); Wockenfuss v. State, 382 S.W.2d 939 (Tenn. 1964).

127. 378 U.S. 368 (1964).

128. 378 S.W.2d 751 (Tenn. 1964).

129. In the circumstances, this successful objection was to no avail because the whiskey was clearly visible when the officer asked the defendant to alight from his car, and therefore the search was not illegal. See also McBride v. State, 200 Tenn. 100, 290 S.W.2d 648 (1956).

130. 336 F.2d 731 (6th Cir. 1964).

131. 268 U.S. 435 (1925).

132. 230 F. Supp. 226 (M.D. Tenn. 1964).

the reliability of such information. It can be based on hearsay evidence and the officer's own knowledge of the defendant's reputation and criminal activities. The test suggested was that of "a reasonable discreet and prudent man" who would "be led to believe that there was a commission of the offense charged."[133] The quantum of proof required is less than for determination of guilt. Probable cause requires knowledge and belief on a balance of probabilities. To have a more stringent test would of course place impossible burdens on the law enforcement agencies. The court also pointed out that the existence of probable cause is a subjective consideration, very highly dependent on the facts and circumstances of each case. In testing the validity of any warrant, the affidavit of the officer applying must be read as a whole.

The most important point made in *Plemmons* was that many fact situations, whether being examined by a police officer or an issuing court, are ambiguous. Consequently, "the determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised."[134] In this statement is seen the agonizingly delicate balance between the protection of the individual against arbitrary interference by "authority" and the need for the police to protect the society by the apprehension of those who refuse to adhere to community standards.

This is a recurrent dilemma and it is hoped that the courts will never be overcome by the blandishments of authority that the capture and conviction of a maximum number of criminals has an absolute priority in our society.

2. *Separate Sovereignty over Criminal Behavior.*—The Supreme Court of the United States has made it clear that it does not constitute a violation of due process for a defendant to be tried and convicted, on the same set of facts, in both state and federal criminal courts. The rationale has been that the two jurisdictions are the creatures of separate sovereignties, and are, therefore, autonomous. Mr. Justice Black, who dissented in *Bartkus v. Illinois*,[135] condemned the holding in this case as a denial of due process under the guise of federalism.

The authorities, including a 1964 Tennessee case,[136] appear perfectly clear that a similar separate sovereignties doctrine applies so that a

133. 268 U.S. at 441. See also Brinegar v. United States, *supra* note 125 at 175-76; Carroll v. United States, *supra* note 125, at 162.

134. 336 F.2d 731, 733 (1964), citing United States v. Nicholson, 303 F.2d 300, 332 (6th Cir. 1962).

135. 359 U.S. 121 (1959).

136. Mullins v. State, 380 S.W.2d 201 (Tenn. 1964).

defendant may be convicted for violating a city ordinance and for the circumvention of a state law.

II. Criminal Procedure

A. *Limitations on Prosecution*

1. *Jurisdiction.*—Does a court have jurisdiction to convict a defendant of a violation of a criminal statute which was enacted by an unconstitutionally malapportioned legislature? The Tennessee Supreme Court in *States ex rel. Fralix*[137] held in effect the affirmative, refusing to declare invalid the acts of "our malapportioned Legislature,"[138] and affirming the judgment of a lower court which had denied habeas corpus to a petitioner who had argued the contrary. The court followed the lead of the United States Court of Appeals for the Sixth Circuit[139] in concluding that the de facto doctrine and the doctrine of avoidance of chaos and confusion applied and dictated such a result.

B. *Proceedings Preliminary to Trial*

1. *Arrest.*—Prior to its amendment in 1961, Tennessee Code section 40-2907 had provided that when it comes to the attention of the trial judge that any defendant whose sentence has been suspended has been guilty of a breach of the laws of the state, of a breach of the peace, or of any other conduct inconsistent with good citizenship, the trial judge shall have power to issue "a notice to such defendant, which notice shall contain in brief form the nature of the charges made against such defendant and shall also require him to appear before the trial judge . . . not less than five (5) days from the execution of such notice." The statute had provided further procedure whereby such suspension might be revoked. In a 1956 decision, *Hooper v. State*,[140] the supreme court interpreted this provision for notice as requiring only that the defendant be informed generally of the charge against which he is called upon to defend so that it can be shown whether the charge has been inspired by mistake or malice. The amendment of section 40-2907 in 1961 eliminated express references to notice. The amended section provides in pertinent part that

> Whenever it shall come to the attention of the trial judge that any defendant who has been released upon suspension of sentence has been guilty

137. 381 S.W.2d 297 (Tenn. 1964).
138. *Id.* at 298.
139. Dawson v. Bomar, 332 F.2d 445 (6th Cir. 1963), *cert. denied*, 376 U.S. 933 (1964). The Tennessee Supreme Court had previously indicated its attitude on the question in State *ex rel.* Smith v. Bomar, 368 S.W.2d 748 (Tenn. 1963), *cert. denied*, 376 U.S. 915 (1964).
140. 201 Tenn. 156, 297 S.W.2d 78 (1956).

> of any breach of the laws of this state or who has violated the conditions of his probation, the trial judge shall have the power in his discretion to cause to be issued under his hand a warrant for the arrest of such defendant as in any other criminal case.[141]

Recently, in *Davenport v. State*,[142] the supreme court noted the changed wording of this section, stating that "there is no provision in the statute as to the nature of the notice, if any, to be given the violator."[143] In that case, the trial court, based upon an affidavit alleging specific unlawful conduct on the part of the defendant, had issued a bench warrant for the defendant's arrest charging her with having violated the terms of a previously suspended sentence, and, following a hearing, had revoked the suspension and reinstated the original sentence. On appeal the defendant contended that the bench warrant was insufficient to give reasonable notice that a hearing would be held to determine whether or not the suspended sentence should be revoked. The supreme court found that the bench warrant had been issued upon an affidavit reciting evidence that the defendant had breached the law and violated the terms of her suspended sentence; that the bench warrant referred to the fact that the affidavit had been made; that the defendant had "committed the offense of violating the conditions of a suspended sentence imposed February 25, 1963"; and that the warrant directed the executing officer to arrest and bring before the trial court the named defendant "to answer the charge of violating the conditions of her suspended sentence." Apparently, the supreme court intended to make the point that there had been enough notice to the defendant here to have satisfied the statute even when it specifically required notice. But the court made this somewhat curious statement:

> Since the notice provision was completely deleted from the amended statute, we think it is obvious that the Legislature intended for the rule as laid down in Hooper v. State, supra, to control. Clearly, under that rule, the notice in the present warrant is sufficient to make known to the defendant generally the charges that she is called to defend.[144]

Although amended section 40-2907 does not expressly require notice, it is reasonable to imply such a requirement because it does authorize the trial judge upon stated circumstances to issue a "warrant for the arrest of such defendant as in any other criminal case." An arrest warrant "in any other criminal case," properly issued, gives the party to be arrested notice of what offense he is alleged to have com-

141. TENN. CODE ANN. § 40-2907 (1956).
142. 381 S.W.2d 276 (Tenn. 1964).
143. *Id.* at 278.
144. *Id.* at 278-79.

mitted.[145] It seems appropriate, therefore, for the interpretation stated by the court in the *Hooper* case to be applied now to the amended statute.

2. *Preliminary Examination.*—After an unsuccessful attempt in the Tennessee state courts to obtain a writ of habeas corpus, a state prisoner petitioned the United States District Court for the Middle District of Tennessee for habeas corpus, which petition was denied on the grounds that on its face no constitutional rights of the petitioner had been violated. On appeal to the Court of Appeals for the Sixth Circuit, the petitioner contended that his constitutional rights had been violated in that he had not been given a proper preliminary hearing and had been bound over from the office of the Memphis Chief of Police to the Shelby County grand jury without having been confronted with the witnesses against him. The court of appeals, in *Green v. Bomar*,[146] affirmed.

The court concluded that, assuming that the appellant had not been given a preliminary hearing,[147] this did not constitute a denial of due process of law. This conclusion seems to be correct. Although the Tennessee Code requires that no person can be committed to prison for a crinninal matter until examination thereof is first had before a magistrate,[148] and although the code has detailed requirements as to the conduct of the preliminary examination,[149] the code has not been interpreted as establishing the preliminary examination as a prerequisite to a lawful indictment and conviction.[150] Thus, the holding is in accord with the general rule that, absent a controlling statute, a preliminary examination is not an essential prerequisite to the finding of an indictment.[151] It has long been held that, so far as federal prosecutions are concerned, "The Constitution does not require any

145. TENN. CODE ANN. § 40-707 (1956); TENN. CONST. art. 1, § 7. See generally Perkins, *supra* note 124, at 530-44.

146. 329 F.2d 796 (6th Cir. 1964).

147. The court noted that the trial judge in Division I of the Criminal Court of Davidson County in his order denying appellant's petition there for habeas corpus said that the petitioner had admitted in a hearing before that court that he had had a preliminary hearing in which he pleaded guilty and was bound over to the grand jury. *Id.* at 797 n.1.

148. TENN. CODE ANN. § 40-604 (1956). A temporary holding of a suspect by the police has been held not to be a committal to prison and not a violation of the code provision. Hardin v. State, 210 Tenn. 116, 355 S.W.2d 105 (1962); East v. State, 197 Tenn. 644, 277 S.W.2d 361 (1955); Wynn v. State, 181 Tenn. 325, 181 S.W.2d 332 (1944).

149. TENN. CODE ANN. §§ 40-1101 to -1130 (1956).

150. The return of an indictment has been held to authorize the arrest of the indicted person without the necessity of a preliminary examination. Shaw v. State, 164 Tenn. 196, 47 S.W.2d 92 (1932).

151. 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1730 (Anderson ed. 1957) [hereinafter cited as WHARTON].

preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge."[152] The Constitution, not requiring a preliminary examination in prosecutions by the United States, the due process clause of the fourteenth amendment should not operate to bind such a requirement on the state. The Sixth Circuit's decision that due process does not require such an examination in a state prosecution confirms what had previously been thought in this regard.[153]

The court also concluded that, assuming that the state omitted to hold a preliminary examination, such omission did not violate the appellant's rights under the sixth amendment "to be confronted with the witnesses against him." The court quoted the language of the sixth amendment, "In all *criminal prosecutions,* the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." and pointed out that the appellant had been accorded that right when he had been prosecuted at a trial in which he was convicted by the testimony of witnesses who testified against him in open court and in his presence.[154]

3. *Grand Jury—Evidence.*—At common law it was said that only legally competent evidence should be heard by the grand jury.[155] Particularly, it has been said that hearsay evidence upon questions before a grand jury is no more admissible than upon trial of the cause before the court.[156] But what if a person indicted by a grand jury later claims that the indictment came after the grand jury heard incompetent evidence, such as hearsay? There generally has been a lack of agreement among American jurisdictions as to this problem area. The consensus is that, although some improper evidence was heard, the indictment is valid if there was other competent proof received upon which it could have been based.[157]

The jurisdictions are widely split concerning what result should be reached when there is a challenge to an indictment on the ground that there was no evidence before the grand jury, or only incompetent

152. Mr. Justice Holmes for the United States Supreme Court in Hughes v. Gault, 271 U.S. 142, 149 (1926). Also holding that "there is no constitutional right to a preliminary hearing": United States v. Heideman, 21 F.R.D. 335, 337 (D.D.C.), *aff'd,* 259 F.2d 943 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 959 (1959).

153. See, *e.g.,* Note, *The Right to Counsel in Criminal Prosecutions,* 30 TENN. L. REV. 420, 434 (1963). See also State v. Tominaga, 45 Hawaii 604, 372 P.2d 356 (1962).

154. In support of this conclusion, the court cited Goldsby v. United States, 160 U.S. 70 (1895); McDonald v. Hudspeth, 129 F.2d 196 (10th Cir.), *cert. denied,* 317 U. S. 665 (1942); and Moore v. Aderhold, 108 F.2d 729 (10th Cir. 1939).

155. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 162-63 (1947); Comment, 104 U. PA. L. REV. 429 (1955).

156. 1 UNDERHILL, CRIMINAL EVIDENCE § 76 (5th ed. Herrick 1956) [hereinafter cited as UNDERHILL].

157. *Ibid.*; Annot., 59 A.L.R. 567, 573 (1929).

evidence is presented. Some courts hold that an indictment should be quashed if it plainly appears to the court to have been based entirely on incompetent or illegal evidence.[158] Other courts absolutely refuse to inquire into the evidence that may have been before the grand jury with a view to setting aside an indictment.[159]

Ruling in an area wherein the courts of appeals had been divided, the United States Supreme Court a few years ago in *Costello v. United States,*[160] concluded for the federal courts that a defendant in a criminal case may be required to stand trial where only hearsay evidence was presented to the grand jury which indicted him, and that all the fifth amendment requires is that the indictment, if valid on its face, be returned by a legally constituted and unbiased grand jury. The Supreme Court in *Costello* seemed to take the extreme position that federal courts are not to look behind the indictment even if it be attacked as having been returned without the grand jury having heard any substantial or rationally persuasive evidence.[161] This was not the opinion of Judge Learned Hand, whose decision the Supreme Court affirmed in *Costello,* for Judge Hand said that in such a situation "the grand jury would have in substance abdicated."[162]

In *Burton v. State,*[163] the Tennessee Supreme Court was faced with a contention that the trial court had erred in not allowing the defendants at a hearing on a plea in abatement to cross-examine the prosecutor (apparently the only witness who had testified before the grand jury) in an effort to show that substantial portions of his testimony had been hearsay. The court overruled the contention, citing decisions of other jurisdictions holding that the legality and sufficiency of evidence heard by the grand jury is not subject to review. The court also relied substantially upon the reasoning of the *Costello* decision that, if indictments were open to challenge on the ground that the evidence before the grand jury was inadequate or incompetent, there would be great delay in criminal cases since before a trial on the merits, the defendants could always insist on a kind of preliminary trial to determine the competency and adequacy of evidence

158. See 4 WHARTON § 1852, and the cases cited therein.

159. 1 UNDERHILL § 76. This has been said to be a minority view. ORFIELD, *op. cit. supra* note 19, at 163. It has also been said to be the majority view. Annot., 31 A.L.R. 1479 (1924).

160. Costello v. United States, 350 U.S. 359 (1956), 9 ALA. L. REV. 92 (1956), 55 MICH. L. REV. 289 (1956). This decision affirmed United States v. Costello, 221 F.2d 668 (2d Cir. 1955), 43 CALIF. L. REV. 859 (1955), 24 FORDHAM L. REV. 453 (1955), 69 HARV. L. REV. 383 (1955), 104 U. PA. L. REV. 429 (1955), 65 YALE L.J. 390 (1956). See also Lawn v. United States, 355 U.S. 339 (1958).

161. The opinion for the Court in the *Costello* case was so read by Justice Burton in his concurring opinion. 350 U.S. at 364-65.

162. 221 F.2d at 677.

163. 377 S.W.2d 900 (Tenn. 1964).

before the grand jury. The court noted that the prosecuting witness at the trial had demonstrated on the merits that he knew of his own knowledge facts ample to establish the offenses charged. But it does not appear from the report of the *Burton* decision to what extent the grand jury heard this kind of non-hearsay testimony. In the view of the author, it is to be hoped that the Tennessee Court has not gone so far as to hold, as the United States Supreme Court apparently did in the *Costello* case, that the indictment may not be looked behind, even in order to see if it were returned without *any* substantial or rationally persuasive evidence, or so far as to hold that an indictment may not be challenged even on the ground that the grand jury heard *no* evidence of probative value. If the *Burton* decision is that far-reaching, with the result that a grand jury may return an indictment under such circumstances, then, in a real sense, a grand jury so conducting itself will have "in substance abdicated."

4. *Indictments.*[164]—As a rule, defects or omissions in an indictment which run only to form are waived by failure of the accused to object appropriately in the preliminary stages of the proceeding. Further, pleading to an indictment is commonly held to be an admission that it is a genuine record; for example, by pleading not guilty, without previously objecting, a defendant waives such insufficiency of manner or form of the indictment as constitutes only a defective statement of the accusation against him.[165]

In this vein, the Tennessee Supreme Court a number of years ago held that an objection for want of a prosecutor on the indictment may be made by motion to quash or by plea in abatement,[166] but that such an objection is waived unless made before a plea to the merits.[167] The court in *Estes v. State*,[168] decided during the survey period, held, consistent with principles previously adopted,[169] that the sheriff being listed as prosecutor rather than the person alleged in the indictment to have been the intended victim of an assault with intent to murder was at most an irregularity which was waived by a plea to the merits without objection having been previously made.

Also, it is well settled under Tennessee law that if a criminal defendant at the trial level makes no effort to correct a technical defect in his indictment, the ensuing verdict cures the defect. This principle

164. See also text accompanying notes 155-162 *supra.*

165. 4 WHARTON § 1881.

166. Wattingham v. State, 37 Tenn. 24 (1857).

167. Brooks v. State, 156 Tenn. 451, 2 S.W.2d 705 (1928). See also Johnson v. State, 187 Tenn. 438, 215 S.W.2d 816 (1948); Blackman v. State, 169 Tenn. 197, 83 S.W.2d 899 (1935); CARUTHERS, HISTORY OF A LAWSUIT 724 (8th ed. Gilreath & Aderholt 1963).

168. 381 S.W.2d 283 (Tenn. 1964).

169. The court relied on Brooks v. State, *supra* note 167.

was recognized during the survey period by the United States Court of Appeals for the Sixth Circuit in affirming a district court judgment denying, on this principle of state law, a writ of habeas corpus to a state prisoner who had petitioned on the ground of an alleged defect in his indictment.[170]

The rules discussed above, however, do not apply to defects or omissions in the indictment, or in the mode of finding the indictment, which are of such fundamental character as to make the indictment completely invalid. Such fundamental defects or omissions are not waived by a defendant's failure to raise them by a preliminary motion or plea or by pleading to the merits.[171] In *Warden v. State*,[172] the Tennessee Supreme Court acknowledged but refused to apply the rule that an indictment which in its statement of a cause of action contains a defect that would be fatal on a motion to quash is cured on trial if the issues made by the pleadings require proof of the facts defectively stated or omitted in the indictment.[173] Although the defendants in *Warden* had not moved to quash the indictment against them, on appeal the court held that the indictment was so defective as to be void—the indictment had failed to state a cause of action, making it void rather than voidable—and the necessary facts not averred in it could not be proved at trial.

The indictment in *Warden*, after charging defendants with possession of intoxicating liquors on March 30, 1963, further charged that

> the offense herein presented is a second or subsequent violation of Section 39-2527, Tenn. Code Ann. and as such constitutes a felony as provided by Section 39-2528, Tenn. Code Ann., the defendants having heretofore in this Court and by this Grand Jury been indicted for possession of intoxicating liquors in violation of Sect. 39-2527, T.C.A., on Jan. 19, 1963, on January 22, 1963, and on January 26, 1963, and upon conviction for either of said offenses, the offense herein presented is a felony.[174]

The Tennessee Supreme Court held that this indictment failed to state facts sufficient in law to constitute the elements of the second-offense felony of which the defendants were convicted below (the

170. Kimbro v. Bomar, 333 F.2d 755 (6th Cir. 1964). The court quoted the district court's conclusion, with which it said it was in accord as follows: "The petition does not indicate that any effort was made to correct the alleged defect on the trial level. If indeed such defect existed, it was cured by the verdict under Tennessee law. Jones v. State, 197 Tenn. 667, 277 S.W.2d 371 (1954); Driscoll v. State, 191 Tenn. 186, 232 S.W.2d 28 (1950); Pope v. State, 149 Tenn. 176, 258 S.W. 775 (1923)." 333 F.2d at 757.

171. 4 WHARTON § 1881.

172. 381 S.W.2d 244 (Tenn. 1964).

173. *Id.* at 246, citing Magevney v. Karsch, 167 Tenn. 32, 48 S.W.2d 562 (1933).

174. 381 S.W.2d at 245.

elements being possession of liquor for sale and that this is a second or subsequent possession). The statute under which the *Warden* defendants had been convicted, Code section 39-2528, makes a felony of "a second or subsequent violation of any of the provisions of § 39-2527."[175] The indictment stated that "the offense presented is a second or subsequent violation of Section 39-2527 Tenn. Code Ann." and further stated that the defendants had on the previous occasions been indicted for violation of Code section 39-2527. The supreme court held that the indictment was insufficient to charge a felony under section 39-2528 because, to do so, it must aver the fact of conviction of prior possession, whereas it only averred an indictment for previous violations plus a hypothetical averment that "upon conviction of either of said offenses, the offense herein presented is a felony."[176]

The court in *Warden* also concluded that defendants' indictment was bad for not giving them proper notice of the offense charged. The court invoked the provision in the state Constitution that in criminal prosecutions the accused has the right "to demand the nature and cause of the accusation against him"[177] and the statutory provision that "the indictment must state the facts constituting the offense in ordinary and concise language, . . . in such a manner as to enable a person of common understanding to know what is intended . . . ."[178] Although the indictment stated that the "offense herein presented is a second or subsequent violation" of section 39-2527, and a felony under section 39-2528, the court held[179] that if it did not contain, as required by long-standing judicial precedent, "a complete description of such facts and circumstances as constituted the crime,"[180] but was a mere statement of a legal result or conclusion and, therefore, insufficient to inform the defendants of what they were required to meet. When a statute provides, as here, for increased punishment for a second or subsequent offense, the court concluded that, among the circumstances that should be described in the indictment, are "such circumstances of time and place as to inform the accused of what proofs of prior offenses may be offered against him and enable

175. TENN. CODE ANN. § 39-2528 (1956). Section 39-2527 makes it a misdemeanor for a person to have intoxicating liquors intended for sale.

176. 381 S.W.2d at 245-46. In this connection, the court pointed out that another section of the Code not here involved [TENN. CODE ANN. § 39-2504 (1956)], making second or subsequent sales of intoxicating liquor a felony, expressly provides as an element that there must have been a previous conviction. This hardly seems to support the court's conclusion that an element of the felony in § 39-2928 likewise is prior conviction, when § 39-2528 does *not* expressly require prior conviction as an element.

177. TENN. CONST. art. 1, § 9.

178. TENN. CODE ANN. § 40-1802 (1956).

179. 381 S.W.2d at 245-46.

180. Cornell v. State, 66 Tenn. 520, 523 (1874); Pearce v. State, 33 Tenn. 44, 46-47 (1853).

him to be prepared to make his defense."[181]

Clark v. State[182] holds that an indictment under Code section 39-605 (assault and battery with intent to commit rape) or under section 39-606 (assault and battery with intent carnally to know a female under twelve) includes the section 39-603 crime, attempt to commit a felony.[183]

As a general rule, only one offense can be charged in the same count of an indictment or presentment, and if more are so charged the count is said to be double and bad for duplicity.[184] However, it has been held that when one crime is an essential element of another and more serious offense, an indictment is not duplicitous for charging both crimes.[185] A number of years ago a Tennessee decision[186] held an indictment good that charged in the same count the offenses of larceny and house breaking. During the survey period, the Tennessee Supreme Court, in *Gamble v. State*,[187] relying on that previous decision, held good an indictment that in a single count charged burglary and larceny. In so doing, the court quoted the following statement with approval:

> Burglary and larceny are an exception to the general rule that two distinct offenses cannot be charged in the same count, and an indictment charging both burglary and larceny cannot be demurred to on the ground of duplicity. The exception is as well established as the rule itself and it is clear that a burglary and a larceny committed at the same time may be thus united.[188]

C. *Trial*

1. *Speedy Trial.*—Although various jurisdictions differ as to the point in time when the right to a speedy trial commences, in no jurisdiction does it begin before some charge or arrest is made[189]—perhaps because the original purpose of this right was to prevent

181. 381 S.W.2d at 246, citing *In re* Boyd, 189 F. Supp. 113 (M.D. Tenn. 1959), *aff'd sub nom.*, Bomar v. Boyd, 281 F.2d 195 (6th Cir. 1960); Rhea v. Edwards, 136 F. Supp. 671 (M.D. Tenn. 1955); Frost v. State, 205 Tenn. 671, 330 S.W.2d 303 (1959); Frost v. State, 203 Tenn. 549, 314 S.W.2d 33 (1958).

182. 381 S.W.2d 898 (Tenn. 1964).

183. It is not clear whether the defendant in the case was convicted of assault with intent to commit a felony or of an attempt to commit a felony, since the court referred to each of these offenses, respectively at page 899 and at page 900 of the opinion. Both are provided for in § 39-603, and presumably the rule stated by the court would apply to either of them. See also Jones v. State, 200 Tenn. 429, 292 S.W.2d 713 (1956).

184. CARUTHERS, *op. cit. supra* note 167, § 725 at 869.

185. 5 WHARTON § 1933, at 33, and the cases cited therein.

186. Williams v. State, 1 Tenn. (Shannon) 473, 474 (1875).

187. 383 S.W.2d 48 (Tenn. 1964).

188. *Id.* at 53, quoting 13 AM. JUR. 2d *Burglary* § 41, at 346 (1964).

189. HALL & GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 586 (2d ed. 1958).

unreasonable imprisonment without trial.[190] (If an accused has any right resulting from a delay of the state in bringing its prosecution, it would be in the form of a procedural bar, the statute of limitations, if any, applicable to the offense alleged).

That Tennessee follows the uniform rule in this regard was shown again recently in *Burton v. State*.[191] A store was burglarized in Greene County, Tennessee, on February 17, 1956. Defendants were apprehended in Indiana on February 18, 1956, and were convicted on March 1, 1956, for a criminal offense in that state. While on bond pending appeal of their conviction, on July 5, 1957, they went to another state, where they were subsequently arrested by the FBI and returned to Indiana on August 23, 1958. They were confined in prison in Indiana until August 31, 1962. They were indicted in Greene County, Tennessee, on September 5, 1962, for the 1956 burglary, but resisted extradition until February 1963, when they were returned to Tennessee. Their trial began on May 15, 1963. The Tennessee Supreme Court affirmed their convictions, overruling their contention that the trial court committed error in holding that their rights to a speedy trial, guaranteed by the sixth amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution, had not been denied under the circumstances related. Noting that, from a few days after the burglary until September 1, 1962, the defendants had been confined in an Indiana penal institution, or were on bail pending appeal from an Indiana conviction, or were fugitive from Indiana authorities, the court observed that Indiana need not have surrendered defendants to Tennessee during that period even if extradition had been sought then. The court approved statements that the right to a speedy trial begins with the arrest or commencement of prosecution,[192] and that

> A 'speedy trial' . . . means a trial *as soon after indictment* as the prosecution can, with reasonable diligence prepare for it, without needless, vexatious, or oppressive delay, having in view, however, its regulation and conduct by fixed rules of law, any delay created by the operation of which rules does not in legal contemplation work prejudice to the constitutional right of the accused.[193]

2. *Fair Trial.*[194]—Among other conclusions in the *Davenport*[195] case, the court stated that the constitutional right to a fair trial is not

190. PERKINS, CASES ON CRIMINAL LAW AND PROCEDURE 937 (2d ed. 1959).
191. 377 S.W.2d 900 (Tenn. 1964).
192. *Id.* at 902, citing 22A C.J.S. *Criminal Law* § 467(4), at 26 (1961).
193. 377 S.W.2d at 902, quoting, with emphasis added, Arrowsmith v. State, 131 Tenn. 480, 488 (1914).
194. See also text accompanying notes 198-202 *infra*.
195. 381 S.W.2d 276 (Tenn. 1964).

involved in a proceeding to revoke a suspended sentence, it being assumed that the defendant had previously been given a fair trial before conviction and sentence.[196]

3. *Severance for Trial.*—Three individuals, Monts, West, and Olds by name, were indicted for a felony. Olds moved the trial court for a severance of his case for trial, but his motion was denied. All three defendants were convicted and sentenced. Monts and West appealed, but Olds did not. Contending that the denial of Olds' motion below operated as a denial to him, Monts on appeal assigned as error the failure of the trial court to sever his case for trial from that of the other defendants. The supreme court in *Monts v. State*[197] held that, for a denial of a motion for severance to be assignable as error on appeal, the motion must have been made by the party assigning it; the fact that one defendant made a motion is of no benefit to another defendant on appeal who did not, because the former may have had grounds not applicable to the latter. Further, the court noted, even if the trial judge had granted Olds' motion, that still would not have effected a severance of Monts' trial from that of West. Because there had been no exercise of discretion by the trial court on a matter raised by Monts, the supreme court held that Monts' assignment of error in this regard was without proper foundation on review and overruled it.

4. *Appointment of Court Reporter.*—The United States Court of Appeals for the Sixth Circuit, in *Polk v. Bomar*,[198] affirmed a district court order denying habeas corpus to one who claimed that the failure of the Tennessee trial court, in which he was convicted of robbery and armed robbery, to appoint a court reporter pursuant to a provision of the state Code[199] violated his constitutional right to a fair trial. The court held that no constitutional right of defendant was violated in his trial. The court rested its decision on these points: (1) There was no evidence that the defendant needed a

196. The court quoted with approval 5 WHARTON § 2194, where it is stated that in a hearing on revocation of a suspended sentence, "the hearing is summary" and "the defendant is not entitled to the same guarantees as a person who is not convicted and is merely on trial upon an accusation of crime." 381 S.W.2d at 279.

197. 379 S.W.2d 34 (Tenn. 1964).

198. 336 F.2d 330 (6th Cir. 1964).

199. "Whenever any party shall be indicted and arraigned upon any indictment of presentment on which the death penalty may be inflicted and the district attorney general in charge of the prosecution shall make it known that he intends to insist upon the infliction of capital punishment and such defendant be financially unable to employ counsel and the trial court be required to appoint counsel for such defendant, the trial judge then after making due inquiry and investigation as to the financial condition of the accused may in his discretion appoint a capable court reporter to report such trial. . . ." TENN. CODE ANN. § 40-2010 (1956).

court reporter in order to perfect the record on appeal, particularly inasmuch as Tennessee courts not only permit narrative bills of exceptions but actually prefer them to stenographers' transcripts;[200] the United States Supreme Court has recognized the propriety of narrative bills of exceptions,[201] and there was no evidence that a narrative or some other kind of exception could not have been prepared if defendant had really wanted to appeal; (2) no prejudice resulted to defendant from the failure of the trial court to furnish him a court reporter, since, although advised of his right to appeal, he did not appeal; and (3) if he had a right under the Tennessee Code to a court reporter, he waived it.[202]

5. *Jury—Separation of Jurors.*—It has long been the rule in Tennessee that the separation of jurors in felony cases, even before being sworn, constitutes reversible error unless it is shown that there was no tampering with the jurors while separated.[203] A few years ago the supreme court acknowledged that this is the rule only in Tennessee and Mississippi.[204] The general rule elsewhere is that separation of jurors in a felony case before they are sworn is not reversible error unless it is affirmatively shown that prejudice resulted to the defendant.[205] The requirement that the jury not separate has been based in Tennessee[206] on the provision in the state constitution guaranteeing an accused "trial, by an impartial jury,"[207] and the theory that the accused is therefore entitled not to have jurors go at large where they may possibly be contaminated and influenced.[208]

During the survey period it was urged upon the supreme court in *State v. Fowler*[209] that it was reversible error for a trial court not to have declared a mistrial when a separation of the jury occurred before it was sworn, even though no prejudice thereby to the defendant was shown. The supreme court preliminarily noted that the state's separation-of-jurors-reversible-error rule is based on the theory that a juror who separates himself from his fellows places himself in

200. Tucker v. Tennessee, 210 Tenn. 646, 361 S.W.2d 494 (1961); Beadle v. State, 203 Tenn. 97, 310 S.W.2d 157 (1958).

201. Griffin v. Illinois, 351 U.S. 12 (1955); Miller v. United States, 317 U.S. 192 (1942). See also Draper v. Washington, 372 U.S. 487 (1963).

202. The court cited Banks v. State, 203 Md. 488, 102 A.2d 267 (1954); Commonwealth *ex rel.* Turk v. Ashe, 167 Pa. Super. 323, 74 A.2d 656, *cert. denied sub nom.*, Turk v. Claudy, 340 U.S. 907 (1950).

203. Wesley v. State, 30 Tenn. 344 (1852); Hines v. State, 27 Tenn. 476 (1848).

204. England v. State, 196 Tenn. 186, 194, 264 S.W.2d 815, 819 (1954).

205. 5 WHARTON § 2103.

206. Lee v. State, 132 Tenn. 655, 179 S.W. 145 (1915); Long v. State, 132 Tenn. 649, 179 S.W. 315 (1915).

207. TENN. CONST. art. 1, § 9.

208. See note 206 *supra.*

209. 373 S.W.2d 460 (Tenn. 1963).

a position in which he might be tampered with, so that a court will not speculate as to whether an injury resulted to the accused from the unexplained separation. The court then held the rule inapplicable in this case, that reversible error was not committed because the trial court discharged the two jurors who had separated themselves,[210] and upon questioning the remaining jurors it received from them the statement that no one had talked to them, thereby removing any chance that the jury which tried the case had been tampered with or that prejudice had resulted to the defendants. Regardless of what one may think of the Tennessee rule, the result reached in the *Fowler* case seems correct.

6. *Confrontation of Witnesses.*—An accused in a criminal prosecution in Tennessee has, under the federal constitution,[211] the state constitution,[212] and the state criminal code,[213] the right to confront the witnesses against him.

The United States Court of Appeals for the Sixth Circuit, emphasizing that the right of confrontation concerns the prosecution itself, recently concluded that an accused had been accorded his rights in this regard when he was convicted on the testimony of witnesses who testified against him at his trial in open court and in his presence. The court held that this right was not violated by omission of a preliminary examination.[214]

In *State ex rel. Dickens v. Bomar,*[215] the Tennessee Supreme Court considered the argument that a defendant in a robbery prosecution had been denied his right to confront witnesses when the State failed to call as a witness at the trial the individual who allegedly had been

210. The Court cited Griffee v. State, 69 Tenn. 41 (1878), and Taylor v. State, 79 Tenn. 708 (1883). In the *Griffee* case, the trial court, upon being apprised that two of six jurors selected but unsworn had improperly separated themselves from the remaining four, discharged all six and allowed the case to proceed to trial. The supreme court approved the trial court's discharge of all six jurors, including the four "who had ample opportunity to have been tainted by their night's association with the offending jurors" because "a jury should be above suspicion." *Id.* at 43. The court held in the *Taylor* case that after a panel is made up but before it is sworn a trial court may discharge a juror for cause without being compelled to discharge the remaining jurors.

211. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. The United States Supreme Court has held that this sixth amendment provision is a fundamental right made obligatory on the states by the fourteenth amendment, and that this right must be accorded the accused in a state prosecution under the standards that apply in a federal proceeding. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

212. "That in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face . . . ." TENN. CONST. art. 1, § 9.

213. "By the Constitution, the accused, in all criminal prosecutions has a right to meet the witnesses face to face . . . ." TENN. CODE ANN. § 40-2405 (1956).

214. Green v. Bomar, 329 F.2d 796 (6th Cir. 1964).

215. 381 S.W.2d 287 (Tenn. 1964).

the victim of the robbery. The court concluded that the right to confrontation does not require the state to call every witness having knowledge of the facts, citing *Eason v. State*,[216] a previous decision in which the court had held that the State would not be compelled to make out its case by introducing any particular witness, for "if it be important to the proper defense of the defendant, he can always have the witness in his favor."[217]

The right of confrontation was also invoked in *State ex rel. Byrd v. Bomar*.[218] There it was contended that this right of the accused under the sixth amendment to the United States Constitntion was violated since he "was not confronted with all the witnesses against him, which were named on the face of the indictment to be summoned for the State." The Tennessee Supreme Court rejected this contention because it was not alleged that the accused had been denied the right to be confronted with the witnesses against him who actually testified at the trial. The court again relied upon *Eason*. It also relied on secondary authority to the effect that the right of confrontation is "only the right to meet those witnesses face to face whose testimony is offered at the trial" and that "the fact that the prosecution does not produce all the witnesses is not a violation of such constitutional provision, even though the name of one of the witnesses is endorsed on the information."[219]

7. *Evidence.*—Evidentiary questions involved in some of the criminal cases reported during the past year are treated elsewhere in this survey,[220] but they are footnoted here[221] as a convenience to the reader.

216. 65 Tenn. 431 (1873).

217. *Id.* at 436.

218. 381 S.W.2d 280 (Tenn. 1964).

219. 23 C.J.S. *Criminal Law* § 999, at 1047 (1961). See also Aycock v. United States, 62 F.2d 612 (9th Cir. 1932), *cert. denied*, 289 U.S. 734 (1933); Hood v. State, 80 Okla. Crim. 175, 157 P.2d 918 (1945); 2 UNDERHILL § 515.

220. Patterson, *Evidence—1964 Tennessee Survey*, 18 VAND. L. REV. 1221 (1965).

221. *Admissions*: Boulton v. State, 377 S.W.2d 936 (Tenn. 1964) (rule of "admissions by silence"—that when a statement is made accusing one of a crime and he makes no denial by word or gesture, both the statement and his failure to deny it are admissible as evidence of his acquiescence in its truth—should be applied with circumspection and such evidence should be received with great caution); State v. Fowler, 373 S.W.2d 460 (Tenn. 1963) (rule of "admissions by silence" applied, evidence that defendants hung heads and made no audible response to statements by accomplices implicating them admissible to corroborate accomplices' testimony). *Business records*: Gamble v. State, 383 S.W.2d 48 (Tenn. 1964) (written logs made by police department radio dispatcher contemporaneously with all radio dispatches, showing for the night that a crime was committed the time of police radio calls, the number of the police car dispatched, and the place to which dispatched, admissible under the Uniform Business Records as Evidence Act, TENN. CODE ANN. § 24-712, despite contention that tape recordings of the dispatches and not the logs were best evidence, and despite subsequent notations on the log when it was explained to the jury that these additions were not part of the original record to be considered by them). *Confessions*: Monts v.

8. *Improper Argument.*—In his closing argument at the trial of the *Gamble* case,[222] an attorney for the State commented that the record was silent as to the identity of a woman that a defendant claimed he was with at the time the offense charged was committed. That the trial court permitted such argument to be made was assigned as error to the supreme court, the contention being that this was a comment on the defendant's failure to testify. The court overruled this assignment, holding that the comment was not on the failure of the accused to testify (such comment would have been improper),[223] but on the absence of any evidence in the record on the point in question, and therefore that the comment was not improper.[224]

State, 379 S.W.2d 34 (Tenn. 1964) (facts that at the time he confessed to a crime defendant had been without sleep for 24 hours and had just heard from the police of the accidental death of his son do not render the confession involuntary and inadmissible). *Corroboration*: Monts v. State, *supra* (an accessory after the fact is not an accomplice within the rule requiring that the testimony of an accomplice be corroborated); Boulton v. State, *supra* (evidence which merely casts a suspicion on an accused or which only shows he had an opportunity to commit the crime is legally insufficient to corroborate the accomplice's testimony); State v. Fowler, *supra* (evidence that defendants were seen talking with admitted accomplices the night of the crime, that a vehicle belonging to one of the defendants was seen near the scene of the crime on the night in question, that ashes of burned paper were found on the farm of another defendant at a spot where accomplices confessed the group had destroyed stolen papers, and actions of defendants in hanging their heads and making no audible response when confronted with accomplices and their implicating confessions, all together sufficient to corroborate accomplices' testimony). *Cross examination*: Payne v. State, 379 S.W.2d 759 (Tenn. 1964) (trial court's refusal to permit defendant to cross-examine State's rebuttal witness, who had testified that he would not believe defense witnesses under oath, with reference to source of knowledge and information on which rebuttal witness based his conclusion, was prejudicial error, where jury treated testimony of defense witness as impeached); State v. Fowler, *supra* (not error for judge to permit district attorney general, in order to test credibility as a witness, to cross examine a defendant as to specific previous acts which involve moral turpitude or other misconduct which tends to show his lack of veracity or untrustworthiness). *Cumulative evidence*: Monts v. State, *supra* (not error for judge to deny defendant's request that the jury be permitted to observe a demonstration of the machine upon which his confession had been originally recorded—for purpose of showing that the machine could have been manipulated to omit some of defendant's statements—because it would merely be cumulative of fact already admitted by a State's witness that some of defendant's statements had not been recorded). *Presumptions and inferences*: Gann v. State, 383 S.W.2d 32 (Tenn. 1964) (presumptions that homicide is malicious, that handling a weapon so as to make killing a natural or probable consequence is malicious, and that use of a deadly weapon is sufficient to sustain a charge of second degree murder are not rebutted where evidence showed defendant went on deceased's property with a deadly weapon, was responsible for ensuing argument, provoked use of deadly weapons, fired shots first, and refused to eare for his wounded adversary); Harvey v. State, 376 S.W.2d 497 (Tenn. 1964) (inference that possessor of recently stolen goods stole them does not operate where verdict of guilty only on a count of receiving and concealing operated as acquittal of larceny as charged in another count).

222. 383 S.W.2d 48 (Tem. 1964).

223. TENN. CODE ANN. § 40-2403 (1956).

224. The court quoted the following statement: "It is of course, now well settled that our statute (Code Section 9783)(now T.C.A. § 40-2403) providing that no presumption of guilt of the defendant shall arise from his failure to testify in his own

Also in the *Gamble* case, in arguing to the jury that his client should not be convicted because the State had withheld at the trial tape recordings of certain police radio dispatches, defense counsel stated, "Let me ask you one other question about how fair they have played with you in the proof in this case." At this point, an attorney for the State objected to the argument and interjected the comment that "if they want this tape, I'll play it right now." The defense counsel moved for a mistrial, the motion was overruled, and the trial court's action in that regard was assigned to the supreme court as error. Invoking the Harmless Error Statute,[225] the Court overruled this assignment, holding that, although the State's attorney should not have made the statement offering to play the tape recording, the result of the trial was not in any way affected thereby. In this connection, the court also referred, as apropos, to the fact that it had held previously[226] that statements otherwise improper may be made by counsel when opposing counsel has opened up the subject. This, of course, is the sometimes criticized[227] "doctrine of retaliation."[228]

9. *Instructions.*—In the *Gamble* case,[229] the court was once again presented with the question of whether a trial judge had given an oral charge contrary to the statutory requirement[230] that in felony cases the judge's entire charge shall be reduced to writing before being given to the jury. The supreme court considered the trial judge's oral statements[231] referring the jurors to a particular written

behalf, has application only to the personal testimony of the defendant himself and does not extend to apparently available testimony by others." Ford v. State, 184 Tenn. 443, 449, 19 S.W.2d 313,317 (1945). The court also relied upon Hays v. State, 159 Tenn. 388, 201 S.W.2d 539 (1929). 383 S.W.2d at 59.

225. TENN. CODE ANN. § 27-117 (1956).

226. Coke v. State, 208 Tenn. 248, 345 S.W.2d 673 (1961).

227. "[The] doctrine of retaliation . . . seems undesirable as it is almost impossible to determine accurately the effect of the comparative misconduct of the parties." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 65 (1947).

228. 5 WHARTON § 2083. The court quotes 23A C.J.S. *Criminal Law*, § 1108, at 215 (1961), where it is stated that the doctrine of retaliation is applied to comments "on failure to introduce certain evidence." 383 S.W.2d at 58.

229. 383 S.W.2d 48 (Tenn. 1964).

230. "On the trial of all felonies, every word of the judge's charge shall be reduced to writing before given to the jury, and no part of it whatever shall be delivered orally in any such case, but shall be delivered wholly in writing. Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement." TENN. CODE ANN. § 40-2516 (1956).

231. The relevant facts are reported as follows:

"The record shows that, after a little over three hours deliberation, the following occurred:

" 'Jury knocked on Jury Room Door and told the Deputy Sheriff they had reached a verdict but to be instructed how to write the verdict.'

"The Court thereupon ordered the jury brought into the courtroom. The jacket in the case was passed to the Court. The Court then stated:

charge previously given them so that they might now correct the form of their verdict. And the court held that, pursuant to precedent that "statements as to the form . . . of the verdict need not be in writing,"[232] such oral statements by the trial judge did not constitute reversible error.

The Criminal Code provides that "if the attorneys on either side desire further instructions given to the jury, they shall write precisely what they desire the judge to say further."[233] This provision, enacted in 1873, was early held to be mandatory.[234] In time, however, it came to be held that in felony cases the provision is not mandatory as to certain fundamental points; concerning those particular points, the supreme court holds it to be reversible error for the trial judge to fail to charge the jury even though not required by statute, nor requested by a party, to do so. These points have been limited to charges in felony cases on the identity of the accused,[235] reasonable doubt,[236] the weight to be given a dying declaration,[237] circumstantial evidence when the case is based solely thereon,[238] alibi,[239] and the

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" 'Gentlemen, the form of your verdict—now, the Court is referring only to the form, Mr. Foreman; it does not correspond to the instructions. The verdict has to correspond to the form the Court outlined to you in writing. Referring only, now, gentlemen, to the form of your verdict, not the content, you will find the form in the jacket. Another matter relating to the form where you used the names of your defendants in your verdict, gentlemen of the jury, name the defendants as outlined for you. The Court feels you should return to the Jury Room and be guided more by the written form for your verdict; so you'll return to your room.

"(JURY OUT) (2:30 p.m.) (RECESS) (JURY IN) (2:32 p.m.)

" 'THE COURT: Gentlemeu, the Court addresses you again as to the form. The Court is not referring to the contents of the verdict. Now, Mr. Foreman,—Mr. Brown, you served as Foreman, according to the form of your verdict you have named the defendants and you have language immediately after that—relating only to the form of the verdict.

" 'JURY FOREMAN: May I say something, please?

" 'THE COURT: Don't go into the content of the verdict. You should strike out where you have the words "or any of them".'

"Thereupon the jury retired to the jury room and in three minutes returned into open Court with their verdict, which was accepted by the Trial Judge." 383 S.W.2d at 54.

232. " 'The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence . . . statements as to the form or character of the verdict' need not be in writing." Taylor v. State, 369 S.W.2d 385, 387-88 (Tenn. 1963), quoting from 23A C.J.S. *Criminal Law* § 1301 (1961). The court also relied on Frady v. State, 67 Tenn. (8 Baxter) 349 (1875).

233. TENN. CODE ANN. § 40-2517 (1956).

234. State v. Becton, 66 Tenn. 138 (1874).

235. Ford v. State, 101 Tenn. 454, 47 S.W. 703 (1898).

236. Frazier v. State, 117 Tenn. 430, 100 S.W. 94 (1906).

237. Pearson v. State, 143 Tenn. 385, 226 S.W. 538 (1920).

238. Bishop v. State, 199 Tenn. 428, 287 S.W.2d 49 (1956), 24 TENN. L. REV. 886 (1957); Webb v. State, 140 Tenn. 205, 203 S.W. 955 (1918).

239. Poe v. State, 212 Tenn. 413, 370 S.W.2d 488 (1963).

rights of one when his home is broken into.[240]

In the *Monts* case,[241] the court considered once more whether it should expand this "class denominated as fundamental"[242] to include a charge on circumstantial evidence when the State's case is made up of both circumstantial and direct evidence. The conclusion of the court in its original opinion was in the negative, the court holding as it had in a number of previous cases[243] that the subject matter of such a charge is not fundamental and that, therefore, the mandatory provision of the code that attorneys submit to the judge written requests for instructions that they desire to be given to the jury is applicable. Because the bill of exceptions by defendant Monts did not show that he had requested a charge on the law of circumstantial evidence, the supreme court in its original opinion and on petition for rehearing held that the conviction could not be reversed for failure of the trial court to instruct the jury as to the law of circumstantial evidence, although the case against him involved circumstantial as well as direct evidence.[244]

However, the supreme court reversed the conviction of Monts' co-defendant, West, finding error in the refusal of the trial court to give a requested charge on the law of circumstantial evidence when the evidence against West was both circumstantial and direct. The court reasoned as follows:

> When a case is grounded on both circumstantial and direct evidence, it is entirely possible that the jury, in the exercise of its function as the sole judge of the credibility of the evidence, may find that the direct evidence is unworthy of belief. If they should so find, then they would be left with only the circumstantial evidence to guide them in determining whether the defendant is guilty of the offense charged. But without the law of circumstantial evidence before them, how can they be expected to properly evaluate this evidence? The possibility that we have just mentioned makes it imperative that the trial judge instruct the jury on the law of circumstantial evidence.[245]

The court, interestingly enough, recognized that the rationale of the rule it was adopting would apply with equal force to all cases involving both circumstantial and direct evidence regardless of whether a request for instructions on circumstantial evidence be submitted. But, as noted above, the court reversed West's conviction

240. Morrison v. State, 212 Tenn. 633, 371 S.W.2d 441 (1963).

241. 379 S.W.2d 34 (Tenn. 1964).

242. Bishop v. State, *supra* note 238, at 433, 287 S.W.2d at 49; Webb v. State, *supra* note 238, at 206, 203 S.W. at 955.

243. Arterburn v. State, 208 Tenn. 141, 344 S.W.2d 362 (1961); Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1 (1958); Gray v. State, 203 Tenn. 332, 313 S.W.2d 246 (1958); Moon v. State, 146 Tenn. 319, 242 S.W. 39 (1921); Barnards v. State, 88 Tenn. 183, 12 S.W. 431 (1889).

244. 379 S.W.2d at 42, 44.

245. 379 S.W.2d at 41.

but did not in its original opinion or on petition for rehearing reverse Monts', although both defendants were convicted of the murder of the same individual in a trial in which both circumstantial and direct evidence had been presented against them and in which the trial judge's instructions did not include a charge on the law of circumstantial evidence. The controlling distinction lay in the facts as they first appeared to the supreme court on appeal, that West's lawyer had requested, but Monts' lawyer had not requested, instructions on circumstantial evidence and had been turned down (although it might have occurred to the supreme court that a trial court would very likely have ruled the same way on identical such requests by co-defendants for instructions).

On a second petition for rehearing the supreme court was able to determine, from a certificate filed with it by the clerk of the trial court subsequent to the original decision and the decision on the first petition for rehearing, that Monts had specially requested the trial court for instructions on circumstantial evidence. The supreme court, therefore, on the basis of its decision as to defendant West likewise reversed and remanded the lower court decision as to Monts.

If, in spite of section 40-2517, a trial judge is required in a case consisting entirely of circumstantial evidence to charge the jury concerning circumstantial evidence whether or not requested to do so, why would the trial judge in a case consisting of both circumstantial and direct evidence not be likewise required to give a charge about circumstantial evidence although not requested to do so, in view of the supreme court's recognition, in its original opinion in *Monts*, that in the latter case a jury may disregard the direct evidence and find a defendant guilty entirely on the basis of circumstantial evidence? Once the direct evidence is disregarded, the position of the defendant in the latter case becomes that of the defendant in the former case. And, because the direct evidence *may* be disregarded, the charge as to circumstantial evidence seems to be just as necessary in the latter as in the former case. The matter seems to be as much of the "class denominated as fundamental" in the one case as in the other. The position of the defendant on appeal in either case should not depend on whether or not his lawyer thought to make the request. The important thing should be: was the instruction given?

10. *Verdict.*—It was held in *Harvey v. State*[246] that a guilty verdict on one count only of an indictment operates as an acquittal on the remaining counts of the indictment.[247]

246. 376 S.W.2d 497 (Tenn. 1964).

247. Citing State v. Abernathy, 153 Tenn. 441, 284 S.W. 361 (1926). See also 5 WHARTON § 2129; ORFIELD, *op. cit. supra* note 227, at 475.

11. *Motions after Verdict.*—The rule is well settled in Tennessee that a motion for a new trial is only a pleading and cannot be looked to as establishing facts which it alleges.[248] On the first petition for rehearing in the *Monts* case,[249] counsel for defendant Monts contended that the supreme court erred in its original opinion in stating that Monts did not request the trial court to charge the jury on the law of circumstantial evidence. In support of his contention that Monts had in fact made such a request, counsel called attention to Monts' motion below for a new trial alleging that the trial court had erred in refusing to grant Monts' special request for such a charge. The supreme court invoked the rule referred to above, holding that it was not sufficient that the motion for a new trial included a statement that a request for instructions had been made. The bill of exceptions failing to show such a request, the court held that the motion for a new trial could not supply evidence that the request had been made.[250]

D. *Penalties*

The criminal code provides that, in the event of conviction for petit larceny or for receiving stolen goods *under* the value of 100 dollars, the court may on the jury's recommendation substitute for punishment in the penitentiary imprisonment in the county jail or workhouse; it further provides that in such cases, upon the defendant's demand, the jury shall as a part of their verdict assess all the punishment for the offense and may, in lieu of punishment in the penitentiary, substitute imprisonment in the county jail or workhouse for any time less than one year.[251] In the report on *Lax v. State*,[252] it is stated at one point that the defendant was convicted of receiving and concealing stolen property having a value of more than 100 dollars,[253] and at another that his conviction was for receiving property stolen outside of the state.[254] The jury set as his punishment eleven months and twenty-nine days on the county road and payment of a fifty dollar fine. A motion by the defendant for a new trial was overruled

248. Hargrove v. State, 199 Tenn. 25, 281 S.W.2d 692 (1955); Hagood v. State, 183 Tenn. 49, 190 S.W.2d 1023 (1945); CARUTHERS, HISTORY OF A LAWSUIT 421 (8th ed. Gilreath & Aderolt 1963).

249. 379 S.W.2d 34 (Tenn. 1964).

250. *Id.* at 44. See also Wynn v. State, 181 Tenn. 325, 181 S.W.2d 332 (1944).

251. TENN. CODE ANN. § 39-4205 (Supp. 1964).

252. 378 S.W.2d 782 (Tenn. 1964).

253. *Id.* at 783. Without more, this would appear to refer to the offense of receiving and concealing stoleu goods of a value over $100, for which the penalty by statute is imprisonment in the penitentiary for from three to ten years. TENN. CODE ANN. § 39-4217 (Supp. 1964).

254. 378 S.W.2d at 786. This appears to refer to the offense of receiving personal property stolen outside of the state, for which the penalty by statute is punishment "as in the case of larceuy." TENN. CODE ANN. § 39-4219 (1956).

except that "Defendant is re-sentenced to eleven (11) months and twenty-nine (29) days, six (6) months of which is suspended on payment of $50.00 fine and all costs of the cause and on good behavior of the defendant." On appeal, the defendant assigned as error that the jury's verdict was void because it fixed a punishment unauthorized by law for the offense of which he was convicted. The supreme court affirmed the judgment. In so doing, it relied on a previous decision[255] which held that a conviction of grand larceny included a finding of guilt of petit larceny as a lesser included offense and that a sentence for grand larceny could therefore be corrected, when the value of the stolen property had not been proved to be in excess of the statutory amount, so as to sentence the defendant to the minimum statutory punishment for petit larceny. In the instant case, the court reasoned that, since according to the evidence the property received was worth more than 100 dollars and thus the conviction of receiving stolen property worth more than 100 dollars was warranted, such conviction necessarily was in effect also a conviction of receiving stolen property worth less than 100 dollars. Therefore, the sentence appropriate to the lesser offense as recommended by the jury was authorized. In any event, the court pointed out, the evidence would have justified the jury in assessing the penalty at from three to ten years in the penitentiary for the greater offense and if the trial court and jury erred in setting the lesser sentence it was to the defendant's benefit and therefore not reversible error in view of the Harmless Error Statute.[256]

During the survey period the United States Court of Appeals for the Sixth Circuit handed down a decision concerning the Tennessee Habitual Criminal Act,[257] which should be of interest to the state's bench and bar.

In *Goss v. Bomar*,[258] this act was challenged by an appellant from a district court decision denying a petition for habeas corpus, as having been applied to him so as to constitute "cruel and unusual punishment" in violation of the eighth and fourteenth amendments of the Constitution of the United States. The petitioner, an inmate of the state penitentiary, contended that the life sentence without possibility of parole which had been imposed on him was so grossly excessive and disproportionate to his offenses as to thus violate the Constitution. The court of appeals recognized that habitual criminal statutes (existing in forty-four of the fifty-six states and separate

255. Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944).
256. TENN. CODE ANN. § 27-117 (1956).
257. TENN. CODE ANN. § 40-2801 to -2807 (1956). See Note, *Out of Sight, Out of Mind: The Plight of the Habitual Criminal*, 26 TENN. L. REV. 258, 259 (1959).
258. 337 F.2d 341 (6th Cir. 1964).

federal jurisdictions) are not unusual in this country, and that provision for life sentence for repeating offenders is not unusual under such statutes (being present in thirty-four of them). But the court took note of the petitioner's contention that his situation was unusual in that (1) three of his prior convictions were entered upon the same day as a result of offenses committed in a seventeen day period, (2) the Tennessee statute under the circumstances of his case makes a life sentence mandatory without any exercise of discretion by judge or jury, and (3) under Tennessee law a life sentence for habitual criminality prohibits consideration for parole.

The district court in the *Goss* case had disposed of the petition on the basis of a 1912 United States Supreme Court decision[259] upholding a habitual criminal statute against eighth amendment attack. However, the Court of Appeals pointed out that at the time of the 1912 decision there had been great doubt as to whether the eighth amendment could be said to constitute a restriction on the individual states, whereas in 1962 the Supreme Court held that the eighth amendment prohibition applies to the states through the fourteenth amendment.[260] The court also emphasized that the prohibition of cruel and unusual punishment is to be enforced in relation to modern concepts of what constitutes "cruelty" and what is "unusual,"[261] quoting the Supreme Court's statement that "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[262] Stating its belief that the eighth amendment claims raised by petitioner "merit consideration in an appropriate tribunal," the court noted that the record did not show that these claims had ever been submitted to the Tennessee Supreme Court.[263] Because the highest court of the state must pass on the constitutional issues involved before the federal courts could do so,[264] the court affirmed the denial of the petition "solely" on the ground that petitioner had not exhausted his state remedies.[265] To say the least, the *Goss* decision indicates an attitude that the Tennessee Habitual Criminal Act could be applied so as to amount to "cruel and unusual punishment" under the eighth and fourteenth amendments.

E. *Post-Trial Procedure*

1. *Right to Appellate Review, Right to Counsel.*—The facts of

259. Graham v. West Virginia, 224 U.S. 616 (1912).
260. Robinson v. California, 370 U.S. 660 (1962).
261. 337 F.2d at 342, citing Weems v. United States, 217 U.S. 349 (1910).
262. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
263. 337 F.2d at 343.
264. By virtue of the rule of Darr v. Burford, 339 U.S. 200 (1950).
265. 337 F.2d at 343.
266. 234 F. Supp. 882 (M.D. Tenn. 1964).

Tucker v. Meadows,[266] decided during the survey period by the United States District Court for the Middle District of Tennessee, provides a lesson in how *not* to accord a criminal defendant his procedural rights after trial. The petitioner for habeas corpus in that case was convicted of armed robbery in a state court trial, during the course of which as an indigent unable to employ counsel he had the services of court-appointed counsel, and, because it was a capital case, a court reporter was appointed at defense counsel's request to report the trial. At the conclusion of the trial, the petitioner notified his counsel that he wanted a motion for a new trial filed, and this was conveyed by counsel to the trial judge. At the same time the defense counsel moved the court for permission to withdraw from the case, and the motion was granted immediately. The day following the conviction, the trial judge approved an order removing the petitioner to the state penitentiary which recited that the petitioner was "now being held in the Sumner County jail pending the filing of a motion for a new trial." After commitment to the penitentiary the petitioner wrote the court-appointed attorney a number of times requesting him to take steps to appeal the convictions, but his letters were unanswered. Later he wrote this attorney requesting a trial transcript, to which the attorney replied that if the petitioner could pay the court reporter's regular fee he was sure a copy of the transcript could be prepared for him. No steps were taken by either the attorney or the trial judge to advise him as to the steps required to perfect an appeal.

In ruling in favor of the petitioner, the federal district court found fault, not with state statutes concerning the procedural rights to appeal of an indigent defendant in a capital case, but with failures to observe the requirements of those statutes in the case before it. The court noted that the code places the duty on the court-appointed reporter to prepare a copy of the proceedings of the trial "and turn the same over to such counsel appointed for such defendant to be used as his bill of exceptions."[267] But the court reporter failed to prepare and file the copy of the transcript of evidence, which would have served as the bill of exceptions necessary to obtain full appellate review. It was also noted that the code provides that the court-appointed attorney "shall file such bill of exceptions in duplicate and the clerk in preparing his transcript for the appellate court upon appeal shall use the original bill of exceptions as part of such transcript, retaining a copy in his files."[268] But, with knowledge of the petitioner's intention to file a motion for a new trial, the court-appointed attorney requested and was granted permission to withdraw

267. TENN. CODE ANN. § 40-2011 (1956).
268. *Id.* § 40-2012.

from the case. The court concluded that the statute was designed to protect an indigent defendant, and to make certain that necessary steps would be taken to perfect his appeal in a capital case, and to provide adequate representation by the court-appointed attorney in taking those steps. The court also observed that "The statute is not conditioned upon the request of the defendant nor upon his indication of an intention to appeal" but is "mandatory in character and any failure to observe its requirements necessarily constitutes a violation of a defendant's rights in the class of cases to which it applies.[269] The court found that Tennessee's statutory procedure for protecting the indigent defendant in connection with his right to appeal a capital case was frustrated in this case by the action and non-action of state officers and agencies. The court was particularly critical of the trial court and the attorney below:

> The court-appointed attorney had no right to withdraw from the case at this critical stage of the proceeding and the court was without authority to permit it. The default was only compounded after the withdrawal of the court-appointed attorney by the failure of the court to take any steps to appoint another attorney to represent the petitioner, although notice had been given in open court that it was the petitioner's desire to file a motion for a new trial. It had been definitely established in the proceeding that the petitioner was an indigent defendant and the inference should have been clear that he was ignorant of his rights and that without counsel a new trial motion could not be prepared and filed.
>
> From these established facts the Court can only find and conclude that the petitioner was not only denied his statutory rights to have an appellate review, but that he was also denied effective representation of counsel at a critical stage in the proceeding in violation of the equal protection and due process clauses of the Fourteenth Amendment.[270]

The facts of the *Tucker* case are not believed to be typical. Rather, it is believed that the trial courts, and the officers of these courts including court-appointed attorneys, generally are aware of and attempt to observe their statutory and constitutional obligations to the indigent criminal defendant, even during the post-trial stage of perfecting the procedural steps required to effectuate appellate review.

269. 234 F. Supp. at 884.
270. *Id.* at 885-86.