Kentucky Law Journal

Volume 23 | Issue 3 Article 2

1935

Proposed Criminal Code Changes for Kentucky as Recommended in the Report in 1934 of the Kentucky State Bar Association's Committee on the Code of Criminal Procedure of the American Law Institute

John A. Geyer

George T. Skinner

PROPOSED CRIMINAL CODE CHANGES FOR KENTUCKY AS RECOMMENDED IN THE REPORT IN 1934 OF THE KENTUCKY STATE BAR ASSOCIATION'S COMMITTEE ON THE CODE OF CRIMINAL PROCEDURE OF THE AMERICAN LAW INSTITUTE.*

By JOHN A. GEYER AND GEORGE T. SKINNER**

"Crime is one of our major problems. Petty misdemeanors are probably decreasing but major crimes, such as murder, bank robberies, and kidnaping, have grown to alarming proportions. It has been estimated that an inhabitant of the United States is murdered every forty-five minutes; more than ten persons per year for each one hundred thousand inhabitants as compared with the English murder rate of about one person for each two hundred thousand inhabitants. We no longer have to contend merely with individual criminals acting alone or with small gangs of toughs. Probably eighty per cent of the serious crimes are the results of the activities of groups of well-organized criminals who carry on one or more of the numerous rackets. Their business is to levy tribute upon honest citizens by threats of death or serious property damage; threats which their victims know only too well that they are capable of executing.

"In this war on crime, leadership is the privilege and duty of the legal profession. It is to the legal profession to whom the public has a right to look for guidance of criminal research in the field of criminal justice."[1]

Of course, the present unfortunate conditions of crime are

* This study is published in cooperation with the Committee of The Kentucky State Bar Association on the Code of Criminal Procedure of the American Law Institute. Resolution No. 7, adopted by the Attorney General's Crime Conference held in Washington, Dec. 10th, recommends to all legislatures a careful consideration of this Model Code of Criminal Procedure. The committee in Kentucky is now in its third year and has made two reports to the Bar Association.

** A. B., Kentucky.

[1] "Scientific Research in the Fields of Criminal Justice," talk broadcast by William Draper Lewis, Director of the American Law Institute, on Nov. 10, 1934 over the Columbia Broadcasting System as the sixth in a series of twelve programs entitled "The Lawyer and the Public" presented by the American Bar Association under the auspices of the National Advisory Council on Radio in Education."

created by many factors; but those factors with which the legal profession is primarily interested are personnel, administration, and procedure of the criminal system. It has been said that these three factors "rank in the order named with respect to their influence upon the results achieved."[2]

In regard to these factors the American Law Institute has restated the criminal law in a manner to promote its greater certainty, and has produced a model code of criminal procedure which, if adopted, "will remove many of the existing just complaints of the unnecessary technicalities and delays in the administration of the criminal law."[3]

Virtually every one of the provisions of the American Law Institute's Model Code is in force in some jurisdiction either in identical language, or in substance, and many of them are in force in a large number of jurisdictions. "The Code is therefore a discriminating selection from a large body of law that has been approved by experience."[4] A summary of the Code's chief provision is as follows:

"1. The Code facilitates the arrest of suspected persons by providing that a warrant of arrest may be served by any peace officer, and that he need not be in possession of the warrant at the time of the arrest.

"2. The provisions relating to bail require adequate and effective security for the appearance of the defendant at the trial. This prevents the pernicious practice of 'straw-bail.'

"3. In about half the States of the country a defendant may be prosecuted upon an information sworn to by a prosecuting officer. This method of prosecution, as compared with prosecution by indictment, is less expensive, more expeditious, and more efficient. The Code provides that all offenses may be prosecuted by information as well as by indictment.

"4. One of the potent causes of the miscarriage of justice in criminal cases is the extreme technicality required in the indictment. The proposed Code abolishes these technicalities.

"5. In many States the defendant may not waive a jury trial and elect to be tried by the judge. The Code permits that the jury may be waived by the defendant in all cases except where a sentence of death may be imposed.

"6. The Code provides that jurors shall be examined as to their qualifications by the judge. This prevents the inordinate delay which frequently results in selecting a jury in a case which has been widely advertised in the newspapers.

"7. It sometimes occurs that a mistrial results from the fact that a juror dies or is discharged for some reason during the course of the proceedings. The Code provides that where a trial is likely to

[2] 11 Nebraska Law Review 221, (223).
[3] American Law Institute Proceedings, Volume III, 492.
[4] *Supra*, 11 Neb. L. R. 221, (223).

be protracted, the court may order alternate jurors to be called, one of whom may take the place of any juror who dies or is discharged.

"8. The Code provides that in criminal cases where the issue of insanity is raised the court may appoint disinterested medical witnesses to examine the accused and to testify at the trial. By such practice unbiased and non-partisan testimony regarding the defendant's mental condition is presented to the jury.

"9. The requirement of law that a person could not be convicted of a crime unless all twelve jurors concurred in finding him guilty results yearly in hundreds of so-called mistrials. The proposed Code provides that in all except trials for capital offenses, a verdict may be rendered by ten jurors in felonies in the case of serious offenses and by eight jurors in minor offenses."[5]

According to the latest Report of the Kentucky Committee on the Code of Criminal Procedure of the American Law Institute,[6] certain of the model provisions, fifteen in number, have been recommended for adoption in Kentucky. It is the purpose of the authors of the present paper to indicate that these provisions have decided advantages over the present practice as governed by the Kentucky Code of Criminal Procedure.

Each of the recommended sections follows with separate discussion

SECTION 4. DIRECTION AND EXECUTION OF WARRANT.

The Kentucky Criminal Code section 27 provides that "a warrant of arrest shall . . . command *the officer to whom it is directed* to arrest the person named therein as the offender . . ." This section of the Kentucky Code also indicates the form for the warrant: "The Commonwealth of Kentucky to any sheriff, constable, coroner, jailer, marshal, or policeman of the State of Kentucky. . . ." According to the indicated form the warrant is directed to *any* peace officer, but the section itself speaks of *the officer to whom it is directed.* It necessarily follows that a peace officer may execute the warrant only in his county.[7]

This section of the Kentucky Code is insufficient for two reasons. First, the localized effect gives the culprit too great an opportunity for escape. Under our present system, except in the adjoining counties, if a fugitive escapes into X county, the warrant would have to be returned to the justice and a new one issued to the X county; but if in the meantime the fugitive

[5] *Op cit.*, "Scientific Research in the Fields of Criminal Justice".
[6] *1934 Proceedings of Kentucky State Bar Association*, page 225.
[7] *York* v. *Commonwealth*, 82 Ky. 360 (1884).

had slipped into Y county, a new warrant would have to be obtained. An adroit fugitive would have all the time and chance of escape he should desire.

Of course, the situation is cared for to a slight extent by section 36, paragraph 3 of the Criminal Code, which states that the peace officer, "when in actual pursuit of an offender, may cross a county line for the purpose of making the arrest in the adjoining county." Therefore, even though the officer may pursue into adjoining counties, he is limited to them and them only when in "hot" pursuit.

Secondly, as a converse of reason one, arrest should be facilitated to meet modern conditions. Our present method is as antiquated as that monstrosity, the horse and buggy, for which it was adaptable. However, with our modern fast means of transportation and paved roads, county lines have been brought closer together. We have improved scientific means of capturing the fugitive in the radio, as for instance station WPET, Lexington police radio station. In step with such unification, the execution of the warrant should be given state-wide application.

The American Law Institute Code section 4 would give us such unification by removing, in effect, boundaries of counties in the execution of the warrant:

"The warrant shall be directed to all peace officers in the State. It shall be executed only by a peace officer, and may be executed in any county by any peace officer in the state."

Method of arrest by officer by virtue of warrant. The A. L. I. Code provides in Section 24:

"When making an arrest by virtue of a warrant the officer shall inform the person to be arrested of the cause of the arrest and of the fact that a warrant has been issued for his arrest, except when he flees or forcibly resists before the officer has the opportunity so to inform him, or when the giving of such information will imperil the arrest. The officer need not have the warrant in his possession at the time of the arrest, but after the arrest if the person arrested so requires, the warrant shall be shown to him as soon as practicable."

The Kentucky Code provides that "a peace officer may make an arrest in obedience to a warrant of arrest delivered to him"[8] and "if required shall show the warrant."[9] The difference between the two code provisions is that concerning the possession of the warrant at the time of the arrest.

[8] Carroll's Ky. Code of Crim. Prac. sec. 36, subsec. 1.
[9] Carroll's Ky. Code of Crim. Prac. sec. 39.

In *Wright* v. *Commonwealth*[10] the court said, "not even a peace officer is authorized to make an arrest without a warrant issued and delivered to him, except when a public offence is committed in his presence, or when he has reasonable grounds to believe that the person arrested has committed a felony."

Under the provisions of the Kentucky Code and the decisions of the courts it is apparent that the person to be arrested, the officer making the arrest and the warrant must be in the same place at the same time.

The impracticability of such a rule especially in misdemeanors can be illustrated by a Michigan case *People* v. *McLean*.[11] In this case a warrant had been issued for the arrest of M upon a charge of assault and battery. The warrant was handed to the sheriff who showed it to his deputy P. The sheriff then ordered P to go to one place while he himself went to another, the sheriff keeping the warrant in his possession. P found M and approached him to make the arrest informing M that he had a warrant and expressing his intention to arrest M. M resisted and when he was subsequently taken into custody was charged with resisting a duly authorized officer. The court in reversing a conviction in the trial court said that regardless of the directions of the sheriff the deputy was not in such proximity to the sheriff as would justify a holding that the deputy was in possession of the warrant, for "a warrant for a misdemeanor cannot lawfully be held by two officers at once when they are not together."

The difficulty becomes very apparent in a city of any size.[12] Any patrolman or detective might encounter the wanted man, but unless he had the warrant in his possession he would be unable to make the arrest. Either there must be one warrant and one man out of many legally able to make an arrest, or there must be a warrant for every officer seeking the individual.

It is submitted that an expeditious arrest can best be accom-

[10] 85 Ky. 123, 2 S. W. 904 (1887). Accord: *Bates* v. *Commonwealth*, 13 K. L. R. 132, 16 S. W. 451 (1891); *Simmons* v. *Commonwealth*, 203 Ky. 621, 262 S. W. 972 (1924).

[11] 68 Mich. 480, 36 N. W. 231 (1888)

[12] Waite, *Some Inadequacies in the Law of Arrest* (1929) 29 Mich. Law Review 448.

plished where there is but one warrant issued and this is held at headquarters or the station and then the various patrolmen and detectives are notified that the warrant has been issued and are told to bring in the person named in the warrant.

Section 37. RIGHT OF ATTORNEY TO VISIT PERSON ARRESTED.

Any attorney-at-law entitled to practice in the court of this state shall, at the request of the person or of some one acting in his behalf, be permitted, under reasonable regulations, to visit the person arrested.

Kentucky has no similar provision in the Criminal Code. However, there is a section of the Code which states that "The magistrate, *before commencing the examination,* shall state the charge, and require of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it." But how long before the commencing of the examination shall the request of the person arrested be heard? That question is not answered by the Code.

Yet it is a general practice in the state to permit attorneys to visit prisoners under reasonable regulations. Should we not have a statutory basis for this practice? Otherwise, it is quite possible that the present discretion of the jailer or police in allowing attorneys to visit the accused will result in holding the person illegally in jail, when he is in fact innocent, because of his ignorance of the law, the presumption that everyone knows the law notwithstanding. The discretion of the officer holding the person accused should be removed so as to allow the free exercise of a right recognized by the courts of the person arrested to have benefit of counsel.

Also, under the constitution, every person arrested is entitled to a speedy trial. With this provision allowing an attorney to visit the accused, the attorney could take immediate action in habeas corpus proceedings if the person arrested is innocent and is being held unduly. Not only would the speed of trial be beneficial to the arrested person, but it would be favorable to the interest of the state in the practical way of deceased costs of providing for the person arrested, and in the way of public policy.

Section 40. WAIVER OF EXAMINATION.

(1). The defendant may waive a preliminary examination. If

he does waive, the magistrate shall hold him to answer and shall either admit him to bail or commit him to custody as provided in section 55.

(2). Notwithstanding a waiver of examination by the defendant, however, the magistrate, on his own motion may, or on the demand of the prosecuting attorney, shall examine the witnesses for the Commonwealth and have their testimony reduced to writing or taken in shorthand by a stenographer and transcribed. After hearing the testimony, if it appears that there is not probable cause to believe the defendant guilty of any offense, the magistrate shall order that he be discharged.

There is no similar provision in the Kentucky Criminal Code. Altho there is no statutory justification for waiver of preliminary examination in Kentucky, such waiver is a generally recognized practice. It frequently happens that the attorney representing the defendant will make the statement to the examining court that he desires to waive the examining trial, and when the examining trial is waived, the defendant is held to the grand jury and his bond fixed at such amount as the court may think proper. It sometimes happens, where an examining trial is waived, that evidence is heard for the purpose of fixing the amount of bail. Therefore, Kentucky recognizes that the preliminary examination is a privilege personal to the accused, and that it is not an integral and fundamental part of our judicial system. It would make for stability and unity if this practice of waiver were given a statutory basis. Since it is admitted that waiver of preliminary examination is a part of our practice, then there can be no objection to the introduction of the American Law Institute provision 40 into our Code if this provision adequately meets the purposes and privileges connected with preliminary examination and its waiver.

In no sense is a preliminary examination a trial for the purpose of determining the guilt or innocence of the accused. If this were the object of the examination, it would be quite obvious that the defendant should not be allowed the privilege of waiving this part of the procedure. The main reasons for having a preliminary hearing may be summarized as follows: (1) to inquire whether a crime has been committed; (2) to ascertain whether there is sufficient evidence for probable cause that the accused is guilty; (3) to protect the person charged from

open and public accusations; (4) to avoid the expense of public trials; (5) to perpetuate testimony then given; (6) to determine the amount of bail in bailable cases in order to insure the presence of the defendant. In other words, a preliminary examination is simply "a course of procedure whereby a possible abuse of power may be prevented, and the accused discharged or held to answer, as the facts warrant."[13] The above six purposes of the preliminary examination will be satisfactorily met by the American Law Institute Code section 40.

By waiving a preliminary examination the defendant is giving up his right in numbers one and two of the above stated reasons for preliminary examination, since by so waiving the defendant is considered as admitting that the testimony, if taken, would be sufficient to establish probable cause for belief in the guilt of the accused.

The third listed reason, viz., to protect the person charged from public accusation, is solely for the benefit of the defendant. If the defendant had full knowledge and appreciation of this right, should he not be allowed to relinquish it?

Reason four, viz.: to avoid the expense of public trial, is obviously accounted for by the very provision for waiver itself. If the defendant knows that he is innocent, he of course will take advantage of the preliminary examination.

Reason 5 is provided for, in that subsection two of section 40 states that "*notwithstanding waiver of examination* by the defendant, . . . the magistrate, on his own motion, may, or on demand of the prosecuting attorney *shall examine* the witnesses for the Commonwealth; and have their *testimony reduced to writing* or taken in shorthand by a stenographer and *transcribed.*" Perpetuation of the testimony is thus provided for in spite of the waiver by the defendant. This provision is quite essential. To illustrate, in *Commonwealth* v. *Keck*[14] an eye-witness of a homicide testified at the preliminary examination and died before the trial. If, in such a case, the State, upon learning of the fatal condition of the witness, were not allowed to hold a

[13] *State* v. *Langford*, 293 Mo. 436, 240 S. W. 167, (168), (1922).
[14] 148 Pa. 639, 24 Atl. 161, (1892).

hearing in spite of the defendant's waiver of the preliminary examination, vital evidence could not have been procured.

Reason 6, concerning bail, is provided for by the American Law Institute Code provision. The section states that "the Magistrate shall hold the accused to answer, and shall either admit him to bail or commit him to custody."

Thus the American Law Institute Code provision adequately meets the needs and purposes of preliminary examination and, with particular reference to waiver, will provide a statutory basis, if adopted, for a generally recognized practice.

TESTIMONY OF WITNESSES AND DEPOSITIONS ADMISSIBLE AT TRIAL

The A. L. I. Code provides:

Section 51. The testimony of the witnesses and of the defendant, if he testified shall either be reduced to writing by the magistrate or under his direction, or be taken in shorthand by a stenographer and transcribed. The magistrate shall give the defendant an opportunity to sign his deposition.

Section 53. (1) In case the defendant testified his deposition if signed by him, shall be admissible in evidence against him at the trial without further authentication. Nothing herein contained shall prevent the Commonwealth from giving in evidence at the trial any admission or confession or other statement of the defendant made at any time which by law is admissible as evidence against such person.

(2) When a witness has been examined as provided in section 46 (All witnesses shall be examined in presence of the defendant and may be cross-examined.) and his testimony taken as provided in section 51, his deposition may be admitted in evidence upon the trial of the defendant for the offense for which he is held, either on behalf of the Commonwealth or the defendant, if for any reason the testimony of the witness cannot be obtained at the trial and the court is satisfied that the inability to procure such testimony is not due to the fault of the party offering it.

Section 64 of the Kentucky Code provides "The magistrate in the minutes of the examination shall state the name and place of residence of each witness examined, and the substance of his testimony. But such statement shall not of itself be evidence for any purpose." Part 1 of Section 53 is offered as giving a mutual advantage to both parties in a criminal trial, without any violence to the present rules of evidence. The testimony of a defendant is admissible, if it can be proved, whether it is in writing or not. The difference lies in the fact that there is a strong indication that the signed statement is correct. The other one has to be proved like any other admission. Therefore, there

is an advantage to the prosecution in having this written statement by the defendant. There is also an advantage to the defendant in that he is protected against the ordinary faked up written statement not signed by him that so often is produced by the police authorities after the arrest is made.[15]

In *Wilson* v. *Commonwealth*,[16] it is said that "an officer may refresh his recollection from the minutes and then state, when his recollection was refreshed, what the testimony was, if he could." This was permitted even though it seems the person who made the statement was in court at the time. But it has been held that where the testimony at the examining trial was taken down and afterwards transcribed by an official stenographer, and the witness died before trial, such stenographer could read the testimony as transcribed at the trial.[17] There is a dictum in *O'Brian* v. *Commonwealth*,[18] to the effect that testimony given on the preliminary examination is admissible at the trial if the witness is dead. Evidence of a witness in the examining trial, who died before trial in the circuit court, was admitted when narrated by those who recollected the testimony of the dead witness.[19] Where a witness who testified in the first trial of a defendant, subsequently became insane and so continued up to the time of the second trial, it was held permissible to prove what the witness said on the first trial.[20] The situation in Kentucky then is this: If the witness is dead stenographic notes may be read, or if the witness is dead or insane, his testimony at a previous proceeding may be proved at the second by persons narrating the testimony they heard.

The A. L. I. Code provisions allow the introduction of the statements on the examining trial if for any reason the witness cannot be present and if it is not the fault of the party wishing to introduce the statement. In a Texas case[21] the court said "We are unable to appreciate any good reason why the people

[15] *The American Law Institute Proceedings*, Vol. VIII p. 83.
[16] 21 K. L. R. 1333, 54 S. W. 946 (1900).
[17] *Moore* v. *Commonwealth*, 143 Ky. 405, 136 S. W. 608 (1911).
[18] 6 Bush 563, 571 (1869).
[19] *Thomas* v. *Commonwealth*, 14 K. L. R. 288, 20 S. W. 226 (1892).
[20] *Walkup* v. *Commonwealth*, 14 K. L. R. 337, 20 S. W. 221 (1892).
[21] *Harris* v. *State*, 71 Tex. Cr. Rep. 463, 160 S. W. 447 (1913).

or respondent should have the benefit of such evidence in cases where the witness is dead, . . . and be denied that benefit where the witness is . . . ill. In all . . . cases the important fact is identical . . . the witness cannot be produced in person to testify before the jury."

As long as the defendant has an opportunity to cross-examine any witness at the examining trial it is submitted that his rights have been amply protected. In *Walkup* v. *Commonwealth*[22] it was said "The testimony of a deceased witness given in an action between the same parties is admissible. The reason is, that it has been given under oath and with an opportunity for cross-examination. The tests of truth are not absent, and the reasons that apply in such a case are equally applicable to one where a witness has, after testifying become insane." Testimony of a witness who is ill or absent for any reason not attributable to the party wishing to introduce such evidence does not seem to be changed in any way by the reason for the absence of the witness.

It is true that the Kentucky Constitution[23] provides that the defendant shall have the right to meet the witnesses against "him face to face." It is submitted that the important purpose of this provision is to assure the accused of an opportunity to cross-examine those witnesses appearing against him. And if he has had that opportunity at the preliminary examination it does not seem as if any of his rights will be infringed upon if the recorded testimony of absent witnesses is admitted on his trial as provided in Section 53 of the A. L. I. Code. It is recommended that Kentucky adopt these two sections of the A. L. I. Code so that evidence duly taken before a judicial body shall not be forever lost to the determination of a case.

JUSTIFICATION OF SURETIES.

In section 79 of the A. L. I. Code the following provision is made:

> Each surety shall justify by affidavit that he possesses the qualifications prescribed by sections 75 and 78, and shall in such affidavit describe the property in respect to which he proposes to justify as to his sufficiency, stating the encumbrances thereon, by mortgage, judgment,

[22] 14 K. L. R. 337, 338, 20 S. W. 221 (1892).
[23] Constitution of Kentucky, Sec. 11.

or otherwise, and the amount and the number of undertakings, if any, entered into by him and remaining undischarged.

The Kentucky Code is lacking in the details of the justification of sureties. Section 76 of the Kentucky Code provides that the sureties shall be residents of the Commonwealth, owners of visible property, over and above that exempt from execution, to the sum in which bail is required, and shall be worth that amount after the payment of their debts and liabilities.

In Kentucky after a surety has justified in accordance with our present regulations it is impossible to learn from the affidavit what particular piece or pieces of property were scheduled. It is impossible to learn if the property upon which the surety purported to justify is worth the amount of the bail bond if the property is unencumbered, much less to ascertain its value if it has an encumbrance upon it. Under the present situation all that is available as a fact is the surety's statement that he has property. It seems that in order to even convict the surety of perjury it would be necessary to prove that he not only did not possess a certain piece of property, but that he did not possess any property.

The A. L. I. Code provision demands, first, a description of the particular property; and, second, a statement concerning encumbrances, and, if there are any, the kind and the amount of such outstanding encumbrances. Third, a statement must be made by the surety concerning the number and amount of any other undertakings entered into by him that remain undischarged.

By requiring a description of the property and a listing of all encumbrances it is possible for the court to ascertain if that property in its present state is sufficient for the particular undertaking in question if there are no undischarged undertakings upon the same property. If there are undischarged undertakings they must be deducted from the value of the property in relation to the particular undertaking at hand.

It would be impossible for a person to be accepted "on $100,000 face value of bonds upon a showing that he owned a half interest in property valued at $25,000 and mortgaged for $11,500."[24] Under the regulations provided in the A. L. I.

[24] Waite, *Code of Criminal Procedure: The Problem of Bail* (1929) 15 A. B. A. J. 71.

Code that individual's property would be surety for only $13,500 and no more. When his undertakings had reached that figure he would no longer be accepted as surety on undertakings until some or all of the previous undertakings had been discharged.

In an effort to eliminate irresponsible bondsmen and uncollectible bonds it is submitted that this section should be adopted in Kentucky. It is necessary that the exact status of the property of every bondsman be known at the time that a particular bail bond undertaking is entered into, and this section of the A. L. I. Code makes this possible.

PROFESSIONAL BONDSMEN AND REGISTRATION.

The A. L. I. Code has the following sections, one defining a professional bondsman and the second providing for registration of professional bondsmen:

> Section 80. When a person other than a surety company has become a surety for the release of a person on bail and has received compensation therefor in more than two undertakings on neither of which he has been discharged from liability, he is a professional bondsman.
>
> Section 81. A professional bondsman shall not become surety on an undertaking unless he has been registered as a professional bondsman in the office of.....; and any such bondsman who offers himself as a surety without having so registered shall be guilty of a misdemeanor, and shall be imprisoned not exceeding.....or fined not exceeding.....or both in the discretion of the court.

There are no sections in the Kentucky Code which regulate the activities of professional bondsmen as a class.

Originally, as a rule, the bondsman was a personal friend of the accused, incurring the liability as a matter of accommodation.[25] But now the personal element has largely been supplanted in many cases by the commercial, or monetary element. It is, perhaps, inevitable that such should be the case. It is often very difficult, and at times impossible, for an accused person to obtain a friend who is willing to go bail. In such situations the professional bondsman is a necessary element in our bail system, unless we desire that those persons unable to obtain a friend as bail shall languish in jail.

The business of giving bail goes to the very roots of the

[25] The Professional Bondsman (1916) 83 Central Law Journal 445.

system and there is afforded many opportunities for improper practices which affect the efficient administration of justice. It may be argued that professional bondsmen are an evil and foreign to our theory of bail. But at the same time it seems as if they have become an intricate part of our system which cannot be done away with without at the same time bringing about some other unwanted situation. Therefore, it seems that a regulation of professional bondsmen as a class should be provided so that they may be kept under the scrutiny of the court.

The A. L. I. Code provides as to contracts to indemnify sureties:

> Section 85. Every surety for the release of any person on bail shall file with the undertaking an affidavit stating whether or not he or anyone for his use has been promised or has received any security or consideration for his undertaking; and if so, the nature and the amount thereof, and the name of the person by whom such promise was made or from whom such security or consideration was received. Any wilful misstatement in such affidavit or any intentional omission to set forth in the affidavit all the security or consideration promised or given shall render the person making it subject to the same penalty as one who commits perjury. An action to enforce any indemnity agreement shall not be in favor of the surety against such indemnitor, except with respect to the agreements set forth in such affidavit. In an action by the indemnitor against the surety to recover any collateral or security given by the indemnitor such surety shall have the right to retain only such security or collateral as is mentioned in the affidavit required above.

Kentucky has no code or statutory provision concerning this point, but there has been an expression in judicial decision. In *Ratcliffe* v. *Smith*[26] the plaintiff who had been let out on bail upon the defendant's becoming his bondsman, brought an action in equity to have his title restored to certain property which had been the consideration in a contract between the parties whereby the bondsmen agreed to allow the accused to leave the state. It was held that a contract between a principal and his surety on a bail bond to indemnify the surety against loss is unlawful and against public policy and will neither be enforced in law nor will an executed contract resting on such consideration be relieved against in equity. Thus, it is seen that Kentucky disproves of contracts of indemnity where the purpose is to provide a means by which the accused may flee from justice. But the Kentucky case did not settle the question

[26] 13 Bush 172 (1877).

whether the contract would have been enforceable if there had been no intention that the accused should escape.

The fact to be faced is that indemnity contracted for in the great majority of cases is not one of full and complete restitution. Ordinarily the surety is paid a certain fee which is only a small percentage of the amount of the bond itself. According to our theory of bail the surety is a friend of the accused and goes his bail as a gesture of friendship and accommodation. The fact is that in a great number of cases the accused does not have a friend who is willing or able to provide the proper amount of bail. In such a situation the accused must either languish in jail or pay a fee to a professional bondsman in order to obtain his liberty. If the fee is paid there is in effect a contract made and executed whereby the surety is indemnified against loss. It is true that in this particular instance if the accused does not appear for trial he is not completely indemnified, but when a bondsman is surety on a number of bonds he is protected from loss much as an insurance company is. Therefore, we are faced with what may be admitted to be an evil in allowing any kind or amount of indemnity, but we also must face the fact that in the present day world it is necessary to have professional bondsman, although they are clearly inconsistent with the theory of bail.

It does not appear to be a rash assumption that courts will not permit an affidavit to pass which calls for an unreasonable amount of indemnity. Certainly if an unreasonable amount is called for, some suspicion must be aroused as to the intentions of the parties. If a bondsman realizes that his recovery is to be based upon the facts set forth in his affidavit it seems as if he will be more vigilant in seeing that the accused is present for trial. Instead of a tendency to increase the number who will not appear for trial, such a provision as Section 85 will have just the opposite tendency. It is submitted that it is better to regulate even a supposedly evil practice, if it is impractical to eradicate it than to completely ignore it and pretend it is non-existent.

UNDERTAKING A LIEN.

The A. L. I. Code provides in section 102:

The undertaking shall be a lien on any real property described in the affidavit required by section 79 from the time of the recording of such undertaking and affidavit in the county in which the property is situated. Upon the filing of the order with the (title of the official whose duty it is to record instruments which are liens should be inserted) of the county where the property is situated cancelling the undertaking the lien shall be discharged.

The Kentucky Code contains no similar provision.

This section is recommended in an effort to assure the collectibility of forfeited bail. Of course an arrangement whereby the amount of bail would be deposited in cash would be ideal as far as assuring collectibility is concerned. But this would make it very difficult to get bail on many where release should be granted. To this end it has been suggested that where the release is on bond it must be secured by a lien on specific real estate. Then as a necessary complement it must be shown by the bondsman that the real estate he offers as security has a net value over and above all other liens sufficient to secure the bond.

Such an undertaking would have four things in its favor.[27] First, it would be assurance of the collectibility of the bond.

Second, it would facilitate and expedite the collection of forfeited bonds. To realize the importance of this point one needs but to look at the reports on the point in various large cities. Much of the failure to collect upon forfeited bonds is caused by the cumbersomeness of the necessary procedure and the preoccupation of the prosecutor's office, and not to the financial irresponsibility of the bondsman. By making every bond a lien upon real estate there is a limit placed on the extent to which a particular piece of property may be put up as security; also, the disposal of the property would be hampered and the owner would have an incentive to pay the amount and clear the lien on his own initiative. Even in case a compulsory payment is necessary the foreclosure could be more easily and quickly accomplished than at present.

Third, since the bond is a lien upon the property there would be a tendency towards expediting the setting of cases for trial. Under existing conditions, if the bondsman can pledge the same property for large amounts of bonds, he does

[27] Waite, *Code of Criminal Procedure: The Problem of Bail*, 15 A. B. A. Jour. 71 (1929).

not care when a particular case comes for trial. He is not hampered by the delay. But with a lien attached to his property he is naturally limited in the number of bonds by the value of the property. Since his only opportunity for a profitable business is in a rapid turnover the bondsman will see to it that there is little delay in the disposition of proceedings and so remove the lien created by that bond thus enabling the bondsman to provide for another. Even defense attorneys who are noted for their dilatory tactics would be put under a certain amount of pressure by the bondsman and be forced to proceed promptly.

Fourth, a bondsman having scheduled real estate as his necessary property would be unable to beat collection of a forfeiture by a hasty sale, for presumably the bond would have been recorded and it would be a lien thereon.

TAKING INSUFFICIENT BAIL, ACCEPTING INSUFFICIENT OR UNQUALIFIED SURETIES.

Section 112 of the A. L. I. Code provides:

> Any official who takes bail which he knows to be insufficient, or accepts a surety in an undertaking knowing such surety not to possess the qualifications of sufficiency required by law is guilty of a misdemeanor and shall be imprisoned not exceeding.....or fined not exceeding..... or both at the discretion of the court.

Kentucky has no provision of a similar nature, but it seems that such a provision would have a beneficial effect in the administration of bail bonds. In the past judges have not insisted upon financially responsible bondsmen and there is no reason to believe that they will do so in the future. In an effort to remedy this evil it is recommended that some means be adopted to impress upon the proper officials the importance of their duty in accepting sureties. Other sections of the A. L. I. Code have been recommended in which simple standards are set up to which sureties must conform before being acceptable. This section provides a means of making an officer responsible for his dereliction of duty in accepting sureties which the law does not permit him to accept.

This is not a wholly unprecedented procedure, for as far back as the 13th century a statute declared that certain accused persons might be "let out by replevin" and the method of pro-

cedure to be pursued, provided "and if the sheriff, or any other, let any go at large by surety, that is not replevisable. . . . he shall lose his fee and office forever."[28] A statute of 1554 after a recital of the disregard by justices of the laws permitting them to "let to bail" declares that any justice of the peace who shall "offend in anything contrary to the true intent and meaning" of the law shall be punished by fine.[29]

No judge could be expected to certify the responsibility of sureties, but any judge can be expected to require that they make whatever showing of responsibility the law requires that they make.[30]

WHEN TRIAL BY JURY MAY BE WAIVED.

Section 266 of the A. L. I. Code provides:

"In all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered of record."

As a general proposition waiver of jury trial has several noteworthy advantages. However inconsistent it may appear, waiver is really an important safeguard to trial by jury. With a decrease in the number of jurors, the quality of the jurors should be improved. Of course the loss of time and money attributed to the jury system would be ended. Also there is a psychological advantage, for "To choose a jury is one thing, to be forced to take one is another." Those things which are optional are more to be cherished than those which are compulsory. Another reason more apparent would be that the defendant may be saved from the passion of the jury, as in the Loeb-Leopold murder case. Also, even if not purely a reason, there is the fact that a great use of waiver is made in states allowing such—thus there is a practical indication of the advantages.[31]

Under the present condition of the Kentucky law in regard to jury trial and its waiver, a jury may be waived in misdemeanor cases. Such practice is prevalent in spite of the constitutional provision that preserves and guarantees to one

[28] 3 Edw. I. c. 15; strengthened 27 Edw. I. c. 3.
[29] 1 and 2 Phillip and Mary, c. 13; Kelyng's Rep. 3.
[30] Waite, *Code of Criminal Procedure: The Problem of Bail.* (1929) 15 A. B. A. J. 71.
[31] 16 Iowa L. R. 223. "Proposed Jury Changes in Criminal Cases".

charged with crime the ancient mode of trial by jury.[32] However, a statute precisely covers the situation. Kentucky Statutes section 2252 permits the waiver of the right to jury trial in all but felony cases.[33] Yet it is significant that in the cases before 1925 allowing waiver of jury in misdemeanor cases the statutory provision was not mentioned or used in the decisions.[34] Such would indicate that in misdemeanor cases at common law there was waiver of jury trial.

In regard to felony cases particularly, the case of *Branham* v. *Commonwealth*,[35] was the first case to present the question of waiver of jury in a situation involving a felony. It was there held that a defendant charged with the commission of a felony cannot waive his constitutional right to trial by jury, under the Constitution section 7, and Kentucky Statutes section 2252. Later Kentucky cases involving waiver of jury in a felony[36] are based upon this decision. Thence in order to determine the basis of non-waiver in felony cases we must analyze the Branham Case and determine what was the real holding in that case. According to the language of the court, the denial of waiver of jury in a felony case is based upon both the constitution and the statutory provision. In view of the presence of the statute, the real basis obviously is the statute which expressly prohibits waiver in felony cases. Thence the reference made to the Kentucky Constitution is really *obiter dictum.*

Whether waiver would be allowed under the Constitution in the absence, or under a change, of section 2252 of the Kentucky Statutes has not yet been presented for decision. In case section 2252 were repealed, the Kentucky courts would be presented with this question which has been decided in numerous jurisdictions. Generally, the question resolves itself

[32] Kentucky Constitution, section 7. "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modification as may be authorized by this Constitution."

[33] Kentucky Statute 2252: "A petit jury in the circuit court shall consist of twelve persons, and in all trials held in courts inferior to the circuit court, or by any county, police, or city judge, or justice of the peace, a jury shall consist of six persons; but the parties to any action or prosecution, *except for felony*, may agree to a trial by a less number of persons than is provided for in this section."

[34] *Murphy* v. *Com.* 58 Ky. 365 (1858); *Tyra* v. *Com.* 59 Ky. 1, (1859); *Phipps* v. *Com.*, 205 Ky. 832, 266 S. W. 651 (1924).

[35] 209 Ky. 734, 273 S. W. 489, (1925).

[36] *Jackson* v. *Com.* 221 Ky. 823, 299 S. W. 983 (1927); *McPerkins* v. *Com.* 236 Ky. 528, 33 S. W. (2d) 622 (1930).

into whether jury trial is a personal privilege or is a fundamental part of the frame of government. The recent case of *Patton* v. *United States* is most persuasive in holding that it is a privilege.[37] There is good authority to the effect that the right of jury trial is part of the frame of government which the defendant cannot waive.[38] Yet the modern trend is toward the conclusion that the defendant may waive, for the right to jury trial is a personal privilege.

Upon the assumption that right to trial by jury is a personal privilege, should not the defendant waive in felony cases as well as in misdemeanor cases? The Constitution makes no distinction between felonies and misdemeanors in this regard; and the general principles underlying the "power" to waive is the same in felony and misdemeanor cases.[39] Satisfactory results might be reached by amending section 2252 of the Kentucky Statutes, so as to remove the exception as to felonies. However, the Model Code provision should be enacted for the courts would then have the benefit of the careful consideration of the whole problem by the American Law Institute, and the benefit of the decisions in other states, since the section, as written, will be and has been adopted in various jurisdictions. The American Law Institute clause stating that "such waiver shall be made in open court and entered of record is advisable in order to guarantee that the defendant shall make his waiver affirmatively, willingly, and understandingly."[40]

Section 312. TRIAL WHERE JOINT DEFENDANTS.

"When two or more defendants are charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials. In ordering separate trials, the court may order that one or more defendants be each separately tried and the others jointly tried, or may order that several defendants be jointly tried in one trial and the others jointly tried in another trial or trials, or may order each defendant be separately tried."

Briefly, the American Law Institute section states that two

[37] 281 U. S. 276, 50 S. Ct. 253, (1930).

[38] *Cancemi* v. *People*, 18 N. Y. 128 (1858).

[39] 21 Kentucky Law Journal 1, (27), "Constitutionality of Waiver in Kentucky", Prof. Roy Moreland, (1933).

[40] *Idem*, page 28.

or more persons charged with an offense will be tried jointly at the discretion of the court.

The Kentucky situation of joinder of defendants in criminal cases is determined by section 237 of the Kentucky Criminal Code, which reads as follows: "If two or more defendants be jointly indicted for a felony any defendant is entitled to a separate trial." The language of this section is mandatory as to the right of a defendant, jointly indicted with another or others for a felony, to a separate trial. The court is without power to refuse it to him when demanded. At common law the Commonwealth alone in all cases had the right to elect whether to try jointly or separately defendants jointly indicted, subject to the discretion of the court. The Code changed the common law to the extent of also allowing a defendant in cases of joint indictment for a felony the right to demand and have a separate trial.[41]

[41] "With reference to the matter discussed by us several days ago, I am very strongly of the opinion that one of the most helpful things that could be done to improve criminal procedure in Kentucky, would be the passage of an act by the Legislature permitting defendants, who are jointly indicted in felony cases, to be tried together, with the right given to the presiding judge to grant the separate trial if, in the exercise of his discretion, a separate trial is necessary in order to give a fair trial to the parties.

"It seems useless, expensive and an ineffective thing to do that, in a case where defendants are jointly indicted for felony, for the Commonwealth must present the same witnesses in each of several trials, with a new jury for each trial, and the result is often a miscarriage of justice.

"I recall especially one case where two men were indicted and charged with the theft of a lot of tobacco. The evidence for the Commonwealth showed the theft of the tobacco and that the two defendants together took it by truck to a warehouse, the tobacco so sold being identified as the stolen tobacco. The defendants demanded, and as a matter of right, received a separate trial. Upon the first trial the defendant being tried testified that he was standing on the street and that the other defendant came along in the truck with the tobacco and asked him to ride to the warehouse and help him unload it, and that he was entirely innocent in the transaction. Upon the later trial of the other defendant he told the same story, i. e., that he was standing on the street and the defendant, who was the first tried, came along in the truck with the tobacco and asked him to go along and help unload it. Had these cases been tried together the jury could have determined which of the defendants was telling the truth, or could have reached the conclusion, which I think was the truth, that both of them were actually engaged in the theft of the tobacco; yet, upon separate trials, there was sufficient doubt thrown in the minds of the jury as to make a conviction difficult.

"If you can do anything toward having our Code of Criminal Practice amended so as to make possible the joint trial for defendants

The practice of allowing separate trials under the Kentucky Code section mentioned above has met with widespread disapproval from many of the best lawyers and jurists of the state. These eminent servants of justice are convinced that the present practice is a waste of time, money, and a means of miscarriage of justice. As for one prominent Commonwealth's attorney, "It seems useless, expensive and an ineffective thing to do that (allow separate trials), for the Commonwealth must present the same witnesses in each of several trials, with a new jury for each trial, and the result is often a miscarriage of justice."[42]

The granting of separate trials to joint defendants generally grew out of the desire to prevent deficiency of jurors. "The practice of trying separately persons jointly indicted grew out of the public inconvenience resulting from the exercise by each joint defendant of his several right to challenge jurors peremptorily. Each of them was entitled to the same number that the law accorded him on trial of a separate offense, it was found that the venire and tales were frequently exhausted, and the great delay and serious public inconvenience were produced thereby, trials being at times prevented from this deficiency of jurors at the same assizes; and hence the plan of the crown's having separate trials, in case the joint defendants would not agree to join in their peremptory challenges, was adopted in furtherance of public justice."[43]

That is saying that the reason for allowing separate trials is to prevent deficiency of jurors. Apparently section 237, allowing joint defendants in felony cases to have separate trials as a matter of right, had for its purpose the prevention of deficiency of jurors. Yet it is a fact that even if section 237 is repealed, thereby not allowing joint defendants to claim as a matter of right a separate trial in a felony case, the end of prevention of deficiency of jurors is still attained. By way of elucidation we see that section 198 of the Kentucky Criminal Code provides

who are jointly indicted in felony cases, you will have made a substantial contribution to the enforcement of law in this State." Letter to the authors from James Park, Commonwealth's Attorney for Fayette County.

[42] *Hoffman* v. *Com.* 134 Ky. 726, 121 S. W. 690 (1909); *Drake* v. *Com.* 214 Ky. 147, 282 S. W. 1066 (1926).

[43] *Ballard* v. *State*, 31 Fla. 266, 12 So. 865 (1893).

that "When several defendants are tried together, the challenge of any one of the defendants shall (must) be considered the challenge of all." The defendants are thereby forced to join in their peremptory challenges, i. e., all of the defendants are entitled in the aggregate to not exceeding three and in felonies to not exceeding fifteen peremptory challenges. Thence, in the absence of section 237, there would arise no situation where the joint defendants in the felony case could each have fifteen peremptory challenges, and where a deficiency of jurors might result. Since a deficiency of jurors is now prevented by the code section 198, another provision, namely 237 allowing the defendant to have a separate trial as a matter of right, is unnecessary and superfluous.

Thus the above model provisions of the American Law Institute Code may technically and constitutionally be adopted into our Criminal Code. It is submitted that these provisions will make for more effective criminal justice in Kentucky.