Vanderbilt Law Review

Volume 12
Issue 4 *Issue 4 - October 1959*

Article 12

10-1959

Criminal Law and Procedure--1959 Tennessee Survey

Robert E. Kendrick
Vanderbilt University Law School

CRIMINAL LAW AND PROCEDURE— 1959 TENNESSEE SURVEY

ROBERT E. KENDRICK*

* * *

I. SUBSTANTIVE CRIMINAL LAW

1. Conspiracy.—Cline v. State[1] was an appeal from a conviction of a conspiracy to dynamite and destroy a public school building in Clinton, Tennessee, in violation of a statute making it a felony for two or more persons to agree "to commit an illegal act capable of producing conditions destructive to life or property . . ." by possessing, transporting or using explosives.[2] Three men, D_1, D_2 and D_3, had been indicated; but, before defendants were put to trial, the state entered a *nolle prosequi* against D_1, who became a state's witness. Afterwards, D_2 was acquitted in the same trial in which D_3, the appellant here, was convicted. Reversal was sought on the basis of precedent holding that, it being essential to criminal conspiracy that two or more persons combine to do an illegal thing, "when only two are charged with a conspiracy, and one of them is acquitted, the

* Visiting Associate Professor of Law, Vanderbilt University.

1. 319 S.W.2d 227 (Tenn. 1958), 4 RACE REL. L. REP. 88 (1958).
2. TENN. CODE ANN. § 39-1407 (Supp. 1959).

conviction of the other is void."[3] The court conceded that on authority if both D_1 and D_2 had been acquitted the case against D_3 as a joint conspirator would have failed. But it distinguished precedent on the ground that here only D_2, and not D_1 as well, had been acquitted and—adopting the rule that "so long as the acquittal or death of co-conspirators does not remove the basis for a charge of conspiracy, a single defendant may be prosecuted and convicted of the offense. . . ."[4]—found no error in this regard concerning D_3's conviction. There is a division of authority on the question of what effect the entry of a *nolle prosequi* against one of two persons accused of conspiracy has on the other,[5] and the Tennessee court has taken what seems to be the more logical position. Certainly where the *nolle prosequi* was entered prior to trial, one can agree with Judge Goodrich[6] that it is going too far to treat the subsequent conviction of the sole remaining defendant as if it were a conviction of one whose only alleged co-conspirator had been acquitted. Such a *nolle prosequi* has a quite different effect from that of an acquittal. Whereas an acquittal frees one from further prosecution for the same offense (the courts in these cases seemingly treat the not guilty verdict as a jury declaration of innocence[7] which would leave the remaining

3. DeLaney v. State, 164 Tenn. 432, 436, 51 S.W.2d 485, 487 (1932) and cited authority. This well-documented case dates the quoted rule from the year 1410 A.D. The contrary view has been argued on the ground that, where D_1 and D_2 are the only ones charged with conspiracy, and acquittal of D_1 but a conviction of D_2 indicates an inconsistency that is more apparent than real, for the "not guilty" verdict for D_1 often amounts only to "not proved," and is far more outweighed by the repugnancy between an acquittal of D_2 and facts clearly proving guilt on his part. *E.g.*, People v. Kuland, 266 N.Y. 1, 193 N.E. 439 (1934), 97 A.L.R. 1311 (1935). And see, WILLIAMS, CRIMINAL LAW: The General Part 518 (1953).

4. The Court took this statement from 11 AM. JUR. *Conspiracy* § 26 (1937).

5. The statement sometimes found that the "majority of cases" [1 WHARTON, CRIMINAL LAW AND PROCEDURE § 91 (12th ed. 1957)] or the "prevailing view" [29 VA. L. REV. 658, 659 (1943)] favors the rule that a conviction cannot be sustained under such circumstances is not borne out by investigation. That conviction cannot be sustained: State v. Jackson, 7 S.C. 283, 24 Am. Rep. 476 (1876). Miller v. United States, 277 Fed. 721 (4th Cir. 1921) (dictum); Feder v. United States, 257 Fed. 694 (2d Cir. 1919) (dictum); Berness v. State, 113 So. 2d 178 (Ala. App. 1958) (dictum). Sustaining conviction: United States v. Fox, 130 F.2d 56 (3d Cir. 1942), 37 ILL. L. REV. 370 (1943), 91 U. PA. L. REV. 358 (1942), 29 VA. L. REV. 658 (1943); United States v. Lieberman, 8 F.2d 318 (E.D. N.Y. 1925); United States v. Rindskopf, 27 Fed. Cas. 813 (No. 16165) (W.D. Wis. 1874); Kleiheg v. State, 177 N.E. 60 (Ind. 1931), *superseded on other grounds*, 206 Ind. 206, 188 N.E. 786 (1934). *Cf.* Rutland v. Commonwealth, 160 Ky. 77, 169 S.W. 584 (1914) (conviction of D_2 possible even though indictment had been dismissed against D_1, dismissal not being equivalent to a verdict of not guilty) (dictum); People v. Bryant, 409 Ill. 467, 100 N.E.2d 598 (1951) (trial court's striking of indictment for conspiracy as to D_1, alleged co-conspirator with D_2, but with leave to reinstate, held not to amount to acquittal of D_1 and therefore not to preclude conviction of D_2).

6. United States v. Fox, *supra* note 5.

7. This conclusion does not necessarily follow, of course, for the jury may

defendant, if convicted, in the impossible position of one who had conspired with himself), the *nolle prosequi,* if entered before the accused was put to trial, does not foreclose a second indictment.[8] Left open in Tennessee is this question: What would be the result if the circumstances were the same as in *Cline* except that the *nolle prosequi* is entered *after* putting the alleged co-conspirator to trial? Would a conviction of the sole remaining defendant be sustained there also? There are indications elsewhere that, both at common law in general[9] and under Tennessee common law,[10] such a procedure would produce the effect of an acquittal of the "nolled" defendant, having been once in jeopardy and therefore permanently immune from another prosecution for the same offense. If jeopardy is equated with acquittal, there would appear to be no reason in such cases for sustaining a conviction of the only remaining alleged conspirator. Time of entry of the *nolle prosequi* seems, therefore, quite significant.[11]

In the *Cline* case, reversal was sought by the convicted defendant on a second assignment of error that there was no proof of an overt act by him to further the object of the alleged conspiracy; and, therefore, that he had committed no crime in view of the following statute: "No agreement shall be deemed a conspiracy unless some act be done to effect the object thereof, except an agreement to commit a

---

just as well have thought the evidence insufficient to prove guilt beyond a reasonable doubt.

8. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 339 (1947). Tennessee decisions have recognized that different consequences flow from an acquittal and a *nolle prosequi.* "It was said by this court in *State v. Fleming,* 7 Humph. [26 Tenn.] 154, 46 Am. Dec. 73 (1846) that a *nolle prosequi* is a discharge without acquittal . . . . It being a discharge, it is necessarily a termination of the particular prosecution, although it is not a bar to a subsequent prosecution, unless it shall be entered after the defendant has been put to his trial upon a valid indictment before a jury duly sworn and impaneled. In such case, it is generally held that a *nolle prosequi* would terminate the prosecution, as the defendant would have been in jeopardy. *Walton v. State,* 3 Sneed [35 Tenn.] 687 (1856)." Scheibler v. Steinburg, 129 Tenn. 614, 617, 167 S.W. 866 (1914).

9. "At common law . . . if the nolle prosequi resulted in the withdrawal of a legally sufficient indictment, after the trial commenced and without the consent of the defendant, it had the effect of an acquittal." PERKINS, CASES ON CRIMINAL LAW AND PROCEDURE 912 (1959).

10. See cases cited in note 8 *supra.*

11. It is of interest that the case of chief reliance of those who would not sustain a conviction of D_2 after the charge against D_1 has been nolle prossed, State v. Jackson, *supra* note 5, involved a *nolle prosequi* that was entered as to D_1 after the jury had retired and before the guilty verdict was rendered against D_2, thus putting D_1 as much beyond another prosecution as if he had been acquitted. It does not at all follow, then, that this case should be cited (as it has been) as standing for the proposition that a conviction of D_2 is sustainable in a conspiracy prosecution regardless of the time of entry of a *nolle prosequi* as to D_1.

felony on the person of another, or to commit the crimes of arson or burglary."[12]

The court, while agreeing that a proper construction of the statute as applied to the instant case required evidence of an overt act by this defendant to sustain the charge against him, in affirming the judgment of conviction, found such evidence in testimony that he had spoken of receiving an offer of $1000 to blow up the building and had loaded dynamite in his automobile and transferred it to his home and that he had been found in unexplained possession of a large quantity of dynamite. This finding is consistent with the general view that a sufficient overt act may be anything done to further the end of the conspiracy[13]—acts of preparation will do—and need not go so far as to amount to an attempt to commit the crime which is the object of the combination.[14]

2. *False Pretenses.*—In *Beck v. State*,[15] the court held unnecessary to the element of reliance by the victim in a false pretenses case that the misrepresentations must have been such as "would be calculated to deceive a man of ordinary prudence and caution."[16] This is in accord with its own precedents[17] and the weight of modern authority.[18] Happily, this also accords with good sense and justice. Earlier decisions which embraced the "ordinary prudence and caution" rule apparently imported it from the tort cause of action in deceit.[19] Regardless of its merits or demerits in tort law, it would

12. TENN. CODE ANN. § 39-1102 (1956). The statute, of course, modifies the common law rule that the crime consisted in the combination by two or more persons for a forbidden purpose and required no additional overt act for a conviction thereof. CLARK & MARSHALL, CRIMES § 9.00 (6th ed. 1958). This modification, in effect since the Code of 1858, was apparently overlooked by the court in State v. Smith, 197 Tenn. 350, 273 S.W.2d 143 (1954), one commentator acidly suggesting that the oversight might have resulted from the court's "zeal in following *Corpus Juris Secundum*." Scott, *Criminal Law and Procedure—1955 Tennessee Survey*, 8 VAND. L. REV. 992, 994 (1955).

13. *E.g.*, Williamson v. United States, 207 U.S. 425 (1908).

14. PERKINS, CRIMINAL LAW 533 (1957).

15. 315 S.W.2d 254 (Tenn. 1958).

16. *Id.* at 256.

17. Cook v. State, 170 Tenn. 245, 94 S.W.2d 386 (1936); Bowen v. State, 68 Tenn. 45, 40 Am. Rep. 71 (1876). The case which the court said "settled the rule in this state," Rowe v. State, 164 Tenn. 571, 51 S.W.2d 505 (1932), however, in reality did not settle it. The evidence there was said to be abundant that defendant's representations were calculated to deceive even a man of ordinary prudence and caution. *Rowe* simply called attention to the lack of uniformity in the court's earlier decisions, cited and expressed dissatisfaction with those adhering to the ordinary care and prudence rule, and indicated that "if cornered" it would be inclined not to follow that rule. Cornered four years later in the *Cook* case, the court harked back to *Bowen* and settled upon the modern rule.

18. PERKINS, CRIMINAL LAW 262 (1957), and cases there cited.

19. See discussion in Rowe v. State, note 17 *supra*, at 576, and in 2 WHARTON, *op. cit. supra* note 5, § 588. For an indication that in the tort action the trend of modern cases is to soften the effects on the victim of the rule of "justifiable" reliance, see PROSSER, TORTS 551-54 (2d ed. 1955).

seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppel against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the perpetrators thereof who say in effect, "You were so grossly negligent in believing me that, the means being at hand to investigate my representations, you won't be heard to say you were deceived." Society has an interest in protecting the slow, the weak, the inexperienced and the unsuspecting—and not the prudent and cautious only.[20]

3. Homicide.—After a quarrel between *X* and *D* on a busy city street during which *X* had drawn a knife, *D* went home, procured his pistol and returned to the scene of the quarrel twenty-five minutes later. A gun battle between *X* and *D* ensued in which one of *D's* stray bullets killed *Y*, who was not implicated in the affair. Error was brought from a conviction of second degree murder, *D* contending that the weight of the evidence showed that he had shot at *X* in self-defense[21] upon seeing him with a pistol and that this defense excused the homicide. The judgment was affirmed in *Gray v. State*,[22] the court holding that the jury could properly conclude that *X* and *D* had engaged in a mutual combat or that upon his return *D* had become the aggressor. It is true that if *D* had been justified in shooting at *X* in self-defense, the privilege would have protected him also from criminal responsibility for accidentally killing a third party;[23] but it is generally held that self-defense cannot be invoked to justify homicide resulting from a mutual combat willingly entered.[24] It is also true that, although one who arms himself for defense after being threatened has a right to go about his lawful business even though it takes him into the vicinity of the other party,[25] he may be deprived of relying upon self-defense as justification by so doing if he expects and intends for his presence to provoke the combat.[26] The court in the *Gray* case by dictum rejected the argument that whenever one returns to the scene of the original trouble and engages in shooting it is immaterial as to who provoked the difficulty or who was the

20. It has been pointed out, however, that as a practical matter the more absurd the character of the representation, the less likely it is that a jury will believe that the victim was in fact misled. 2 WHARTON, *op. cit. supra* note 5, § 588.

21. For a discussion of Tennessee cases, see Baker, *Homicide and Self-Defense*, 15 TENN. L. REV. 288 (1938).

22. 313 S.W.2d 246 (Tenn. 1958).

23. 1 WHARTON, *op. cit. supra* note 5, § 225. *Cf.* Johnson v. State, 125 Tenn. 420, 143 S.W. 1134 (1912).

24. 1 WHARTON, *op. cit. supra* note 5, § 227.

25. PERKINS, CRIMINAL LAW 898 (1957).

26. Rogers v. State, 95 Tenn. 334, 33 S.W. 563 (1895).

aggressor on the second occasion,[27] stating that returning armed does not deprive one of the right of self-defense "in all cases"—especially where there is no effort to molest the other party.[28]

4. Indecency and Lewdness: Defense of Uncontrollable Impulse.—Tennessee continues to hold fast to the *M'Naghten*[29] rules in criminal cases where mental disease or defect is pleaded in defense. At a time when controversy continues to swirl over whether the *M'Naghten* "right-wrong" test[30] should give way to the *Durham*[31] "product" test[32] or the Model Penal Code[33] "substantial capacity" standard,[34] the Tennessee Supreme Court in *Ryall v. State*,[35] by reaffirming its

27. Bonnard v. State, 25 Tex. Civ. App. 173, 7 S.W. 862, 8 Am. St. Rep. 431 (1888).

28. 313 S.W.2d at 247. *Cf.* Foutch v. State, 95 Tenn. 530, 34 S.W. 423 (1896), 45 L.R.A. 687.

29. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

30. "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 210, 8 Eng. Rep. at 722.

31. Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954), 45 A.L.R.2d 1430 (1956). A second trial in that case was also appealed, 239 F.2d 52 (D.C. Cir. 1956). For favorable comment, see BIGGS, THE GUILTY MIND 149 (1955); WEIHOFEN, THE URGE TO PUNISH (1956); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955); Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1955). For expressions of doubt as to the value of the *Durham* test, see: Hall, *Responsibility and Law: In defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 779 (1956); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955); Werthan, *Psyehoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955). For other views, see the symposium, *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317-404 (1955) and an article by Mr. Justice Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956). Law review editors had a field day with the case—an incomplete investigation reveals that there were at least thirty-two student notes and comments—too numerous for bare citations here. Most of the student critiques examined are favorable to the decision.

32. "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). The state of New Hampshire had long before adopted such a rule. State v. Pike, 49 N.H. 399 (1870).

33. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955). See, Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321, 392 (1956).

34. "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." *Ibid.*

35. 321 S.W.2d 809 (Tenn. 1958).

long-time position[36] that the "uncontrollable impulse of the mind" or the "irresistible impulse" test[37] is not to supplement the "right-wrong" test in this state,[38] has refused to take any middle ground. There should be no doubt now, therefore, that the court as presently constituted will be unpersuaded by legal scholars or psychiatrists to adopt one of the more recent formulations.

The *Ryall* case, in which the defendant had been convicted on indictments charging him with acts of "gross indecency and lewdness" in exposing his private parts in public places to a woman stranger and her children, also touched lightly on an intent problem. It was argued that the state did not prove intent. But the court, having determined that insanity had not been established, used defendant's own testimony that he knew what he was doing, although lacking the power to resist, for finding that he had a general intent to expose himself. And the general intent, held the court, was all that was required, a particular intent or purpose on defendant's part not being necessary.[39] If the sanity of defendant be conceded, then the holding on intent is sound. Indecent exposure, a form of obscene exhibition,[40] and one of several common law varieties of "open and notorious lewdness" or "grossly scandalous and public indecency,"[41] from early times has not required as a mental state more than a general intent to expose oneself to public view.[42]

II. Criminal Procedure

1. Arrest.—The question of when a law enforcement officer in Tennessee may use deadly force to stop one fleeing from arrest has been the subject of previous full and able discussions.[43] So well-settled seems the rule that, excluding self-defense, an officer is never so

36. *E.g.*, Temples v. State, 183 Tenn. 531, 194 S.W.2d 332 (1946); Davis v. State, 161 Tenn. 23, 28 S.W.2d 993 (1930); Wilcox v. State, 94 Tenn. 106, 28 S.W. 312 (1894).

37. A person is said to be acting under an insane irresistible impulse when, from mental disease or defect, he is incapable of restraining himself, though he may know that he is doing wrong. Miller, Criminal Law 127 (1934). The American Law Institute in 1955 found that irresistible impulse had been added to the *M'Naghten* test of right-wrong in fourteen states, federal jurisdiction, and the Army. The states are Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Michigan, New Mexico, Utah, Vermont, Virginia, and Wyoming. In addition, Georgia has a delusional-impulse test. Model Penal Code 161 (Tent. Draft No. 4, 1955).

38. Ryall v. State, *supra* note 35, at 811.

39. *Ibid.*, citing State v. Davis, 214 N.C. 787, 1 S.E.2d 104 (1939).

40. Perkins, Criminal Law 337 (1957).

41. 4 Blackstone, Commentaries* 64, 65 E. 38. Bell v. State, 31 Tenn. 42, 49 (1851).

42. 2 Wharton, Criminal Law and Procedure §§ 783, 784 (12th ed. 1957).

43. *E.g.*, see State *ex rel.* Harbin v. Dunn, 39 Tenn. App. 190, 282 S.W.2d 203 (M.S. 1943); Earle, *Criminal Law and Procedure—1956 Tennessee Survey*, 9 Vand. L. Rev. 980, 985 (1956); Perkins, *The Tennessee Law of Arrest*, 2 Vand. L. Rev. 509, 593-609 (1949).

privileged with regard to a misdemeanant,[44] that in the recent case of *State ex rel. Coffelt v. Hartford Acc. & Indem. Co.*[45] it was apparently not challenged. There, in a civil action against a sheriff and the surety upon the sheriff's bond for the wrongful act of a deputy in shooting and wounding a minor to stop escape from arrest for a breach of the peace, a judgment for the plaintiff was appealed on the ground that the deputy's act was a personal one for which the sheriff was not liable. The Tennessee Court of Appeals, Middle Section, however, determined that since the arrest had been lawful, a breach of the peace having been threatened in the deputy's presence,[46] his further act of shooting the arrestee in the leg to prevent escape was also done in an official capacity, though wrongfully. Since a deputy's official acts are deemed the acts of the sheriff whom he represents, the sheriff was held responsible for the deputy's tortious official act under agency doctrines.[47] Noting its opinion that this was a case of an official act "by virtue of office" for which a sheriff and his surety would have been liable even at common law,[48] the court held that by statute[49] they were liable,[50] whether *virtute officii* or *colore officii*. And it was further held that the sheriff, as in the case of any other principal, was liable for punitive as well as for compensatory damages for his deputy's wrongful acts, a liability with which the surety's was coextensive.[51]

2. Searches and Seizures Without Warrants.—Inasmuch as the Tennessee Constitution prohibits only "unreasonable searches and seizures,"[52] it is of course implied that other searches may be lawfully made.[53] There are statutory provisions concerning search warrants and searches thereunder,[54] but the field of search and seizure without warrants is not so covered, leaving the common law in that regard in force.[55] It is well established thereby that a search may

44. Day v. Walton, 199 Tenn. 10, 281 S.W.2d 685 (1955); State *ex rel.* Harbin v. Dunn, *supra* note 43, and cases there cited.
45. 314 S.W.2d 161 (Tenn. App. M.S. 1958).
46. TENN. CODE ANN. § 40-803(1) (1956).
47. 314 S.W.2d at 163, citing Jones v. State, for Use of Coffey, 194 Tenn. 534, 253 S.W.2d 740 (1952); State *ex rel.* Blanchard v. Fisher, 193 Tenn. 147, 245 S.W.2d 179 (1951); Ivy v. Osborne, 152 Tenn. 470, 279 S.W. 384 (1925).
48. State *ex rel.* Morris v. National Sur. Co., 162 Tenn. 547, 39 S.W.2d 581 (1931). There was no liability at common law for those done under "color of office." Ivy v. Osborne, *supra* note 47.
49. TENN. CODE ANN. § 8-1920(3) (1956).
50. Jones v. State, for Use of Coffey, *supra* note 47; State *ex rel.* Harbin v. Dunn, *supra* note 43; Marable v. State *ex rel.* Wackernie, 32 Tenn. App. 238, 222 S.W.2d 234 (1949).
51. Garner v. State *ex rel.* Askins, 37 Tenn. App. 510, 266 S.W.2d 358 (1953).
52. TENN. CONST. art. 1 § 7.
53. State v. Hall, 164 Tenn. 548, 51 S.W.2d 851 (1932).
54. TENN. CODE ANN. §§ 40-501 to -517 (1956).
55. Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922), 20 A.L.R. 639 (1922).

be reasonably made without a warrant if incidental to a lawful arrest wherein the apprehending officer has reason to believe that the search is a proper precaution in the particular case, among other reasons, in order to preserve incriminating evidence, and that a search under such circumstances is not limited to the arrestee's person but extends also to his immediate surroundings, including personalty and buildings on the premises of the arrest within a reasonable distance.[56] The Tennessee Supreme Court, having had more than one occasion in recent years to discuss unreasonable searches questions,[57] disposed of another in *Pierce v. State*[58] in a single paragraph citing its recent decisions. After receiving a report that a man was being beaten on a public highway, a sheriff arrived there while one of two defendant brothers was still beating him. Defendants claimed that the alleged victim had originally made the attack and had in fact beaten up one of them. Noting the victim's exhausted condition, loss of teeth, hemorrhaging, and head wounds apparently caused by blunt instruments, the sheriff credited his story that defendants had beaten him with a slapjack, baseball bat, loaded shotgun and loaded pistol (allegedly fired during the episode) inside defendants' night club building some 200 feet away before he managed to escape to the highway. The defendant observed in the highway assault was thereupon arrested. Somewhat less than two hours later, the sheriff returned and searched the building without a warrant, gathering up objects conforming to those previously described as having been used in the beating, two fired bullets and three teeth. Defendants brought error from a conviction for assault and battery with one assignment concerning the preponderance of the evidence being based in part upon an insistence that the search which produced much of the evidence was illegal.[59] In affirming the judgment, the court overruled this assignment, holding that the search and the articles taken had a reasonable relationship to the offense for

See, Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938). For discussions of Tennessee law, see Arnold, *Search and Seizure Problems*, 16 TENN. L. REV. 291 (1940); Comment, *Search and Seizure—Tennessee Concepts*, 22 TENN. L. REV. 527 (1952).

56. Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 612-24 (1949). Critical of the extension of the rule beyond the arrestee's person is MORELAND, MODERN CRIMINAL PROCEDURE 119 (1959).

57. Atkins v. Harris, 304 S.W.2d 650 (Tenn. 1957), commented upon in Miller, *Criminal Law and Procedure—1958 Tennessee Survey*, 11 VAND. L. REV. 1224, 1229 (1958); Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856 (1956), commented upon in Earle, *Criminal Law and Procedure—1956 Tennessee Survey*, 9 VAND. L. REV. 980, 985 (1956).

58. 315 S.W.2d 271 (Tenn. 1958).

59. Tennessee follows the federal rule that, where officers procure evidence against an accused by an unreasonable search and seizure, such may not be used against him in a prosecution. Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922), 20 A.L.R. 639 (1922).

which the arrest had been made. If, as it appears from the report of the case, defendant was arrested on the public highway, a decision that it was reasonably incidental to such arrest to go upon the arrestee's nearby premises in order to explore a building for incriminating evidence represents an expansion of the rule that the privilege to search beyond the arrestee's person extends a reasonable distance to include non-dwelling buildings on the premises of the arrest.[60] But the result might be justified by emphasizing that the building here was part of the surroundings under the arrestee's immediate control. At any rate, critics of the growing privilege of officers to search incidental to a lawful arrest are not likely to approve of this decision because no reason is apparent for the sheriff's not obtaining a search warrant after jailing the arrestee and before returning to explore for evidence.[61]

3. Search Warrants.—Attacks were made on search warrants in two cases. In *Solomon v. State*[62] defendant, convicted of unlawfully and knowingly possessing and transporting a gaming device, "to-wit, 'Butter and Egg Tickets,' " brought error contending that the evidence did not preponderate in favor of a verdict of guilty in the absence of certain items, including "Butter and Egg slips" taken from his automobile under search warrants which he claimed were invalid on at least three different grounds. First, it was argued that since the issuance of a search warrant is a judicial function it was improper for a general sessions court clerk to issue them here,[63] as alleged in an amended motion below for a new trial. This assignment was overruled because the warrants were not in the record and there was no record otherwise to prove the allegation. The defendant further contended that it was error not to allow him to show that the warrants had been issued without sufficient probable cause. This assignment was also overruled, the court holding that as the affidavits for warrants were regular on their face, showing material evidence before the magistrate to support their issuance and not indicating

60. For a holding that the privilege to search the premises on which the arrest was made does not include different premises of the arrestee although located nearby, see Application of Rose, 32 F.Supp. 103 (W.D. N.Y. 1940).

61. *E.g.*, see Moreland, *op. cit. supra* note 56, at 126-27; Matherne, *Search and Seizure—United States v. Robinowitz*, 21 TENN. L. REV. 611 (1951). Trupiano v. United States, 334 U.S. 699 (1948), (commented upon in 2 VAND. L. REV. 116) seemed to make the privilege in federal cases conditional upon the unavailability of a warrant, but this limitation was short-lived. "To the extent that Trupiano v. United States . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled." United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

62. 315 S.W.2d 99 (Tenn. 1958).

63. It was so held in Marsh v. State, 185 Tenn. 103, 203 S.W.2d 372 (1947).

fraud or collusion, his action was not subject to review.[64] Finally the warrants were attacked for having been dated May 13, whereas when they were served on the next day the gambling slips found were dated May 14, which defendant argued converted the warrants into general warrants in violation of the Tennessee Constitution.[65] But the court in affirming the convictions held that, this gaming device being a continuous day-by-day operation, it would be unreasonable to require officers to guess what time of day the dates on the slips would be changed, such dates having little importance anyhow in so comprehensive a scheme except to relate the slips to the price of butter and eggs each day. The court also cited authority to the effect that in liquor cases it is not essential that the property seized in a defendant's possession at the time of search be identical with that specified in the warrant where there has been buying and selling, but that substituted liquor may be seized.[66]

It was argued in the United States Court of Appeals for the Sixth Circuit in *Graham v. United States*[67] that a search warrant issued by a criminal court judge in one Tennessee judicial circuit directing a search of appellant's apartment located in another Tennessee judicial circuit (in which it was executed) was invalid for going beyond the territorial jurisdiction of the issuing judicial officer. No Tennessee decision was cited, but reliance was placed on a decision of the United States Court of Appeals for the Second Circuit.[68] The court found merit in the contention and assumed for the purpose of the appeal, but did not decide, that the search warrant was invalid. Although not a holding, this assumption seems to be well-founded.

4. Grand Jury.—The question in *Flynn v. State*[69] was whether the Shelby County grand jury that had indicted the defendant, subsequently convicted by the Shelby County criminal court, was constitutionally impaneled. Whereas the code specifies that a grand jury shall be composed of twelve persons whose names are those first drawn by a child under ten years of age or by the judge from a receptacle containing the names of the jurors in attendance,[70] the 1853-54 legislative act (codified in 1858,[71] but in no subsequent code) creating the criminal court in Shelby County simply provided for grand jury appointment by the judge, which latter method was used in this case. It was contended for defendant that this method violates

64. Gallimore v. State, 173 Tenn. 178, 116 S.W.2d 1001 (1938); Reed v. State, 162 Tenn. 643, 39 S.W.2d 749 (1931).
65. TENN. CONST. art. 1 § 7.
66. Lea v. State, 181 Tenn. 378, 181 S.W.2d 351 (1944).
67. 257 F.2d 724 (6th Cir. 1958).
68. Weinberg v. United States, 126 F.2d 1004 (2d Cir. 1942).
69. 313 S.W.2d 248 (Tenn. 1958).
70. TENN. CODE ANN. § 40-1501 (1956).
71. Acts of Tenn. 1854, ch. 13 at 49.

the other, generally applicable statute and, in turn, the constitutional prohibition[72] against suspending general laws for the benefit of individuals. Although intimating that the method used could have been upheld through statutory construction, the court held that its own previous decisions approving this practice of criminal judges[73] plus legislative history detailed in the instant opinion caused the lower court to do the "natural thing" and that the resulting grand jury was a de facto one, at least,[74] whose acts were valid, not being tainted with fraud. The statute of general application was held to be directory and not mandatory,[75] from which it follows that, its chief purpose being to distribute equally the burden of jury service, a departure from the prescribed method does not, absent fraud or prejudice to the accused, result in an illegal grand jury because that body only charges the accused and does not try him.[76] And the constitutional provision invoked was not violated, the court held, the procedural statute concerned having been enacted for public reasons rather than for any individual's benefit and this defendant not having shown how his rights were adversely affected by its application. Although the statement that the general code section is "merely directory and not mandatory,"[77] standing alone, may be too broad,[78] the decision seems sound, by and large, and certainly so with regard to the constitutional problem.[79]

Another grand jury question in some respects similar to that in *Flynn* was raised in *Pierce v. State*.[80] There an indictment was attacked because four members of the Chester County grand jury which returned it were women, whereas the private act of 1911 providing for juries in that county states that men only may serve on a grand jury.[81] However, a general code provision in effect since

72. TENN. CONST. art. 11 § 7. *Cf.* Nichols v. King, 190 Tenn. 573, 230 S.W.2d 1006 (1950), distinguished by the court in the instant case.

73. State v. Edwards, 174 Tenn. 542, 129 S.W.2d 199 (1939); Balden v. State, 122 Tenn. 704, 127 S.W. 135 (1909); Harris v. State, 100 Tenn. 287, 45 S.W. 438 (1898).

74. The statement in Roberts v. State, 147 Tenn. 323, 247 S.W. 101 (1922), that there is no such thing in Tennessee as a de facto grand jury was rejected as obiter dictum.

75. Citing Epperson v. State, 73 Tenn. 228 (1880); Workman v. State, 36 Tenn. 425 (1857); Pybos v. State, 22 Tenn. 49 (1842).

76. United States v. Glasser, 116 F.2d 690 (7th Cir. 1940), *rev'd on other grounds*, 315 U.S. 60 (1942).

77. 313 S.W.2d at 251.

78. See, WHARTON, CRIMINAL LAW AND PROCEDURE § 1698 (12th ed. 1957), and cases cited, indicating provisions that have been held mandatory and others that have been held directory.

79. For numerous Tennessee decisions upholding class legislation as to counties, see notes 14 and 15 in the annotation following Article 11, § 8, in 1 TENN. CODE ANN. (1956). Compare the decisions cited in note 30 *supra*.

80. 315 S.W.2d 271 (Tenn. 1958).

81. Private Acts of 1911, ch. 115.

1951 provides that "every person" of the age of twenty-one years is eligible for jury service.[82] The court held that the latter general law must prevail over the inconsistent special act,[83] the general law affecting the "rights of citizens in their individual relationship rather than the County in its governmental capacity"—*i.e.*, permitting women to serve on juries—and no reason appearing why Chester County women alone should be denied such permission by a private act suspending the general law.[84]

The distinction that the court may have drawn in the *Pierce* and *Flynn* cases in striking down a private act making special provisions for Chester County grand juries and allowing to stand another private act making special provisions for Shelby County grand juries is that the act in *Pierce* adversely and discriminatorily affected individuals' rights rather than those of the county, a consequence not shown in *Flynn*.

5. *Indictments.*—Three defendants, jointly indicated and convicted of obtaining money under false pretenses, assigned error contending that the indictment was duplicitous because susceptible to having other offenses carved out. But the court in *Beck v. State*[85] held that, false pretenses having been clearly charged, the indictment was not bad as alleged even though independent or lesser included offenses suggested themselves, citing secondary authority for the proposition that a count sufficiently charging an offense is not duplicitous because of allegations tending to show, but insufficient to charge, the commission of distinct, but incidental, offenses.[86]

It was also argned in *Beck* that all could not be jointly indicted for the personal act of the sole defendant alleged to have received the money. However, the court held the indictment likewise not vulnerable to this challenge because the defendants, being engaged in a

82. TENN. CODE ANN. § 22-101 (1956).

83. TENN. CODE ANN. § 1-205(1) (1956), provides that local or private acts were not repealed by the enactment of the *Tennessee Code Annotated*, unless by necessary implication.

84. The court cited City of Memphis v. Yellow Cab, Inc. 201 Tenn. 71, 296 S.W.2d 864 (1956) holding a private act, though not formerly repealed by the code enactment, to be void of legal integrity for purporting to suspend a general law in violation of article 11, section 8, of the Tennessee Constitution. See also Bandy v. State, 185 Tenn. 190, 204 S.W.2d 819 (1947); Pesterfield v. Vickers, 43 Tenn. 205 (1866). The court found also persuasive Gerry v. Volger, 252 App. Div. 217, 298 N.Y.S. 433 (1937).

85. 315 S.W.2d 254 (1958).

86. 42 C.J.S. *Indictments and Informations* § 174 (1944); 27 AM. JUR., *Indictments and Informations* § 124 (1940). Two Tennessee cases in which indictments were held not to be duplicitous received scant attention. White v. State, 157 Tenn. 446, 9 S.W.2d 702 (1928); State v. Morgan, 109 Tenn. 157, 69 S.W. 970 (1902). State v. Smith, 194 Tenn. 608, 253 S.W.2d 992 (1952), discussed in Warren, *Criminal Law and Procedure—1953 Tennessee Survey*, 6 VAND. L. REV. 1179, 1183 (1953), held a presentment not vulnerable for duplicity.

common criminal enterprise, would be equally guilty[87] as conspirators for the act of perpetration committed by a single one of their number.[88] This represents the generally accepted view.[89]

A trial judge was held in error in *State v. Davis*[90] for quashing indictments regular and complete upon their face.[91] This, too, is generally accepted.[92]

6. Preliminary Examination.—An escapee from a state prison was captured on April 25, 1957, at a time and place proximate to the events of an assault and rape and was returned to prison. On April 26, a sheriff and another officer took from him a confession of guilt which they wrote down and which he signed. On the same day a warrant was obtained charging him with the rape, but a preliminary hearing before a magistrate was not held until a week later. A conviction resulted from a trial in which the confession which the officers testified had been voluntarily and freely given was admitted into evidence. On appeal, in *Tines v. State*[93] defense counsel cited the United States Supreme Court decisions in the *Mallory*[94] and *McNabb*[95] cases in contending that the confession was inadmissible because taken during a period in which defendant was being denied a speedy arraignment. Affirming the judgment, the Tennessee Supreme Court distinguished the instant case from the cited cases on the facts that here defendant's apprehension and restraint from April 25 to April 26 was as a recaptured state prisoner and had no connection with the crime to which he confessed. Also, it was held that the week's delay between the confession and the preliminary examination did not affect the admissibility of the confession already taken. Having thereby satisfactorily disposed of this contention the court found it unnecessary to go into the difference between the federal and state rules with regard to confessions taken before arraignment.[96] It is of interest to note Justice Douglas' recent observa-

87. TENN. CODE ANN. § 39-109 (1956) (under which aiders and abettors are deemed principal offenders); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948); Watson v. State, 184 Tenn. 177, 197 S.W.2d 802 (1946).
88. Citing Pierce v. State, 130 Tenn. 24, 168 S.W. 851 (1914).
89. 5 WHARTON, *op. cit. supra* note 78, § 1937.
90. 322 S.W.2d 232 (Tenn. 1959).
91. *Accord,* Price v. State, 199 Tenn. 345, 287 S.W.2d 14 (1956); Wireman v. State, 146 Tenn. 676, 244 S.W. 488 (1922).
92. 4 WHARTON, *op. cit. supra* note 78, § 1853.
93. 315 S.W.2d 111 (Tenn. 1958), *cert. denied,* 358 U.S. 889 (1958).
94. Mallory v. United States, 354 U.S. 449 (1957).
95. McNabb v. United States, 318 U.S. 332 (1943).
96. The court simply cited East v. State, 197 Tenn. 644, 277 S.W.2d 361 (1954), Scott, *Criminal Law and Procedure—1955 Tennessee Survey,* 8 VAND. L. REV. 992, 996 (1955). TENN. CODE ANN. § 40-604 (1956) provides that "No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." The corresponding section in the previous code, TENN. CODE ANN. § 11515 (Williams 1934), was held

tion that "while all states are required by the Constitution to exclude involuntary confessions, none has followed the *Mallory* case by adopting an exclusionary rule merely because the prompt arraignment requirement is violated. Indeed the trend since *Mallory* is in the other direction as decisions in Arizona,[97] Pennsylvania,[98] and Tennessee [citing the *Tines* case] indicate."[99] And the United States Supreme Court has denied certiorari in the Arizona and Tennessee *(Tines)* cases.[100]

7. *Trial.—(a) Evidence.*—Evidentiary questions involved in some of the criminal cases of the past year are treated elsewhere in this survey,[101] but they are footnoted here[102] for the reader's convenience.

(b) Conduct of Judge.—While the defendant was on the witness stand in a felony trial, the judge interrupted these proceedings to call before him a woman who had been acquitted in another case and to warn her that she must not think that her acquittal gave her a right

---

not to have been violated by a detention without mistreatment for seventy-two hours; and a confession taken during that period was held admissible, on the ground that a temporary holding or arrest is permissible before the defendant is taken before a magistrate because after being examined he may be released and no warrant issued. Wynn v. State, 181 Tenn. 325, 181 S.W.2d 332 (1944). For discussions of Tennessee criminal procedure at the preliminary examination or arraignment stage, see CARUTHERS, HISTORY OF A LAWSUIT §§ 721, 728-30 (7th ed. 1951); Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 626-633 (1949).

97. State v. Jordan, 83 Ariz. 248, 320 P.2d 446, *cert. denied*, 357 U.S. 922 (1958).

98. Sleighter v. Banmiller, 392 Pa. 133, 139 A.2d 918 (1958).

99. Douglas, *The Means and the End*, 1959 WASH. U. L. Q. 103, 114 (1959), originally a lecture delivered at the Washington University School of Law, St. Louis, Missouri, March 11, 1959.

100. Notes 97 and 93 *supra*.

101. Morgan, *Procedure and Evidence—1959 Tennessee Survey*, 12 VAND. L. REV. 1281 (1959).

102. *Corpus delicti:* Tines v. State, 315 S.W.2d 111 (Tenn. 1958) (provable by circumstantial evidence) (confession may be introduced before proof of —dictum); Wooten v. State, 314 S.W.2d 1 (Tenn. 1958) (elements of, held established; Marable v. State, 313 S.W.2d 451 (Tenn. 1958) (established by circumstantial evidence). *Res gestae:* Sherrill v. State, 321 S.W.2d 811 (Tenn. 1959) (statements of boys to mother three weeks after alleged offense committed upon them, not part of). *Corroboration of accomplices' testimony:* Sherill v. State, *supra* (requirement not satisfied). *Lie detector test:* Marable v. State, *supra* (results being inadmissible, evidence of refusal to take also inadmissible, but erroneous admission cured by instruction to disregard). *Presumptions and inferences:* Marie v. State, 319 S.W.2d 86 (Tenn. 1958) (presumption that owner of premises is in possession of liquor found there only *prima facie*, evidence to overcome, gives way in case of conflict to presumption of innocence); Wooten v. State, *supra* (jury may (but not required to) "presume" (infer?) that evidence of policemen present at confession, but not produced at trial, would be unfavorable to state). *Competency of witnesses:* Pierce v. State, 315 S.W.2d 271 (Tenn. 1958) (sheriff not incompetent because he swore out warrant for defendant's arrest and was in charge of jury a few minutes before it was sworn). *Evidence of prior convictions:* Frost v. State, 314 S.W.2d 33 (Tenn. 1958) (admissible in driving while intoxicated case under instructions limiting its consideration to amount of punishment).

to engage in similar acts involving the peace and good order of the community wherein both she and this defendant resided. On appeal, the defendant argued that this laid a predicate for his own conviction. The court in *McKinney v. State*[103] conceded that the trial judge's conduct was "entirely out of place" and that it could have influenced the jury in whose presence it took place; but, finding nothing in the record to indicate prejudice, it would not speculate that such was the result here and held that reversible error had not been committed.

(c) Improper Argument.—In the *Wooten*[104] case the attorney general's argument was attacked for stating that defendant should not be allowed to go free but should be found guilty so as to deter others and that "I can't think of any more gross miscarriage of justice than for this man here to be turned loose. There is no question about it." It was held that no error was committed in overruling an objection to these remarks as the attorney general had not indicated that he was basing his opinion on matters not appearing in the evidence.

The reading by the attorney general in his closing argument of a poem quoted in the opinion in a previous homicide decision of the Tennessee Supreme Court[105] was objected to in the *Marable*[106] case on the ground that such was relating the facts of another case and not merely law. In instructing the jury, the trial judge said that he had exercised his discretion in allowing the reading, it being his opinion that it was law and not facts. The reading was assigned as prejudicial error by the defendant; but the Supreme Court overruled the assigument, finding that the poem, having to do only with the saying that a criminal returns to the scene of his crime, related to no particular facts in the other case, and holding that it was within the province of the trial court's discretion as to what to allow to be read from a judicial opinion.[107] The holding on this point conforms to general authority.[108]

Numerous other closing remarks of the district attorney in *Marable*[109] were objected to and assigned as error; but the court, while disapproving of them, in view of the fact that they were made in a long and heated trial of an important case characterized them as "perfectly human and natural" and assumed in the absence of a show-

103. 319 S.W.2d 246 (Tenn. 1958).
104. *Supra* note 102.
105. Dietzel v. State, 132 Tenn. 47, 78, 177 S.W. 47 (1915).
106. *Supra* note 102.
107. *Accord,* Bright v. State, 191 Tenn. 249, 232 S.W.2d 53 (1950); Davis v. State, 161 Tenn. 23, 28 S.W.2d 993 (1930); Smithson v. State, 127 Tenn. 357, 155 S.W. 133 (1912).
108. 5 WHARTON, *op cit. supra* note 78, § 2089.
109. For example, he stated in effect that for two hours defense counsel had engaged in a tirade of vilification of every witness who had testified for the state and referred to defendant as having a "sphinx-like" countenance.

ing of prejudice that they were disregarded by the jury as exaggerations of heated argument.

(d) Instructions.—When the state relies entirely upon circumstantial evidence in a felony case, is it reversible error for the trial judge to fail to charge the jury with regard to such evidence in the absence of a special request therefor? The court, having previously answered this question in the affirmative,[110] was requested to reverse two cases in 1958[111] on the basis of that position. However, the rule was held inapplicable in each instance because there was direct evidence in the record to sustain the state's case.

On the other hand, refusal to give instructions that "I charge you further that before you would be warranted in convicting the defendants upon circumstantial evidence, the evidence must be such as to exclude every other reasonable hypothesis or explanation, except that of guilt" was held justified where there was ample direct evidence of guilt because such incomplete instructions might mislead the jury into thinking that the case was exclusively circumstantial.[112]

In the *Tines*[113] case defendant complained that the trial court did not charge the jury, although not requested to do so, as to the weight and sufficiency of a confession admitted into evidence and that confessions are to be received and considered with extreme caution. An early Tennessee case cited by counsel in support of this proposition, although not holding such instructions required, at least indicates an opinion that they would be proper;[114] but the court interpreted it as relating only to the trial judge's duty in making his preliminary ruling as to the admissibility of an offered confession to determine that there is credible evidence that such was made and made voluntarily. To the contrary, the court held that after admission, it is the sole province of the jury to determine the weight and credibility of a confession and that any attempted instruction as to the weight to be given it would be error.[115] And an instruction stating that it was the

110. Such instructions were held essential in homicide cases in Webb v. State, 140 Tenn. 205, 203 S.W. 955 (1918), 15 A.L.R. 1034 (1921) and in a subsequent larceny case, to all felony prosecutions. Bishop v. State, 199 Tenn. 428, 287 S.W.2d 49 (1956).

111. Wooten v. State, 314 S.W.2d 1 (Tenn. 1958); Gray v. State, 313 S.W.2d 246 (Tenn. 1958).

112. Pierce v. State, 315 S.W.2d 271 (Tenn. 1958).

113. *Supra* note 102.

114. "And it is the opinion of this Court . . . that whenever it [evidence of confession] shall be offered it may be examined with the anxiety just mentioned, and, when submitted to the jury, be accompanied with observations which in legal contemplation characterize it." State v. Fields, 7 Tenn. 145, 148 (1823).

115. See also Espitia v. State, 199 Tenn. 696, 288 S.W.2d 731 (1956), in which the court indicates that instructions of this sort are improper from a constitutional standpoint. "The Judges shall not charge juries with

judge's duty alone to determine from all the circumstances whether a confession should be admitted, but the jury's to determine credibility, was sustained in the *Wooten*[116] case as not implying to the jury that they must believe it is true merely because the judge allowed it in evidence.

Objection was further made in *Wooten* to the following charge:

> What the proof may show you, if anything, that the defendant has said against himself is admissible against him and may be considered along with all the other facts and circumstances in the case in the manner heretofore explained to you but anything he has said in his own behalf you are not obliged to believe but you may treat the same as true or false when considered with a view to all the other facts and circumstances in the case.

The court, however, upheld it, distinguishing somewhat similar instructions held erroneous in 1956 in *Espitia v. State*[117] on the grounds that the jury was told in *Espitia* in effect that they *must* believe anything that the defendant had said against himself was true but that "anything that he has said in his own behalf, you are not obliged to believe, but you may treat the same as true or false when considered with a view to all other facts and circumstances in the case."[118] *Wooten,* then, clarifies the prior holding by pinpointing the error in the first part of the *Espitia* instructions since the latter part of the respective instructions are identical.

When two or more grades of an offense are included in an indictment but there is no evidence to support a lesser included offense and, therefore, the accused can be guilty only of the greater offense or of none at all, the court continues to hold[119] that it is not error to refuse to instruct on the lesser included offense, despite a statute[120] which, on the face, would appear to make such an instruction mandatory in felony cases even when not requested.

(e) Verdict.—Tennessee trial courts having no authority to direct a verdict,[121] it is, of course, not error to overrule a defendant's motion for such[122] even where the supreme court finds there was no evidence

respect to matters of fact, but may state the testimony and declare the law." TENN. CONST. Art. 6, § 9.

116. *Supra* note 102.

117. 199 Tenn. 696, 288 S.W.2d 731 (1956).

118. 199 Tenn. at 698.

119. Baker v. State, 315 S.W.2d 5 (Tenn. 1958). The precedents go back at least as far as Good v. State, 69 Tenn. 293 (1878).

120. "It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." TENN. CODE ANN. § 40-2518 (1956).

121. *E.g.,* Taylor v. State, 191 Tenn. 670, 235 S.W.2d 818 (1950), *cert. denied,* 340 U.S. 918 (1951).

122. Solomon v. State, 315 S.W.2d 99 (Tenn. 1958).

to sustain a verdict of guilty. In the latter event, as in *Sherrill v. State*,[123] the case is remanded not to direct the lower court to enter a verdict of not guilty but with the suggestion that the district attorney nolle the case if no further evidence is produced.[124]

In *McKinney v. State*,[125] the defendant had been indicted for an assault with intent to commit murder in the first degree. When the trial jury brought in a verdict of guilty of "1st degree manslaughter" the judge rejected it as not responsive to the indictment or the evidence. The jury retired again and then reported a verdict of "guilty of assault with attempt to commit 1st degree manslaughter," which was accepted. Defendant's contention that the latter verdict likewise was not proper was overruled by the supreme court. The court labeled the "1st degree" prefix "pure surplusage" amounting to nothing as there are no degrees of manslaughter in Tennessee except voluntary and involuntary; and it agreed with the state that, since there is no such offense in Tennessee as an assault with intent to commit involuntary manslaughter,[126] the verdict was not indefinite because the only offense that the jury could have had in mind was assault with intent to commit manslaughter. And the court had long held that a charge of assault with intent to commit murder in the first degree embraces, among others, assault with intent to commit voluntary manslaughter.[127] Apparently, although not so stated, the court equated the word "attempt" in the instant verdict with "intent."

(f) Motions after Verdict.—It was assigned as error in *Marable v. State*,[128] a homicide case, that a new trial should have been granted because of newly discovered evidence—an affidavit that affiant had seen the deceased alive three days after state witnesses had last so seen him. Such evidence was held by the supreme court not to be grounds for a new trial because it was cumulative, not newly discovered, in view of the trial testimony of a defense witness to the same effect. However, it is pointed out by Professor Morgan that, whereas this decision is supportable inasmuch as there was abundant circumstantial evidence here supporting the judgment of conviction, the test applied in a close case is whether such "new" evidence would be likely to affect the result.[129]

123. 321 S.W.2d 811 (Tenn. 1959).
124. Trial courts in other states are generally authorized to direct verdicts of not guilty. 5 WHARTON, *op. cit. supra* note 78, § 2075.
125. 319 S.W.2d 246 (Tenn. 1958).
126. Shorter v. State, 147 Tenn. 355, 247 S.W. 985 (1922); Stevens v. State, 91 Tenn. 726, 20 S.W. 423 (1892).
127. Crockett v. State, 125 Tenn. 131, 140 S.W. 1058 (1911); Fuerst v. State, 115 Tenn. 357, 89 S.W. 955 (1905). See also, Stevens v. State, *supra* note 126.
128. *Supra* note 102.
129. Morgan, *Procedure and Evidence—1959 Tennessee Survey*, 12 VAND. L. REV. 1281 (1959).

8. Penalties.—Tennessee Code Annotated section 59-1035 provides in part that upon the third or subsequent conviction of driving while under the influence of an intoxicant or of narcotic or barbital drugs a fine of not less than $50 and confinement of not less than sixty days is required, an increased penalty over that specified for first offenders. This statute concludes: "provided further that in the prosecution of second and subsequent offenders the indictment or presentment need not allege any prior offense but it shall be sufficient for the proof to show a prior conviction or convictions in order to warrant the imposition of the increased penalty." In *Frost v. State,*[130] defendant was indicted for driving while intoxicated, but the indictment did not allege a prior offense. However, during the introduction of its evidence, the state over defendant's objections introduced evidence of three prior convictions of defendant for driving while intoxicated. Upon conviction the jury fixed the punishment at a fine of $250 and a workhouse term of eleven months and twenty-nine days. On appeal, the supreme court, holding that the severity of the punishment set was affirmative evidence that the jury had considered the prior convictions, reversed and remanded, declaring the quoted provision of the statute unconstitutional as a denial of due process insofar as it purports to dispense with notice. This being the second time that such a provision in a Tennessee criminal statute has been stricken down,[131] it seems certain that it would be held invalid in any such statute upon challenge. But the instant decision is not to be taken as a holding by the state supreme court that the quoted provision renders the entire driving-while-under-the-influence act (sections 59-1031 to -1035) unconstitutional. The court had previously held that decisions invalidating a similar provision in the habitual criminal act did not nullify the whole act, it containing (as does the act under consideration here) a severability section, and enough remaining of the act after elision of the objectionable provision for a complete law capable of enforcement.[132] A different result might be reached by federal courts, however.[133]

130. 314 S.W.2d 33 (Tenn. 1958).

131. Reliance was placed upon decisions holding such a provision as formerly contained in the habitual criminal statute (TENN. CODE ANN. § 11863.5 (Williams Supp. 1952)) unconstitutional. Rhea v. Edwards, 136 F. Supp. 671 (M.D. Tenn. 1955), *aff'd,* 238 F.2d 850 (6th Cir. 1956).

The court also cited as following the federal decisions, an unreported recent Tennessee Supreme Court case, Bailey v. State.

132. Bomar v. State *ex rel.* Boyd, 312 S.W.2d 174 (Tenn. 1958).

133. After the time period of this survey, the newspapers reported that the United States District Court for the Middle Disrict of Tennessee on July 10, 1959, declared the Tennessee habitual criminal act unconstitutional in its entirety in deciding In the Application of Charles Boyd for a Writ of Habeas Corpus, Civil Docket No. 2674. Nashville Tennessean, July 11, 1959. Although apparently the severability section of the habitual criminal act was not able

III. Recent Legislation

Acts of the 1959 Tennessee General Assembly having some effect on criminal law and procedure are summarized below, chapter references being to the Tennessee Public Acts of 1959.

Chapter 11 amends code section 39-4205[134] (permitting the trial court in all cases of convictions of petit larceny and for receiving stolen goods under the value of $60, on recommendation of the jury, to impose a fine and jail imprisonment instead of penitentiary punishment) to substitute $100 for $60 with regard to the receiving stolen goods provision.

Chapter 11 also amends section 39-4217 (specifying a penitentiary term of from three to ten years for receiving stolen goods over the value of $60) and section 39-4218 (specifying a penitentiary term of from one to five years for receiving such under the value of $60) to substitute $100 for $60 in both cases.

Chapter 13 amends section 40-3102 (authorizing a trial court "within 6 months after" sentence and penitentiary commitment to amend the judgment to allow the defendant credit on the sentence for any time during which he had been held in the county jail or workhouse pending arraignment, trial, and conviction) to substitute "at the time" for "within 6 months after." An additional paragraph now authorizes the supreme court, in the event an appellant is required to spend time in jail pending an appeal to that court, to modify the original sentence to allow a reduction for time so spent.

Chapter 16 amends section 38-306 (concerning peace bonds) to require security of not less than $250 nor more than $2,000 instead of "in such sum as the magistrate may direct," the previous requirement.

Chapter 24[135] provides that ministers of the gospel, priests, rectors, and rabbis over the age of 21 shall not be allowed nor required as a witness to disclose confidential communications properly entrusted to them in their professional capacities, unless waived by the communicating party. The violation of this prohibition by any such person is made a misdemeanor punishable by a fine of not less than $50 and a county jail or workhouse term of not more than six months.

Chapter 37 amends section 39-1211 (making it a misdemeanor for

---

finally to save any part of this act, one cannot determine from the newspaper's fragmentary report of the opinion in this as yet otherwise unreported decision whether doom of the entire driving-while-under-the-influence act is portended. The decision has been appealed, according to the district court clerk's office. Telephone conversation, October 13, 1959.

See also the concurring opinion of Justice Swepston in Frost v. State, 314 S.W.2d 33, 38 (Tenn. 1958).

134. Tenn. Code Ann. § 39-4205 (Supp. 1959). All subsequent section references, except as noted, are to the *Tennessee Code Annotated*, 1959 Supplement.

135. §§ 24-109 to -111.

one to loiter at night upon or about public school grounds) to make it apply also to the grounds of any church property.

Chapter 52 amends section 52-1201 to modify the definitions of "barbital" and "legend drugs." It also amends section 52-1205 (making the possession, selling, bartering, or giving away of such drugs in violation of previous sections a felony punishable by a penitentiary term of from one to five years or a fine of not less than $500, or both) to permit a court, upon a jury recommendation, to substitute in lieu of punishment in the penitentiary, fine and imprisonment in the county jail or workhouse.

Chapter 66[136] creates a radiological health service; makes it the duty of the commissioner thereof to adopt regulations pertaining to the manufacture, use, receipt, possession, storage, and disposal of radiation sources and declares that such regulations shall have the effect of law; authorizes the commissioner or his deputy to inspect radiation sources and to issue a notice of violation of this chapter or regulations promulgated under it; requires owners or possessors of radiation sources to register; and makes violations of this chapter or regulations promulgated under it a misdemeanor punishable by a fine of from $50 to $100 for each offense.

Chapter 76[137] provides that, if any person confined in a penal institution shall wilfully wound himself for the purpose, or with the effect, of escaping labor, he may be confined in solitary confinement or punished in other ways not inconsistent with humanity and that time spent in solitary confinement or in the hospital as a result thereof shall not be credited to such person.

Chapter 86[138] makes it a felony for one wilfully and maliciously to create falsely the impression that he has become deceased, punishable by a penitentiary term of from one to five years, or, upon a jury recommendation, by fine and imprisonment in the county jail or workhouse as provided for misdemeanors in general by the code.[139]

Chapter 109, effective September 1, 1960, creates in each county in Tennessee (with the exception of Polk,[140] Johnson, Humphreys, Stewart, Hancock, Gibson,[141] Sevier, and Perry[142] Counties) a court of general sessions,[143] vests it "with all of the jurisdiction and . . . authority conferred by law upon justices of the peace in civil and

136. §§ 53-3301 to -3313.
137. § 41-723.
138. § 39-1947.
139. TENN. CODE ANN. § 39-105 (1955).
140. Tenn. Pub. Acts 1959, c. 265, TENN. CODE ANN. § 16-1101 (Supp. 1959).
141. Provision was subsequently made for a Court of General Sessions in Gibson County by private act. Tenn. Priv. Acts 1959, c. 328.
142. Tenn. Pub. Acts 1959, c. 255, TENN. CODE ANN. § 16-1101 (Supp. 1959).
143. § 16-1101.

criminal cases, suits and actions,"[144] and makes its jurisdiction co-extensive with the county,[145] jurisdiction of which justices of the peace are at the same time divested. This court is specifically given jurisdiction over misdemeanor cases in which the defendant pleads guilty or requests a trial upon the merits and expressly waives in writing an indictment, presentment, grand jury investigation and jury trial; but it has no jurisdiction over misdemeanors for which the minimum punishment is a fine of more than $50; and it may not in any case impose a fine in excess of $50.[146] It is the judge's duty to advise each defendant of his constitutional rights to be represented by counsel, to be tried only upon presentment or indictment by a grand jury, to make (or to waive) a statement in reference to the accusation, and to a jury trial, and no defendant may be tried in this court until he has waived in writing these rights.[147] Provisions are made for bail and for forfeiture upon default.[148] A criminal docket and a minute book must be kept and certain entries must be made therein.[149] Provision is made for appeal to the next term of the court having criminal jurisdiction in the county, and such appeal is to be tried without indictment and presentment upon the original warrant by the judge without a jury unless the defendant demands a jury.[150] This chapter does not, however, affect the powers, jurisdiction or provisions governing courts of general sessions created by private acts of the General Assembly[151]—in thirteen counties in 1959 (subject to local approval)[152] and in thirty-nine other counties previously.[153] In the event such courts are created by private acts after September 1, 1960, it is provided that each shall have the powers and jurisdiction

144. § 16-1104.
145. § 16-1104.
146. § 40-118.
147. § 40-423.
148. § 40-424.
149. § 40-425.
150. § 40-426.
151. § 16-1124.
152. The thirteen counties, and in each case the chapter number of the Tennessee Private Acts of 1959 creating the court of general sessions in that county, are as follows: Crockett (c. 274); Carroll (c. 282); Chester (c. 292); Gibson (c. 328); Henry (c. 171); Jefferson (c. 68); Loudon (c. 57); Roane (c. 77); Smith (c. 34); Rhea (c. 347); Van Buren (c. 218); Cannon (c. 320); and Pickett (c. 225). Whereas Cannon and Pickett counties each previously had no county judge, the chairman of the county court being the chief administrative officer, the private acts applying to them respectively create the office of county judge with general sessions jurisdiction.
153. Bedford, Bledsoe, Blount, Bradley, Campbell, Carter, Clay, Cocke, Davidson, Dickson, DeKalb, Hamblen, Hamilton, Hardin, Henderson, Hickman, Jackson, Knox, Lawrence, Lincoln, McMinn, Macon, Madison, Marshall, Maury, Montgomery, Putnam, Robertson, Rutherford, Scott, Shelby, Sullivan, Sumner, Tipton, Trousdale, Warren, White, Williamson, and Wilson Counties. Tennessee Legislative Council Committee, *Index to Legislation Introduced 81st General Assembly 1959,* Appendix I, p. 35 (1959).

presently conferred by statute and any additionally conferred by the creative act.[154]

Chapter 132 amends section 13-310 (making it a misdemeanor to transfer lots in unrecorded subdivisions) to make it a misdemeanor also falsely to represent to a prospective purchaser of real estate that roads or streets will be built by a county or other political subdivision.

Chapter 151 amends section 39-4904 (making it a misdemeanor to sell or dispose of dangerous weapons, punishable by a fine of from $100 to $500 and a jail sentence of from one to six months) to provide that the jail sentence shall be in the discretion of the trial judge.

Chapter 165 also amends section 39-4904 to exempt from its operation licensed dealers in firearms, except sales by them to aliens, fugitives, persons of unsound mind, minors, drunkards, drug addicts, and persons who have been convicted of certain kinds of crimes, and persons eligible to purchase a pistol or sidearm in occasional sales of used guns legally purchased without being licensed to do business as such. In any case of sale of firearms, however, advance notice is to be filed with the county sheriff or city chief of police; and if no objection is made within three days that such sale is illegal, the sale may be consummated and the gun delivered with bill of sale. Section 39-4910 (making it unlawful to sell or give away pistol cartridges) is repealed by Chapter 165.

Chapter 197 makes it unlawful for a peace officer or his deputy, or any county official, to act as a professional bondsman, directly or indirectly.[155] It further makes bondsmen convicted of a felony within the preceding five years unacceptable as surety.[156]

Chapter 207 repeals section 37-264, enacted in 1955, which made any child sixteen years of age or older who has been declared a delinquent and committed to a state institution for such and who subsequently commits a felony there or after release therefrom subject to a court determination that he is incorrigible and in the court's discretion to be remanded to the circuit or criminal court of the county where the felony was committed to be tried and subjected to judgment as if he had been eighteen years of age or older when the felony was committed.

A new section 37-264 is substituted by Chapter 207 for the repealed section. It authorizes the juvenile court to hold a child sixteen years of age or older for prosecution and sentencing as an adult in the court that would have jurisdiction if he were an adult when (a) he is alleged to have committed an act that would have been a

154. § 16-1124.
155. § 40-1413.
156. § 40-1414.

felony if committed by an adult and if a finding is made that he is not reasonably susceptible to the corrective treatment of any available institution in the state for children or that the safety of the community requires his restraint for a period extending beyond his twenty-first birthday; (b) in the custody of an institution for delinquent children he commits an act found to be harmful to the other children or disrupting of the institution's program, if he is found not reasonably susceptible to corrective treatment in available institutions for children. It is further provided that if subsequently such a child is charged in any juvenile court with what would be a felony or misdemeanor in the case of an adult, the court after summary review may waive jurisdiction and order him held for prosecution and sentencing as an adult by the court which would have jurisdiction of such offense if committed by an adult.

Chapter 234[157] makes it a misdemeanor for one maliciously to injure, destroy, or remove the real or personal property of another, punishable by a fine of from $2 to $50.

Chapter 235[158] makes it a felony for one to communicate false and malicious reports suggesting that a bomb or any similar device has been placed in or near any building or structure, or so to suggest that an explosion may occur in or near any building or structure, punishable by a penitentiary term of from one to five years.

Chapter 236[159] modifies state anti-sedition laws to make it a felony for one knowingly or wilfully to advocate or teach, or to publish, distribute, or display printed matter advocating or teaching, the propriety of overthrowing the state or national government by force or violence, or to attempt the foregoing things, or to organize or to help or to attempt to organize a group that teaches or advocates such action, or who becomes or is a member of such group knowing its purpose, punishable by a fine of not more than $10,000 or a penitentiary term of not more than ten years, or both. One convicted of violating this statute is also made ineligible for employment by the state for the next five years following his conviction.

Chapter 241[160] requires search warrants to be issued in the original, and with two exact copies, one of which is to be left with the person or persons served and the other to be kept in the issuing officer's records. The issuing officer is required to indorse the warrants with the hour, date, and name of the officer to whom delivered for execution. Exact copies are made admissible in court. Failure to comply

157. § 39-4534.
158. § 39-1411.
159. § 39-4405.
160. § 40-518.

makes any search conducted under such warrant an illegal search or seizure.

Chapter 273 amends section 39-4503 (making the dumping of refuse under certain conditions a misdemeanor punishable by a fine of not less than $25) to broaden its application to include public parks and playgrounds and to make the offense punishable by such fine or by a jail or workhouse term of ten days or by both.