1918

Criminal Law in Kentucky

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Recommended Citation
Howe, John J. (1918) "Criminal Law in Kentucky," Kentucky Law Journal: Vol. 6 : Iss. 5 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol6/iss5/3

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During the year 1917, the Court of Appeals decided eighty-five cases of a criminal nature in which the Commonwealth was a party. In seventy-six of these the accused appealed. Judgments of the lower courts were affirmed in fifty-seven and reversed in nineteen of these. In nine cases appeals were taken by the Commonwealth for a certification of the law. Four of these were affirmed but in five the law was certified.

"In the State of Kentucky the appeal in a criminal or penal case was not allowed prior to the year 1853, but the right was then conferred by statute, and has ever since existed by legislative sanction, subject to certain conditions and limitations imposed by the same power." Consequently an attempt by consent of parties to give jurisdiction to the Court of Appeals to review the judgment of a Circuit Court quashing an indictment is frowned upon by the higher court and their appeal is dismissed.

Section 281 Cr. Code, prevents review on propriety of quashal. Commonwealth v. Starrett, 175 Ky. 89, 193 S. W. 1044.

"Likelihood to deceive, as an element of forgery, depends not upon the skill with which the forgery is executed, but upon the character of the instrument forged. It must be a writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability; but, whether the similitude of the signature with the genuine is such as would be likely to deceive is wholly immaterial."

The court in certifying the law in Commonwealth v. Fenwick, 177 Ky. 685, 198 S. W. 32, refuses to review two of the questions submitted for determination because they were not decided adversely to Commonwealth by court below. This case, as well as

†Carrollton, Ky., President Commonwealth Attorney's Association, 1917.
Commonwealth v. Brand, 166 Ky. 753, should be kept in mind when attempting to perfect appeals for the Commonwealth.

In Burgess v. Commonwealth, 176 Ky. 326, 195 S. W. 445, a conviction is reversed on account of erroneous instructions. Sec. 1242 does not embrace a lower degree of Sec. 1166 where the offense is striking with a deadly weapon, 1242 covering cutting, thrusting and stabbing only. Here the injury was inflicted by striking with a tobacco hook and the jury was erroneously instructed under 1242 and no assault and battery instruction was given. The court says that the omission of the word "strike" from 1242 was evidently an inadvertence on the part of the Legislature. Erwin v. Commonwealth, 96 Ky. 422, 29 S. W. 340, 16 Rep. 602, and other cases cited, are followed.

A verdict of $275.00 in an assault and battery case was affirmed in Lyons v. Commonwealth, 176 Ky. 657, 197 S. W. 387. An automobile was the vi et armis used. The indictment was sufficient; although the word "willfully" was omitted, it was included in the word "maliciously" which was used. Defendant's motion for a continuance was not improperly overruled. The newly discovered evidence was merely cumulative and did not warrant a new trial.

"The Commonwealth Attorney, perhaps, overstepped the bounds of strict propriety in the statement of the case and in the argument at the conclusion of the trial, but we do not find the statements alleged to have been made by him to be far from the facts as found in the evidence, and the statements were therefore not prejudicial to appellant."

Smith v. Commonwealth, 175 Ky. 286, 194 S. W. 367, is particularly interesting because the defendant is his own lawyer. He seemed to think he could run his touring car on a last year's license and "get by" with it because he was paying an ad valorem tax on his machine. Defendant skillfully presents his contention of invalidity of the statute for not measuring up to the requirements of the Kentucky Constitution and the Federal Constitution. Judge Hurt, in an exhaustive opinion, shows defendant's points not well taken and affirms conviction of guilty of violation of Sec. 2739, subsection 31, Ky. Statutes.
Long v. Commonwealth, 177 Ky. 391, 197 S. W. 843, affirmed a conviction for assault and battery although trial was had in defendant’s absence, the charge being a misdemeanor.

“We find no merit in appellant’s plea of former conviction. The person assaulted was a witness before the Grand Jury empaneled by the Breathitt Circuit Court, and then in session, and the assault was made because of his testimony concerning appellant. Therefore, in committing the assault, appellant was guilty of two separate and distinct offenses; one against the dignity of the court which the court had the inherent right to protect by punishment for contempt, the other against the peace and dignity of the Commonwealth which the Commonwealth had the right to punish as a violation of its laws. For this reason, it is the established rule, that a defendant who is guilty of an act which is a contempt of court and also a crime, may be proceeded against both by summary process and by indictment and neither proceeding will bar the other.”

Commonwealth v. Rasner, et al., 175 Ky. 133, 193 S. W. 1011.

Judge Sampson reverses the lower court and holds that parties to a recognizance or bail bond are estopped by execution of it, to deny the truth of the recitals it contains.

Subsection 4 of Sec. 199b (transacting business under an assumed name) excludes from the operation of the statute “the lawful use of the partnership name or designation, provided that such partnership name or designation shall include the true, real name of at least one of such persons transacting business.” Consequently W. B. Siler and J. P. Mahan, doing business under name Mahan & Company, were not violating the law and judgment dismissing indictment is affirmed in Commonwealth v. Siler, 176 Ky. 802, 197 S. W. 453.

“If it should be thought that this interpretation practically annuls the purpose of the Legislature in enacting the law we would not be disposed to deny it, but we can console ourselves with the reflection that the court is not guilty of producing such result, for it is the excluding provisions of subsection 4 which curtail the scope and restrict the usefulness of the requirements of subsection 1 of the section.”
Like decisions from other states construing similar laws are quoted.

In Wilson v. Commonwealth, 174 Ky. 602, 192 S. W. 631, Kentucky Statute 1164, penalizing the breaking into warehouses, storehouses, offices, shops or rooms in a boat, is inapplicable to breaking into a "locker used as a storeroom." Conviction reversed and ordered demurrer be sustained.

The State of Kentucky, under its police power, has not the authority to fix rates of toll that an interstate bridge company may charge foot passengers. Such rates may, in the absence of congressional legislation on the subject, be fixed by the States of Ohio and Kentucky by identical and reciprocal legislation. Conviction of appellant for violating Ky. St. 845 reversed with directions to dismiss indictment in Broadway and Newport Bridge Company v. Commonwealth, 173 Ky. 165, 190 S. W. 715.

In a prosecution for burning a tobacco barn pursuant to a conspiracy, a verdict of guilty was held not palpably or flagrantly against the evidence but evidence held to show a motive for defendant's participation in the conspiracy. Conviction is therefore affirmed in Allen v. Commonwealth, 176 Ky. 475, 196 S. W. 160, wherein substantive evidence had been introduced in rebuttal rather than in chief, which is not always error but subject to the discretion of the court. Judge Bunk Gardner, employed before his election as judge, was one of the special attorneys representing the Commonwealth, the case being tried by a special judge. Certain statements of his argument to the jury were excepted to. One of them was: "That political harlot, that seller of post offices who bought a little newspaper here in Mayfield to oppose me when I was a candidate for Circuit Judge." This remark was in answer to a statement of accused's attorney outside of the record and equally unbecoming and according to court was sufficiently cured by admonition of the trial judge at close of the argument. The alleged prejudicial tendency of other similar remarks is likewise held to be negligible.

Sec. 1213a, known as the "cold check" law, does not conflict with 1189 regarding forgery. Hence it is not open to the objection of unconstitutionality and its provisions apply as well to an
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endorser as a maker. The delivery of the check, being the consummation of the offense, fixes the venue. Demurrer to indictment properly overruled and evidence of similar frauds to show motive and guilty knowledge properly admitted. Siegel v. Commonwealth, 176 Ky. 772, 197 S. W. 467.

In the second case, Siegel v. Commonwealth, 177 Ky. 232, 197 S. W. 809, accused entered a plea of former jeopardy so that the principal question was: "Did the act of the accused in uttering the two checks, at the same time and place and to the same person, constitute one offense or two offenses?" An apparently exhaustive reference is made to the Kentucky cases on the susceptibility of two indictable offenses arising from practically the same circumstances and the citations invite close study. The "concrete rule" finally arrived at is: "If what is set out in the second indictment had been proven on the trial of the first indictment, and they (the facts proven) sustain the indictment, then the two indictments are for the same offense. If what is set out in the second indictment, when proven upon the trial of the first, will not sustain it, then they are distinct offenses, and the conviction or acquittal of either is not a bar to the other." Applying that rule to the facts of this case, the conviction under the first indictment is no bar here.

Accused contended that as he was not the maker or drawer of the check he was not guilty under Sec. 1213a, but the court holds: "By the terms of the statute, the uttering or delivering of a check, with knowledge that the drawer of it has not funds in the bank upon which it is drawn sufficient to pay the check, is prima facie evidence of the intention to defraud."

It was also held that evidence that the bank on which the check was drawn was "authorized by law of the United States or any State of the United States or any foreign government," was unnecessary, as might be under Sec. 1189. Such allegation in the indictment was surplusage. No offer of payment within twenty days of actual notice, so instruction on that point was properly omitted. Judgment on verdict of two years affirmed.

Sec. 1358a purposely provides a penalty for the fraudulent conversion of property by one who had acquired its possession
lawfully by reason of some confidence or trust reposed in him by the owner. Prior to the enactment of this statute in 1902, such conversion was but a breach of trust and was not punishable criminally. The facts in Commonwealth v. Weddle, 176 Ky. 780, 197 S. W. 446, bring it within the inhibition of this statute. The amount involved is sufficiently alleged in the indictment and the evidence warranted submission to the jury.


In Commonwealth v. Harris, 177 Ky. 607, 197 S. W. 1271, the law is certified. A statement, Commonwealth contended should have been admitted as a dying declaration, is held properly excluded because declarant merely expressed an opinion to the effect that he would not get over the cutting whereas he should have expressed a recognition of impending dissolution. This of course need not be in direct terms, "I believe I am about to die." Statements of appellee attempted to be introduced by Commonwealth but excluded by lower court on ground that they violated the "anti-sweating act" held improperly excluded as they were voluntary and made with full and perfect knowledge of their nature and consequences.

A conviction for fraudulently certifying a claim by a road engineer under Ky. St. 1207, was reversed in Sanders, etc. v. Commonwealth, 176 Ky. 223, 195 S. W. 796. A conviction companion case charging false pretenses is reversed in Rand v. Commonwealth, 176 Ky. 343, 195 S. W. 802. Both were remanded. The indictments were sufficient. A demurrer to the indictment in the Sanders case was vigorously urged but overruled, the view urged being too narrow in insisting that no direct contractual relation existed between county and holder of alleged false statement. The crime is statutory and indictment substantially following language of statute is sufficient. The court holds if accused in such a case shows he acted in good faith the necessary element of fraudulent intent fails of proof. Many questions of admissibility of evidence are involved. The instructions to the juries in many particulars were erroneous. These two cases in-
volve much frenzied financeering between the Fiscal Court and contractors with road and bridge building and the subject matter and the cases, though interesting, are too complicated for further discussion here.

Those of us who heard Appellate Judge Sampson at our Association last year, did not, with surprise, read his opinion, affirming in Thomas v. Commonwealth, 175 Ky. 38, 193 S. W. 653. Appellant had been convicted of false swearing and some eight grounds were urged for reversal. In commenting on the proper overruling of the demurrer to the indictment, the Overstreet and other cases are cited and the law as to the sufficiency of an indictment thus stated:

“When an indictment sets forth the title of the prosecution, specifying the name of the court in which the indictment is pending, name of the parties, together with a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the rights of the case, and is direct and certain, with respect to the party charged, the offense charged, the county in which the offense is committed, the circumstances of the offense charged, if they be necessary to constitute a complete offense, the accused cannot be misled or deceived by it or fail to know what offense is charged against him, nor will the court be in doubt when it comes to pronounce judgment, even though the indictment may be phrased in inapt words, or the sentences may be ungrammatical and awkward, or the spelling be incorrect.”

Insufficiency of time for argument is the most potent ground urged for reversal and it is here held that “where the evidence is short, simple and easily understood, where there is no serious contradiction or confusion of the facts, we do not think that the court abused its discretion in limiting the argument on the trial to ten minutes.” Eleven principles are given in the head-notes as being decided by this case. In conclusion the opinion deplores false swearing as “the most common as well as one of the most dangerous crimes in the entire calendar.”

A conviction for false swearing is affirmed in Fugate v. Commonwealth, 177 Ky. 794, 198 S. W. 240. The defendant’s grounds
relied upon for reversal were variance and lack of sufficient evidence. Each is insufficient under the record, the court holds.

On the first point the Overstreet case (147 Ky. 471), the prosecutor's ever present help in time of trouble, is cited and quoted approvingly and it is held that the substance only and not the exact words of the indictment need be proven.

Commonwealth v. Ashby, 175 Ky. 155, 193 S. W. 1029, reverses the lower court in sustaining a plea of former conviction and giving a peremptory instruction to find defendant not guilty. Defendant was indicted for gaming "on the —— day of July, 1916, and before the finding of the indictment," and had therefore, on plea of guilty, been fined for gaming "on —— day of July, 1915." The higher court holds that "inasmuch as the date was specified and the defendant entered a plea of guilty thereto, he cannot be heard to say that he intended to plead guilty to an offense committed on any other day than the one alleged in the indictment to which he entered the plea of guilty."

The "—— day of July, 1915" is held to be a definite and certain date.

Upon the trial of a plea of former conviction the burden is upon the accused to show that he has been convicted of the identical offense for which he was being tried; and, the burden of avoiding the plea by showing fraud or collusion on the part of the accused, his friends, or confederates in obtaining the conviction is upon the Commonwealth. In Commonwealth v. Crowder, 177 Ky. 268, 197 S. W. 643, the Commonwealth admitted that the facts in the two prosecutions were the same and grew out of the same assault but omitted to introduce evidence to show that the first conviction had been obtained collusively. As the Commonwealth failed to avoid the plea, the court properly sustained it and dismissed the prosecution. Consequently judgment was affirmed.

Under Sec. 264 of the Criminal Code, providing that if an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or with part only, is included, the court, on a trial for horse
stealing, where there is evidence that the taking was without felonious intent, may authorize a conviction under Sec. 1256 of the Kentucky Statutes, punishing any person who unlawfully but not with felonious intention, carries away the property of another.

Conviction reversed on account of erroneous instruction and a correct instruction is submitted for guidance of the court in the retrial. The "feloniously" in the instruction was too far removed from the "converted to his own use" and there was an absolute omission of instruction on intention permanently to deprive. Ford v. Commonwealth, 175 Ky. 126, 193 S. W. 1026.

I doubt if the existing rights of the accused were prejudiced by this instruction and it seems to me that the case should have been affirmed.

A prosecution by information may be instituted in the Circuit Court only during a term of court. An information filed in clerk's office in vacation is not in compliance with Ky. St. 1141, and quashal of information is affirmed. Inferior courts, however, may issue summons at any time when information is filed. Commonwealth v. Burge, 176 Ky. 309, 195 S. W. 406.

Commonwealth v. Ruh, et al. (and Cody, et al.), 173 Ky. 771, 191 S. W. 498. Judgment in each case affirmed. A Court of Chancery, at the instance of the Commonwealth, will not enjoin the use of a building for the mere sale of intoxicating liquors on Sunday, in the absence of statute authorizing the action, although the sale of liquors on Sunday is prohibited by law.

An appeal from a judgment of forfeiture of license under the Hutchcraft law is dismissed, it being a moot question in Bunning v. Commonwealth, 177 Ky. 155, 197 S. W. 542, the Court saying:

"As well said by counsel for the Commonwealth, if the action for the revocation of the appellant's license had been instituted by the Commonwealth's Attorney August 21, 1916, when Cook made the affidavit containing the information authorizing it, the evidence appearing in the record might have warranted the revocation of the license under which appellant was then doing business, as it was in force when the offense was committed and continued in force until October 1, 1916. But as the action was not brought until December 1, 1916, two months after the expiration of that license, nothing whatever was, or could be, accomplished
The penalty of a recognizance in sum of $1,000 entered into by defendants under subsection 3, 2557b, was successfully enforced by the Commonwealth's Attorney in a penal action. Held, that although no bond was signed the execution thereof was nevertheless efficacious. No exception was taken to requiring execution of the bond and objection cannot now be made that the records did not at the time show a second conviction of selling liquors. Such judgment cannot be collaterally attacked. The amount too is in court's discretion and not subject to review collaterally. Record shows defendant incorrigible and court's discretion not abused.

Acts 1916, C. 53, requiring one convicted of "bootlegging" to give a good behavior bond, does not increase the punishment for local option violations, and quarterly courts do not lose jurisdiction by reason of this amendment. Judgment of Circuit Court dismissing indictment for same offense when conviction had in quarterly court is affirmed.


Elkhorn Mining Corporation v. Commonwealth, 173 Ky. 417, 191 S. W. 256, conviction of knowingly permitting intoxicating liquors to be sold on premises, reversed. Indictment not aptly drawn under Sec. 2557, but demurrer was properly overruled.

No evidence of defendant's knowledge and peremptory instruction should have been sustained.

On an agreed statement of facts a distiller of brandy in Pulaski County who was the holder of a Federal license to sell spirituous liquors not guilty. The Commonwealth appeals in Commonwealth vs. Hubble, 176 Ky. 681, 197 S. W. 393, and the case is reversed. Hubble being a distiller could have legally received the same kind of spirituous liquor he was legally authorized to distil, to-wit: brandy, but that does not save him from the penalty of the statute, 2569b, if he had in his possession whiskey.
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Riley v. Commonwealth (three cases), 175 Ky. 33, 193 S. W. 657. An indictment whose accusatory part charges defendant with retailing intoxicating liquor in local option territory, and whose charging part alleges retailing liquor within two miles of Guthrie's chapel schoolhouse in violation of the local option law then and there in force and effect is good although it does not refer to the law by giving its title and day on which it became effective.

The statute is a public act and not a private act. Although not extending to all the State the law does extend to all persons doing an act within the territorial limits described therein.

Three convictions are affirmed.

Although defendant had no recollection of selling the liquor, the direct statement of prosecuting witness that he did is sufficient to support a verdict of conviction in spite of fact that the venue was not in terms proven. Keefe v. Commonwealth, 175 Ky. 51, 193 S. W. 645.

"In cases for violation of the liquor laws, the jury are not bound to accept as true the testimony of the accused or that of the witnesses in his behalf. They have the right to consider all the facts and circumstances in the case and may return a verdict of guilty if it is justified by the facts and circumstances developed in the evidence, although it may not be supported by direct evidence of guilt. For example, the direct evidence of Begley and his witnesses tended to show that he did not commit any offense under the statute, but in conflict with this there are the competent and relevant facts shown in the evidence that he was engaged in the unlawful manufacture of whiskey, and that Mrs. Creech got from him about one gallon of whiskey, and the establishment of these two facts was amply sufficient to sustain the finding of the jury. Lemon v. Commonwealth, 171 Ky. 822."

A moonshiner pretended that he gave about a gallon of whiskey to a sick friend and the court holds that this may be treated as a device to evade the law. Consequently conviction is affirmed in Begley v. Commonwealth, 176 Ky. 796, 197 S. W. 448.

O'Conner was charged with selling liquor in local option territory. His plea was former conviction. He had theretofore been found guilty of having other liquor in possession for sale and evi-
evidence of sale of the quart in instant case was admitted with proper instruction to show intent. O'Conner v. Commonwealth, 176 Ky. 673, 197 S. W. 405, is the second appeal, the original trial being in the quarterly court and appealed to the Circuit Court. The plea was declined in both courts and the ruling is upheld in the court of Appeals.

The act of 1916 making second conviction for "bootlegging" a felony applies where sales were made in geographical subdivision wherein the sale of intoxicating liquors had been prohibited by a local act of 1884. While counsel for appellant in Ingram v. Commonwealth, 176 Ky. 706, 197 S. W. 411, argued "with no small degree of force," that the law violated by appellant was not the local option law, but was the local law, nevertheless it goes without saying that the Legislature did not intend for the same second offense to be a misdemeanor in one division of the State and a felony in another. Appellant's motion for directed verdict, the court holds properly overruled.

The first conviction for unlawfully selling liquor in local option territory under the act of March 23, 1916, making the second offense a felony, is affirmed in Armstrong v. Commonwealth, 177 Ky. 690, 198 S. W. 24. The appellant insists that his demurrer should have been sustained and evidence of former conviction excluded, the former offense having been committed before the passage of the amendment, although the trial and conviction took place afterward.

The law is attacked as being ex post facto, the defendant insisting that

"The increasing penalty for the second offense, declared by the amendment of March 23, 1916, was only intended to apply when both the first and second offenses were committed after the amendment went into effect, June 18, 1916."

The court reaches the conclusion that:

"The increased punishment is not for the former offense, but the previous convictions merely aggravate the last offense and add to its punishment."
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Judge Cooley's work on Constitutional Limitations is quoted in support of this holding as is a substantially identical case from Oklahoma and others cited from West Virginia and Kansas.

In conclusion the court details the object of the act which

"Is to protect society from the repeated and flagrant violations of the local option law by a lawless class of persons who infest every community of the State, and whose occupation of 'bootlegging' can not be stopped short of the infliction of punishment by way of confinement in the penitentiary."

An indictment under Sec. 2557b was returned instead of under 2558a, which the facts warranted. Consequently the conviction of a licensed distiller of apple brandy for selling to one not a licensee is reversed. Holesapple v. Commonwealth; 177 Ky. 146, 197 S. W. 541.

Sixteen fifty-dollar judgments aggregating $800.00 for violating Sec. 1575 were affirmed in Adams Express Company v. Commonwealth, 175 Ky. 825, 195 S. W. 109, because an appeal does not lie in a case where the fine does not exceed $50.00. The fact that the several fines were included in a blanket judgment is immaterial, the judgments are nevertheless several and non-appealable.

Conviction for violating 2569b for delivering intoxicating liquor in local option territory affirmed in Adams Express Company v. Commonwealth, 177 Ky. 159, 197 S. W. 630.

Evidence that deliveries in such quantities and with such frequency as to put an ordinarily prudent person on notice that the liquors were not intended for personal use, was sufficient to take the case to the jury and to support its verdict. What information the agent, who delivered the liquor, had, before its delivery, with reference to its disposition by the consignee, was also admissible. Argument of counsel objected to, but in the main was proper and no prejudice resulted, as court admonished jury immediately in the one instance where there was no proof upon which the prosecutor's statement could be based.

The fact that defendant's agent was present in Police Court when a consignee of liquor was twice found guilty of selling
liquor in local option territory is admissible to show knowledge of common carrier that consignee was not selling the liquor for personal use only. That the convictions were afterwards reversed in the Circuit Court makes no difference. The omission of a word in the penal action clearly indicated by the context is immaterial. A conviction where fine of $200 for violation of subsection 2569b was assessed is affirmed in Southern Express Co. v. Commonwealth, 177 Ky. 767, 198 S. W. 207.

Adams Express Co. v. Commonwealth, 174 Ky. 296, 192 S. W. 56.

Conviction reversed on account of erroneous instructions. Charge was knowingly delivering liquor falsely marked in violation of 2569b. The essential things for Commonwealth to show are that the statement was false and that its falsity was known to the agent of the carrier or could have been known to him by the exercise of ordinary prudence. Corrected instructions are submitted.

Although the indictment charged that the local option law was in force in Perry County at time and Perry County is dry by special act of Legislature in 1883, the indictment is nevertheless good as the court takes judicial notice of this character of legislation. (Reed v. Commonwealth, 171 Ky. 225, 188 S. W. 365.) Adams Express Company v. Commonwealth, 177 Ky. 449, 197 S. W. 957, conviction reversed.

An indictment for the offense of transporting for and delivering to a minor intoxicating liquors, as created by the latter part of Subsection 1 of Sec. 2569b of the Kentucky Statutes must allege that the defendant at the time of the delivery knew that the consignee was a minor; but it is not essential that the Commonwealth should show actual knowledge of such fact on the part of the defendant or its agent, it being sufficient if the facts and circumstances developed by the testimony are such as to put an ordinarily prudent person on inquiry, which, if pursued, would develop the facts, in which latter case the jury would be authorized to find that the delivery was knowingly made.

Here company required Commonwealth to elect whether it was proceeding under Sec. 1306 or Sec. 2569b. Had the charge
been merely furnishing and not delivering as a common carrier it might not have been necessary under 1306 to allege knowledge. That is my personal opinion. I will also add as my opinion that insofar as Sec. 1 of Sec. 2596b forbids the delivery of liquor to a minor it applies only to such liquor as is delivered to a minor in local option territory for purposes of sale. My view is that Sec. 1 of Sec. 2569b and Sec. 1306 are not in every case inconsistent and that the former does not amend the latter and that the former insofar as it attempts to prohibit the furnishing of liquor to a minor, except for the purpose of sale, is unconstitutional on account of no reference being made to it in the title of the act. (See Commonwealth v. Thompson, 159 Ky. 8, 166 S. W. 623.) Had the Commonwealth in the instant case elected to prosecute under 1306, in my opinion, it would have been unnecessary to allege or show knowledge or local option territory or that the liquor was for sale.

Appellant was convicted of violating Subsection 2 of Sec. 2569b by delivering fourteen gallons of whiskey to Harlan Patrick. Conviction is reversed in Adams Express Company v. Commonwealth, 178 Ky. 59, 198 S. W. 556. There was a variance between the indictment and the evidence, but that did not affect the substantial rights of the appellant and no steps were taken to set aside swearing of jury or otherwise, so appellant cannot now complain. The jury, however, having found defendant guilty on the circumstance alone of delivering fourteen gallons of whiskey without any other incriminating facts or circumstances, the verdict cannot be sustained, so the upper court holds, in the absence of some evidence, circumstantial or direct, tending to show the guilt of defendant, as the statute does not limit the amount of liquor that the carrier may deliver for the personal use of consignee.

In my resume of decisions last year I suggested that one looking for points to resist the defense of insanity should master Davidson v. Commonwealth, 171 Ky. 488, 188 S. W. 631. A second chapter on insanity worthy of close reading is recorded in an appeal by the same defendant reported in 174 Ky. 789, 192 S. W. 846. After petition for rehearing was denied by Ap-
pellate Court which affirmed conviction, and after mandate had been filed, appellant filed application for lunacy inquest. This the court denied and the Appellate Court dismisses the appeal, because there is no statutory right for it, and it was no abuse of the lower court's discretion to refuse the inquest on the bare motion unaccompanied by affidavits, although the higher court holds that from a strictly humane standpoint a trial court might, in its discretion, entertain such a motion if properly supported. "It is obvious," says Judge Settle in the opinion, "that to permit convicts to arrest the execution of sentence imposed on them by demanding, as a matter of legal right, an inquiry into their mental condition, would be tantamount to granting them the privilege of thwarting the administration of criminal justice for an indefinite time."

The wife of B. E. Choate advised her husband that she had, at the solicitation of Henry Campbell, engaged in unlawful sexual intercourse with Campbell. At his trial for mayhem, Choate afterwards testified that he remembered having read in the Bible that no murderer should enter the Kingdom of Heaven so he did not yield to his first impulse to kill Campbell, but decided to emasculate him.

Mrs. Choate had made a written statement, reaffirming former oral statements admitting the immorality, and the next day, threatening Campbell with death, Choate compelled Campbell to accompany him in a buggy, and after driving some 200 yards from Campbell's house gave Campbell the choice between death and castration and Campbell chose the latter. Choate then handcuffed him, forced him to get out of the buggy and lie down and after performing the operation Choate drove away, leaving Campbell in the road. Choate's defense was insanity. The jury's verdict was guilty and punishment fixed at three years and four months in the penitentiary. Conviction is affirmed in Choate v. Commonwealth, 176 Ky. 427, 195 S. W. 1080.

That the jury reached its verdict by lot is one of the grounds advanced for reversal. An average of opinions was struck and by rising vote adopted, jury polled in open court and each answered it was his verdict. Same question up in Bennett v. Com-
Possibly the most delicate question involved in this rather indelicate case was the reversibility of incompetent evidence allowed over defendant's objection concerning interviews and visits of defendant with a woman other than his wife, which evidence had a tendency to show that possibly the relations between Choate and her were too intimate. The upper court says many of the questions were irrelevant and incompetent, but holds that neither this nor any of the other alleged errors prejudiced the substantial rights of the accused. This is rather a lengthy opinion and a most interesting case. The accused did not catch his wife in the act with prosecuting witness. Had he done so, and killed Campbell, the so-called "unwritten law" might have, through appeal to the jury, brought about his acquittal, but when the accused deliberately, after cooling time had transpired, after merely hearing of his wife's illicit relations, constituted himself the prosecuting witness, judge, jury and executioner and proceeded to put his man under duress and operate upon him in the particular manner described, then if sane, as found by the jury, he should not be entitled to a new trial because a few unprejudicial errors may have been committed.

A murder conviction was reversed in Day v. Commonwealth, 175 Ky. 540, 194 S. W. 797. Mrs. Day was not faithful to her husband. He died. She and her lover were jointly indicted, accused of poisoning the deceased. The Commonwealth attempted to show the death occurred from arsenical poisoning but the analyst, performing the autopsy and making examination of viscera, found no arsenic and indications pointed to death from species of Bright's disease, intestinal nephritis.

Much evidence of damaging statements made by co-defendant not in presence of appellant was erroneously admitted, defendants not being charged with conspiracy. The verdict is held to be palpably against the evidence and set aside. In substance the court concludes that proof of incontinence is not proof of murder. Judge Sampson dissents from the opinion.

"The fact that the jury, while considering the case, was permitted to witness a moving picture show, where the subject was
a woman being tried for the murder of her husband, need not be considered," says the court, "as it will probably not occur upon another trial."

In Mack Logan and Frank Tribble v. Commonwealth, 174 Ky. 80, 191 S. W. 676, conviction of two alleged conspirators in a murder indictment is reversed. Keach who was slain was the town marshal of Dawson. He was charged with a breach of the peace alleged to have been committed by striking one Rogers with a pistol while Rogers was a prisoner in his charge.

The constable with the warrant of arrest in seeking to execute it upon Keach was accompanied by Rogers and appellants. When demand was made by the constable for Keach to give up his pistol, Keach stepped back and pulled his pistol from its holster. Rogers fired at Keach and missed him, whereupon Keach fired at Rogers and killed him. In the struggle that followed Logan placed his pistol to his head and killed him. Erroneous instructions are the cause of reversal and a correct form is given for the next trial. Exclamation of bystander is held to be no part of res gestae, but act of one of defendants immediately after the deceased is shot, picking up latter's pistol and firing at another is admissible as part of res gestae to him and not his co-defendants. The defendants are guilty if they conspired to commit the murder, whether or not another who was present at the time and was killed by deceased fired the first shot. Witness at preliminary hearing may be impeached by one of Coroner's jury, although testimony not taken by stenographer. Held error to permit defendant to explain just what he said where he denied making exact statement as introduced.


Quite a review is made of cases on dying declarations and the evidence here is held to be admissible as such. "After all," says the court, "each case must depend upon its own facts, and if it is shown by the testimony, from circumstances, or from what the declarant may have said, that the offered statement as a dying declaration was made at the time when the declarant
was in extremis, and believed that he was approaching impending dissolution, it is admissible."

It was error, however, for the court to state to the jury, upon the admission of the dying declaration, that what the witness has stated shall be taken by the jury and weighed by it as though it had been testified to by the deceased in person before the jury, as this relieves the jury of passing upon the credibility of the witness to the dying declaration.

"While the jury was considering the case it came into the court room and asked the court if a prisoner under a life sentence was subject at any time to a parole from the board of prison commissioners. The court gave an affirmative answer to the question, and the jury retired to its room, and afterward returned the death verdict. This, if it occurred, was error, because the jury's verdict should not be influenced by what another department of the state government might or might not do, or had authority to do. It is to be guided only by the facts pertaining to the guilt or innocence of the accused, and the law applicable thereto."

A second appeal of Frashure v. Commonwealth, 176 Ky. 244, 195 S. W. 409 (heretofore reversed 169 Ky. 620, 185 S. W. 146) again results in reversal because "contrary to the former opinion of this court" the contents of a private writing were erroneously admitted.

"The evidence does not contain the slightest proof that the appellant wrote the letter or authorized its writing; neither is there anything in the evidence, which could authorize a jury to find that the appellant was the author of the letter or authorized its writing by another. The mere fact that the name of appellant was subscribed to the letter was not proof of the writing of it by him in the absence of any evidence which could connect him with its authorship, and the court should have sustained the objection of appellant to any proof of the contents of the letter."

The appellant, a cripple, was charged with the murder of his seventeen-year old niece who had been living with him about ten months and was pregnant at the time of her death.

The case is a most extraordinary one, says the opinion, and the appellant is either an innocent 'and much ill-used man, or
else he is a great criminal and deserving of the most condign punishment. It would seem that without the excluded evidence a conviction will be impossible.

On December 13, 1917, however, Frashure was again found guilty and given a life sentence. Newspaper accounts say this was the sixth trial given defendant, the murder having been committed in May, 1914. Three juries disagreed and three gave life sentences.

A Deputy Marshal of Prestonburg who made an arrest and killed a third party coming to scene of the arrest, was entitled to an instruction to the effect that he had a right to use such force as was reasonably necessary, or reasonably appeared to him to be necessary, to overcome the forcible rescue of the prisoner by the deceased. An instruction covering this theory is set out in full in the opinion for guiding the court at the next trial. A manslaughter conviction of twenty years is reversed. Smith v. Commonwealth, 176 Ky. 466, 195 S. W. 813.

Canter v. Commonwealth, 176 Ky. 360, 195 S. W. 825, affirms a conviction for manslaughter. The self-defense instruction did not in one phrase sufficiently emphasize that the “apparently necessary” should be from the accused’s standpoint rather than that of the jury. While more apt terms should have been used to define appellant’s rights, the instruction as a whole and the circumstances of the case make it impossible, so the court holds, for the appellant to have been prejudiced thereby. The same is true as to a second criticism for omitting the instruction covering the intention of accused, as to assault one with a pistol precludes the idea that the intention is not to kill or seriously injure. Alleged misconduct of juror and jailor is held immaterial. An obiter dictum condemns the permitting of a juror to hold a conversation over the telephone where the officer cannot hear what is said to the juror.

Breckinridge v. Commonwealth, 176 Ky. 686, 197 S. W. 395, affirms a manslaughter conviction as a sequel to a crap game which is apparently dignified as a society function, the negroes in the game being set out in the opinion after the familiar “among those present were.” A defendant cannot rely on the
Criminal Law In Kentucky.

Commonwealth having had a witness subpoenaed or recognized. The Commonwealth may afterwards release the witness. Consequently such reliance by defendant is not a sufficient showing of diligence to entitle defendant to a continuance. Exception was taken to underscoring in the instructions. The Court said:

"While it is better practice not to underscore any part of the instructions, we conclude that the underscoring of the words in question was not sufficiently prejudicial to the substantial rights of the defendant to authorize a reversal."

The language of the instructions is approved.

One of the most important murder cases before the Court of Appeals was McDonald v. Commonwealth, 177 Ky. 224, 197 S. W. 665.

The indictment was sufficient although it did not in terms allege that the defendant "did kill and murder" the deceased. The court's discretion in refusing a change of venue was not abused. The motion for continuance was not seasonably made nor substantially grounded. The defense being an alibi, omission to allow a view by the jury was negligible. Malice was properly defined and may be inferred from the proof.

Although the accused had been found guilty on circumstantial evidence only, nevertheless it was of such a convincing quality that the jury's verdict was not disturbed. This, in spite of the fact that there was some insistence on the part of defendant's counsel that one of the attorneys for the prosecution had made reference to the fact that the accused had not testified. The attorney denied and filed an affidavit accordingly. The trial court did not undertake to decide what was the exact language used but certified that on defendant's objection to the statement the Court admonished counsel that "no comment upon or reference to defendant's failure to testify could or should be made."

After setting out in detail the many incriminating facts in evidence, the higher court says:

"All these circumstances, which the defendant did not deny or explain, made his failure to testify so apparent to the jury, that this fact could not have received any additional emphasis
from counsel’s reference thereto. Indeed, the facts developed by the prosecution point so unerringly to the guilt of the defendant, that we have no doubt that the same verdict would have been returned by the jury had no reference of any kind been made by counsel to the fact that the defendant did not testify in his own behalf."

If defendant’s counsel is correct in the exact language used by the special attorney for the Commonwealth, this opinion disregards the spirit of Tines v. Commonwealth, 25 Ky. L. Rep. 1233, 77 S. W. 363. There the Court held that the lower court erred in giving a written instruction that “they shall not comment upon the failure of the defendant to testify; neither shall they draw any presumption of guilt from his failure to testify.” The Tines opinion holds that: “Appellant was entitled to absolute silence on his failure to testify.” In the instant case the accused did not get that “absolute silence” that the Tines case says he was entitled to because, the trial judge admits here that he in substance stated to the jury orally what the Tines case forbids in writing. Reference to these things is made not for the purpose of criticising the McDonald opinion but for the purpose of criticising the Tines opinion which I believe should be overruled outright.

Sub. 1 of section 223 Criminal Code reads as follows:

“That in all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or be allowed to create any presumption against him or her.”

In order that the jury may know that the defendant’s failure to testify shall not be commented upon or allowed to create any presumption against him they certainly should be reminded of the fact that such is the law or else they may arrive at their verdict unlawfully, to-wit, by commenting on that fact and arguing among themselves that such is a common sense presumption of guilt. The Tines opinion says the defendant is entitled to “absolute silence” on his failure to testify.

Many States have a statute almost the same as ours.
In Illinois "When defendant does not testify it is reversible error to refuse to instruct the jury that no presumption of guilt should be indulged against him on that account, as is provided by Rev. S. c. 38, para. 426." Farrell v. People, 133 Ill. 244, 24 N. E. 423.

In Washington the statute makes it "the duty of the court to instruct the jury that no inference of defendant's guilt is to be drawn from the fact of his not testifying, and it is error to omit the instruction, tho his counsel does not ask for it." Linbeck v. State, 1 Wash, St. 336, 25 Pac. 452. State v. Myers, 8 Wash. St. 177, 35 Pac. 580, 756.

In Texas the instruction is made imperative by statute but "It is in the court's discretion to refer to defendant's rights, and it will not be presumed that he was injured by a correct statement of the law." Fulcher v. State, 28 Tex. App. 465, 135 S. W. 750.

Other courts of jurisdiction whose statutes are silent as to instruction of jury on the point, hold the instruction proper.

State v. Carnagy, 106 Iowa 483, 76 N. W. 805.
State v. Skinner, 34 Kan. 256, 8 Pac. 420.
State v. DeWitt, 186 Mo. 61, 84 S. W. 956.
Lillie v. State, 72 Neb. 228, 100 N. W. 316.
State v. O'Grady, 65 Vt. 66, 25 Atl. 905.

Our statute forbidding such comment or presumption is not founded on common sense and should be repealed. When it is the law, to say that it is reversible error to tell the jury that it is the law is certainly ridiculous. As I see it the only error in the McDonald case was failure of the court outright to overrule the Times case.

Henry A. Forster in Nov. 1917 Docket, says:

"In Great Britain and Australia the trial judge in any criminal case where the defendant elects to stand mute (or fails to testify in his own behalf) may and generally does charge the jury that they may consider the defendant's failure to testify in his own behalf. New Jersey is the only American State where the trial judge may do this."
A defendant's failure to testify in his own behalf is not a ground for a new trial. This novel contention is considered in an affirmance of a murder conviction. Ferrell v. Commonwealth 176 Ky. 330, 195 S. W. 495. The fact that defendant wished to testify and his counsel advised against it makes no difference. Nor is the rule different because defendant's counsel were appointed by the court and not of his own selection and employment. Sec. 271 does not embrace such a contention in "or from any other cause."

Miller v. Commonwealth, 175 Ky. 241, 194 S. W. 320 affirms a conviction of murder. Although incompetent evidence was introduced and the instructions were "inaccurate in at least two respects" (according to the opinion) nevertheless the substantial rights of the defendant were not prejudiced. The making by a juror of a brief memorandum of some of salient points of the testimony is not, in itself, such misconduct as would authorize a reversal.

In Flemming v. Commonwealth, 175 Ky. 655, 194 S. W. 788, a conviction of murder is affirmed. Former conviction is properly alleged in indictment, statement by decedent properly admitted as dying declaration and the instructions were not in any particular prejudicial to accused and not erroneous in form although propriety of some under the evidence might be subject to question.

Little v. Commonwealth, 177 Ky. 24, 197 S. W. 514, to the high court

"Seems to be a case where two arch enemies to the peace and happiness of humanity (whiskey and a pistol) met, and, co-operating, produced what is too often the case, a homicide. While we might sympathize with the unfortunate defendant because of the condition into which his conduct has brought himself, we do not think that the reasons assigned and urged for a reversal of the judgment are sufficient for that purpose."

A life sentence given by jury to appellant, a white man, for killing a negro is affirmed, the verdict not being flagrantly against the evidence, there being evidence to support it.
A life sentence of Pearl Johnson for murder is affirmed in Johnson v. Commonwealth, 176 Ky. 339, 195 S. W. 818. Appellant's testimony below as to her being under 18 years of age at time of alleged crime is not sufficiently direct, whereas the Commonwealth's testimony showed conclusively that she was over 18. Hence attempt to resort to Juvenile Court was futile.

The affirmance of this conviction on the verdict of a Kentucky jury makes an editorial in the Courier-Journal of Aug. 10, 1917, even more interesting, especially now since Mrs. deSaulles has been acquitted:

"Women in America, who commit murder may not always, or as a rule, take life with their eyes wide open to the improbability of punishment but all of them might, if unperturbed by qualms of conscience after the crime, be as calm and as contemptuous of those who take murder seriously, as Mrs. deSaulles is represented as being.

"The jury system, admirable in many respects, and better, taken by and large, than any other means of trying persons charged with crime, is almost completely a failure in this country as an instrument for the punishment of women guilty of murder.

"Women who commit murder in America are, with apologies to a novelist for a paraphrase of his title, mere casuals of the courts."

While a defendant was being tried on a charge of carnally knowing a female under the age of 16 years, and after evidence had been introduced the court allowed an indictment just returned by the Grand Jury changing the charge to detaining a woman against her will with intent to have carnal knowledge of her. Consequently Head v. Commonwealth, 174 Ky. 841, 192 S. W. 861, reverses trial court as the latter charge is not a lower degree of the former.

"We are clearly convinced that the action of the court in permitting the new indictment to be returned and substituted for the old one and in proceeding with the trial with the same jury and considering the testimony theretofore heard, was clearly at variance with the rules of practice in criminal procedure prevailing in this and other jurisdictions, and to such an extent as that we are unable to give our sanction to it."
J. W. Frierson, who claimed to be a preacher, was found guilty of criminally knowing a female under 16 years of age, and conviction was affirmed in Frierson v. Commonwealth, 175 Ky. 684, 194 S. W. 914. This indictment in the accusative part charged rape and in the descriptive part charged criminally knowing a female under 16 years of age and omitted the words, "forcibly and without her consent." A demurrer was interposed but overruled.

After discussing the common law rape and sections 1152 to 1155 inclusive, "the indictment, in the instant case," the court says, "charges that character of rape which at the common law was accomplished by the nominal consent of the female and without violence or actual force by the perpetrator, and which, from the facts, the law conclusively presumes force on the part of the ravisher and absence of consent of the victim. Hence, it would be idle in such an indictment to charge that the offense was committed forcibly and without the consent of the infant, as both averments would be only surplusage. The indictment contains a statement of all the facts necessary to constitute the crime and the demurrer was therefore properly overruled."

The defendant also claimed failure of proof of venue. "True, no one directly testifies that the crime was committed in Fayette County, but all of the evidence is to the effect that both appellant and victim, upon whom it is alleged that he committed the crime, resided in Fayette County, at the time and long before and after the crime was committed, and there is no evidence which shows that they were ever together at any place, except in that county, and hence, if the crime was committed at all, it must necessarily have been in Fayette County. The evidence is sufficient to permit the jury to infer from it that the offense was committed in Fayette County and sufficient to support the allegation in the indictment, which fixes the venue of the crime."

This is probably about as strong as any case on proof of exact venue not being essential.

As the corpus delicti was proven, the age of the girl and her death during childbirth were established, the confession of defendant was supported by the "other proof" required by Section 240 of Cr. Code.
The child was brought into the court room and exhibited as evidence of paternity. The record here is silent as to actual profert of the child, although it shows that the Commonwealth's motion to that end was sustained over appellant's objection.

The error in instructing under recent law instead of former indeterminate act is negligible as the jury imposed the minimum of ten years. To undertake a definition of reasonable doubt, the court holds would necessitate the writing of a small volume. The better practice is to follow the language of Sec. 238 of Cr. Code, which was done by the lower court.

In Commonwealth v. L. & N. R. R. Co., 175 Ky. 267, 194 S. W. 345, the sustaining of demurrer to penal action is reversed. The pollution of a running stream by emptying into it in one county a deleterious substance which also caused the pollution of its waters in an adjoining county, through which it ran, is an offense over which the Circuit Court of the latter county has jurisdiction.

Under 772a Ky. St. a railroad company must operate daily, except Sundays, one passenger train each way over a line of road exceeding five miles in length, unless it has a lawful excuse for not so doing, and it is competent for the railroad company to show that, without its fault or negligence, the roadbed was in such condition as that passenger trains could not be operated over it with safety. Consequently L. & N. R. R. Co. v. Commonwealth, 175 Ky. 372, 194 S. W. 315, reversed.

In Gaddis v. Commonwealth, 175 Ky. 183, 193 S. W. 1052, a seduction conviction is reversed because the instructions failed to define the crime and omitted submitting question of unchaste conduct of prosecuting witness after defendant had introduced proof showing her to be unchaste.

The keeping open of a place of business on Sunday at which soda water, soft drinks, coca cola, cigars and tobacco, sandwiches, various kinds of canned goods, cheese and crackers, fruits and candies are sold, is doing business on Sunday in violation of section 1321 of the Kentucky Statutes, providing that "no work
or business shall be done on the Sabbath day except the ordinary
household offices or other work of necessity."

McAfee's confectionery "was not kept open on Sunday to
furnish food for the hungry public, but purely as a matter of
business for profit to the owner. It was conducted precisely on
Sunday as it was on Monday and other week days, and so on
Sunday, McAfee followed his usual trade or calling." In reply
to the objection that many and radical changes in the social,
economic and business conditions of the State since this statute
was enacted the court nevertheless says:

"It must be given the same construction and effect today
that it had yesterday, and in all cases such a necessity must exist
to excuse the doing of work or business on Sunday in more primi-
tive times."

No hard and fast rule is set down but the ground of neces-
sity must be determined by the facts and circumstances surround-
ing the particular transaction.

The Annotator in L. R. A. says:

"The point made in McAfee v. Commonwealth, that a keeper
of a confectionery or small grocery store cannot be permitted to
carry on his business in the regular and ordinary way on Sunday
by reason of the fact that he incidentally sells eatables, such as
sandwiches, is a rather novel one, and does not seem to have been
raised in any other cases."

This opinion (McAfee v. Commonwealth, 173 Ky. 83, 190 S.
W. 671, L. R. A. 1917 C 377) clearly, fearlessly and correctly
states the law, but how did the Court of Appeals get jurisdiction
of a conviction under a statute the maximum fine of which is
only $50.00? And how could the court below impose a fine of
$100.00?

SUNDAY VIOLATIONS.

Shortly after the McAfee case was decided prosecutions
for violation of the Sunday law became more numerous. Tire
service and automobile accessory dealers in Louisville were fined
in Magistrates' Courts. Soon thereafter many warrants against
business houses were taken out in Magistrate Wheeler's Court and twenty-eight cases involving druggists, theater and motion picture proprietors, garages, gasoline supply stations and their employees were dismissed by County Attorney Bullitt.

In stating his reasons for refusing to prosecute the cases, Mr. Bullitt in part said:

"The Sunday law wisely prohibits all but 'works of necessity.' What are the facts in these cases? Drug stores are in my opinion 'necessities.' The fact that they sell soap, tooth brushes and soda water doesn't alter the case. The former promotes what is next to godliness, and the latter helps quench the thirst of throats now as parched as that of Dives when he looked across the gulf at Lazarus in Abraham's bosom.

"Gasoline substations have simply taken the place of the old-time livery stable that was always open on Sunday, even in counties which were barren of everything but blue laws and lovers' lanes. If running a Ford in Louisville on Sunday isn't against the law neither is selling gasoline to run it.

"PLEA FOR MOVIES.

"Innocent amusements are more necessary today than ever. With 50,000 soldiers in a camp, extending from the outskirts of 'Schnitzelburg' all the way to Highland Park, and with Khaki spread over Louisville every Sunday, it is imperative that harmless pastime be furnished the men who honor that uniform. This is in lieu of the divers and sundry temptations that have been removed from their paths. If we take away the movies what is left for them to do?

"Some people are opposed to Sunday newspapers, though they can't help reading them; others oppose Sunday baseball, though they can't help reading the score next day; still others would stop the United States Government from working on the cantonment building on Sunday, though they want America to win the war. But we can't please everybody.

"The Court of Appeals has held that no arbitrary or hard and fast rule can be laid down as to what constitutes 'necessary work' on the Sabbath day. What may not be necessary in one age may become necessary in another. It depends upon the varying social and economic conditions of the world."

This seems to have ended prosecutions for Sunday violations in Louisville.
From the time when the memory of man runneth not to the contrary the "law's delay" has been the subject of criticism and the butt of joke. Many concentrated efforts have been attempted by conscientious lawyers to bring about such a reformation in the modus operandi of the courts that justice might, in all cases, be truly expedited. No organization has been more zealous along these lines recently than the American Judicature Society.

John H. Wigmore, Dean of Northwestern University School of Law, in an article in the journal of the Society, deplores the lack of "efficiency" among the bar in seeking judicial justice. He says:

"There are lawyers on both sides, a trial judge, twelve trial jurors, witnesses, an Appellate Court, an Attorney-General and State's Attorney, a Supreme Court and Legislators. Comes a botched result; a piece of justice is turned out that is palpably damaged goods; nobody can use it; time, labor and materials were wasted. In an efficient commercial house this cannot happen often. Sooner or later in the system there is a superintendent, who finds out what is the source of such defective results, and takes measures (after various experiments and inquiries, of course) to prevent such intolerable occurrences, which mar the repute and undermine the patronage of the house.

"But in our justice system, what happens? Lawyers, trial judge, jury, Appellate Court, Attorney-General, Supreme Court, Legislators—has any one of them the power and the duty to inquire into the botch and see that something is done to guard against repetition? No, not one of them. Each one has done his conscientious, industrious part somewhere along the line; but he had to stop when his own little part was done. Each lawyer pleaded, each witness testified, the jury voted, the trial judge ruled, the Appellate Court reversed, the Supreme Court reversed the Appellate Court, and possibly, somewhat back, the Legislature had passed a statute. But when, in spite of the contributions of each one, the net result of the whole case is a botch, a palpable, unmistakable, useless, wasteful botch, and you or I take it up in the printed records and see this, and everybody can see it, and everybody realizes (parturient montes, nascitur ridiculus mus) that the product turned out by judicial justice is what the lumberman would call "culls," what happens? Nothing. Who comes
down from the superintendent's office and finds out what was the matter? Nobody. There is no superintendent.

As an illustration he takes a case from the latest Illinois reports, Pressley v. Bloomington & Normal Railway & Light Co., 271 Ill. 322, 111 N. E. 511 (Feb. 16, 1916). "This bit of justice's culls goes back over eight years, and the end is not yet, either. The man was killed on October 6, 1907. There have been four trials in the Circuit Court, and the judgment has once more been reversed and the cause remanded for still another trial." A history of the case is then given, the errors in the various trials emphasized, etc. Dean Wigmore than animadverts:

"Whether the standard of efficiency be the industrial one of a modern department store, or the ideal one of Plato's Republic, such a result measures in to the culls class by any standard, and should cause us to reflect seriously on our system."

My first thought on reading this dissertation was that the case was a civil one and that such a result could not happen in a criminal case unless the accused was found guilty each time. Our Frashure case, supra, is almost a match for it. Although Frashure was tried six times, three "hung juries" necessitated retrials rather than errors. Though, with all deference to our present and former member from the Nineteenth district, there may have been reversible errors in the trials where there were disagreements. Think what an expense the State has been put to! Think of citizens inconvenienced by call for jury service, of the time, patience and energy of the court, lawyers and witnesses. And the real question, in its last analysis is, have the substantial rights of the defendant been prejudiced by the verdict rendered? (Cr. Code 271).

Along these lines Judge Christianson, of the North Dakota Supreme Court, in State v. Webb, 162 N. W. 358, in affirming conviction had this to say:

"A criminal trial is not a game of wits between opposing counsel, to be played according to certain technical rules, with the judge acting as umpire. It is a solemn judicial proceeding, to ascertain the guilt or innocence of a person accused of crime."
Rules of criminal procedure were not formulated to enable criminals to escape punishment. They were formulated to aid the courts in properly dispensing justice in criminal causes. They are intended on the one hand to safeguard the rights of the accused, to the end that no innocent person may be convicted of crime, and they are intended on the other hand to enable the State to bring those guilty of crime to the bar of justice. A person accused of crime is entitled to a fair trial in accordance with the principles enunciated in the Constitution and the laws of this State. This right is self-evident. But it is equally self-evident that civilized society as now constituted cannot long exist unless the State can enforce its laws against wrongdoers. The rules of criminal procedure should be construed to effect the purposes for which they were intended, and not to defeat them. The test is not whether certain legal formulas have been literally complied with, but whether anything has been done or left undone which prejudices the substantial rights of the accused. If a substantial right has been prejudiced, a new trial should be had. If not, it is equally the duty of an Appellate Court to affirm a conviction.”

To a limited extent, at any rate, we can do right here in our Association what Mr. Wigmore’s Chief Judicial Superintendent might do, at least we can as to criminal cases. It should be our delight on the occasion of these annual meetings more thoroughly to “talk shop” and submit to this body in committee of the whole the various steps we contemplate in serious cases in order to prevent the result being a “botch” or the mere “culls of justice.”

The press, “yellow” as it often is, and playing in Torm, will make first-page copy out of the story of any murder trial and especially where happy homes have been ruined will detail the testimony ad nauseam. The law journals, apparently, treat all criminal trials with the silent contempt that some of them doubtless deserve, but the earnest prosecutor is never given a resume of the errors or mistakes made in a criminal case until he gets the report in the advance sheets. As a great number of trials result in acquittals and comparatively few convictions are appealed, the prosecutor is not enabled to profit by the mistakes of his fellow-officials to the extent that he might be if greater professional publicity were given them.
Right here it is interesting to note that the legal aid bureaus, public defender propaganda, suspended sentence system, methods of treating and prosecuting users of drugs and narcotics, courses of criminalisties in colleges and universities, seem to have preferred attention in the law magazines. Some scientifically tutored and exceedingly humanely emotioned students would try to make the world believe that those who commit crime are merely sick and that a proper potion or a little hospital treatment will effect a permanent cure.

Probationary methods for the youth and sympathetic direction for the juvenile are eminently proper but surely something more drastic is reasonable for the hardened criminal. What our Kentucky press thinks of our local parole system is voiced by a paragraph taken from the Flemingsburg Times-Democrat:

"That Rotten Parole System—Another illustration of the glaring unwisdom of the parole system of this State is furnished from Bracken County. Some two years ago one Elisha Hughes was sent to the penitentiary from Mason County for shooting at a couple of boys in Maysville and wounding one slightly. Recently he was paroled and returned to his home in Bracken County, and on Saturday night he was brought to Maysville by the Sheriff of Bracken County and lodged in jail for safe-keeping, on a charge of killing a negro man by cutting him in the head with a grass-hook. If he had been allowed to serve out his term this tragedy would not have occurred. He felt that if he could get out of trouble so easy once he could do it again. Let it once be known that the sentence of the Court means something and men will be more careful not to get into trouble."

With just criticism being heaped upon American Criminal Courts for the length of time necessary for trial, the delay in being ready, the sensationalism incident thereto, and the heroizing by the public of those charged with crime, it is high time for us to study methods for fairly speeding criminal justice, practically and scientifically rather than from the standpoints of sociology and philanthropy.