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The Court of Appeals and Prohibition

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NOTES

THE COURT OF APPEALS AND PROHIBITION.

The records of the Court of Appeals for the last two years show that a great many liquor cases have been brought before it for consideration. These cases have a peculiar interest to the public just now, so it may not be amiss to consider a few of them and see if we can work out some idea of the Court's interpretation of the law bearing on this subject. It will readily be seen that the cases fall into a few large classes, such as transportation, treating, search, double jeopardy, and admissibility of evidence.

Many cases have had to be reversed because of the insufficiency of the indictments. In *Elliott v. Commonwealth*¹ the

¹ 240 S. W. 61.

court laid down the law as to what the indictment should contain. It held that an indictment should state with directness the offense of which it accuses the defendant and if the offense has not a name and is created by a statute which does not give it a name, but merely describes it, the indictment should follow the statute. Merely charging the defendant with "selling a beverage and decoction to be used as a beverage" is insufficient. The indictment must allege the intoxicating quality of it. *Mays v. Commonwealth*² holds that an indictment charging unlawful sale of liquor must allege the person to whom the liquor was sold. In *Forman v. Commonwealth*³ the indictment merely charged the defendant with violating the prohibition law, and gave a description of the act. This was held to be fatally defective in that the accusative part of the indictment merely charged a violation of the prohibition law, without specifying the offenses committed in violation of such law.

Many cases have been reversed because the indictments failed to negative the exceptions in the statute. *Largin v. Commonwealth*;⁴ *Cook v. Commonwealth*;⁵ *Lovelace v. Commonwealth*;⁶ *Walker v. Commonwealth*;⁷ *Rickman v. Commonwealth*;⁸ *Elrod v. Commonwealth*;⁹ *English v. Commonwealth*;¹⁰ *Rogers v. Commonwealth*.¹¹ However, *Wells v. Commonwealth*¹² points out that imperfections in the indictment may be waived by failure to demur or to require the Commonwealth to elect upon which of the several offenses named therein it would prosecute.

Before March 22nd, 1922 it was incompetent to show that the defendant's reputation as a transporter of liquor was bad. *Handshoe v. Commonwealth*;¹³ *Warrix v. Commonwealth*;¹⁴

² 240 S. W. 58.

³ 243 S. W. 2043.

⁴ 236 S. W. 243.

⁵ 236 S. W. 946.

⁶ 236 S. W. 567.

⁷ 237 S. W. 369.

⁸ 243 S. W. 929.

⁹ 244 S. W. 55.

¹⁰ 244 S. W. 55.

¹¹ 244 S. W. 73.

¹² 243 S. W. 1015.

¹³ 243 S. W. 1024.

¹⁴ 243 S. W. 1025.

Davidson v. Commonwealth,¹⁵ *Fletcher v. Commonwealth*,¹⁶ *Mullins v. Commonwealth*.¹⁷ However, the Acts of 1922 make evidence of reputation as a bootlegger, etc., competent. *Price v. Commonwealth*.¹⁸ *Bullington v. Commonwealth*¹⁹ held that in a prosecution for the sale of whiskey to a certain person, evidence of other sales was inadmissible.

Duplicity in the indictments has caused many reversals. An indictment charging the defendant with unlawfully having in his possession and keeping for sale intoxicating liquors and unlawfully selling same was demurrable for duplicity. *Walker v. Commonwealth*.²⁰ The indictment in *Lovelace v. Commonwealth*²¹ charging the sale, transporting and keeping of liquor was bad. One charging the manufacturing and keeping in possession charges two distinct offenses. *Bawling v. Commonwealth*.²² Among many others held bad because of duplicity may be mentioned the following: *Mays v. Commonwealth*;²³ *Franklin v. Commonwealth*;²⁴ *Lyttle v. Commonwealth*;²⁵ *Ash v. Commonwealth*;²⁶ *Collins v. Commonwealth*.²⁷

Doubt as to the sufficiency of the evidence has caused several appeals. In *Slaton v. Commonwealth*²⁸ the court stated that a conviction may be had upon circumstantial evidence alone. It also held that a verdict would not be set aside as against the weight of evidence unless it was clearly shown that it was the result of prejudice or passion. Several cases hold that a conviction may rest upon circumstantial evidence alone but that this evidence must establish the guilt of the defendant beyond a reasonable doubt. It must be sufficient to destroy every reasonable hypothesis of innocence. *Bowling v. Commonwealth*;²⁹

¹⁵ 244 S. W. 688.

¹⁶ 245 S. W. 134.

¹⁷ 245 S. W. 278.

¹⁸ 243 S. W. 927.

¹⁹ 236 S. W. 961.

²⁰ 236 S. W. 566.

²¹ 236 S. W. 567.

²² 237 S. W. 381.

²³ 240 S. W. 59.

²⁴ 243 S. W. 1013.

²⁵ 243 S. W. 1037.

²⁶ 236 S. W. 1032.

²⁷ 243 S. W. 1058.

²⁸ 236 S. W. 952.

²⁹ 237 S. W. 381.

Johnson v. Commonwealth,³⁰ *Wells v. Commonwealth*,³¹ *Stephens v. Commonwealth*.³² This rule is especially applicable to violations of the liquor laws, which are nearly always committed with secrecy, and by methods that often make detection difficult.

There are many interesting points brought out in recent cases showing the Court's interpretation of the law. In *Commonwealth v. Stringer*³³ a directed verdict for the defendants was held proper because the only witnesses for the prosecution were held to be accomplices as they had gone with the defendants to the still and tried to start a fire under it but, due to the wetness of the wood, had temporarily abandoned their efforts. Section 241 of our Criminal Code provides that "A conviction can not be had upon the testimony of an accomplice, unless corroborated with other evidence tending to connect the defendant with the commission of the offense."

The transporting, by the owner of a farm, of liquor made in an illicit still on the farm from one part of the farm to another is unlawful. *Scaggs v. Commonwealth*.³⁴ *Simpson v. Commonwealth*³⁵ holds that to sustain an indictment for keeping for sale intoxicating liquors, it is sufficient to prove that liquors are kept for sale; it is not necessary to prove that a sale was either made or attempted. The Court of Appeals reversed *Nunn v. Commonwealth*³⁶ on the ground that testimony before a Grand Jury could not be used against the witness on trial for transporting whiskey, where the defendant did not testify. Where one owning and controlling an automobile driven by his son in which he and others were riding, took a drink from a jar of whiskey and placed it in the bottom of the car where it was then carried, he was guilty of transporting it, though he did not own it, or put it in the car, or know how it came to be there. *Green v. Commonwealth*.³⁷

³⁰ 239 S. W. 1048.

³¹ 243 S. W. 1015.

³² 244 S. W. 301.

³³ 243 S. W. 944.

³⁴ 244 S. W. 799.

³⁵ 244 S. W. 65.

³⁶ 243 S. W. 917.

³⁷ 243 S. W. 917.

*Knigh v. Commonwealth*³⁸ holds that selling by an agent is sufficient to warrant one's conviction for selling whiskey in violation of the statute. The Court says in *Young v. Commonwealth*³⁹ that the accused's possession may be in person or by agent. However, the Court held that where the defendant called at an express office for packages containing liquor and paid the charges and with the agent went to the warehouse, but, before the agent had identified the packages or indicated that they were at the defendant's disposal, officers arrested the defendant and took possession of the packages, he never had the "possession" essential to a conviction for keeping liquors for sale under Kentucky Statutes 2554a-1.

The question as to the admissibility of evidence seems to have given a great deal of trouble, so that many appeals have been taken on this point. Some cases have held that where the acts of the defendant violating the law were done openly that he might be arrested without a warrant and the property might be seized. *Bowling v. Commonwealth*.⁴⁰ *Royce v. Commonwealth*⁴¹ held that a search warrant was unnecessary where the possession of the liquor was open and obvious, and the evidence thus obtained was admissible. Where, as in *Fletcher v. Commonwealth*,⁴² officers saw the defendant picking up a jar of whiskey and proceeding to remove it, they could arrest him and seize the liquor without a search warrant, since the offense was committed in their presence.

However, where the possession or other violation is not open and obvious any search or seizure without a search warrant is illegal, as one's constitutional protection is violated, and any evidence thus obtained is incompetent and should be excluded from the jury's consideration. *Youman v. Commonwealth*⁴³ is the leading case on this subject. It has been followed in *Ash v. Commonwealth*,⁴⁴ *Colley v. Commonwealth*,⁴⁵ *Mills v. Common-*

³⁸ 240 S. W. 40.

³⁹ 239 S. W. 1042.

⁴⁰ 237 S. W. 381.

⁴¹ 239 S. W. 795.

⁴² 245 S. W. 134.

⁴³ 224 S. W. 860.

⁴⁴ 236 S. W. 1032.

⁴⁵ 243 S. W. 913.