1929

Comment on Kentucky Decisions in Criminal Cases in 1928

John Junior Howe

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COMMENT ON KENTUCKY DECISIONS IN CRIMINAL CASES IN 1928

Studies heretofore made have been so well received that a review and discussion of the 1928 decisions in criminal cases have been undertaken by the writer and the Journal's readers are to have the benefit of the work done and consideration given.

Comparative Table

<table>
<thead>
<tr>
<th>Year</th>
<th>1916</th>
<th>1917</th>
<th>1922</th>
<th>1924</th>
<th>1928</th>
</tr>
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<td>103</td>
<td>85</td>
<td>174</td>
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<tr>
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<td>84</td>
<td>76</td>
<td>163</td>
<td>220</td>
<td>135</td>
</tr>
<tr>
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<td>48</td>
<td>57</td>
<td>86</td>
<td>127</td>
<td>79</td>
</tr>
<tr>
<td>Reversed</td>
<td>36</td>
<td>19</td>
<td>77</td>
<td>83</td>
<td>56</td>
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<td>19</td>
<td>9</td>
<td>11</td>
<td>11</td>
<td>6</td>
</tr>
<tr>
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<td>9</td>
<td>4</td>
<td>8</td>
<td>7</td>
<td>---</td>
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<td>10</td>
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<td>4</td>
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<td>Homicide Appeals</td>
<td>---</td>
<td>---</td>
<td>41</td>
<td>47</td>
<td>67</td>
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<tr>
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<td>---</td>
<td>---</td>
<td>25</td>
<td>26</td>
<td>46</td>
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<tr>
<td>Reversed</td>
<td>---</td>
<td>---</td>
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<td>---</td>
<td>---</td>
<td>69</td>
<td>117</td>
<td>21</td>
</tr>
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<td>---</td>
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<td>41</td>
<td>47</td>
<td>16</td>
</tr>
<tr>
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<td>---</td>
<td>33</td>
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<td>---</td>
<td>25</td>
<td>19</td>
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The object of the writer is the same as that expressed when writing about the 1922 cases.

None of the affirmances will be referred to and many well considered opinions will for brevity's sake be not included. No attempt will be made to mention all of the reversed cases nor will

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1 Taxation, condemnation, escheat and other Commonwealth cases of a civil nature are not included herein.

The 1928 cases include all criminal cases decided by the Court of Appeals during 1928 in so far as they have been reported in the South Western Reporter up to and including Volume 10 (2d) No. 4.

The 1924 cases included all criminal cases decided by the Court of Appeals during 1924, although some of the opinions now appear in the early 1925 Advance Sheets. The 1916, 1917 and 1922 cases include those only appearing in the Advance Sheets for those respective years, regardless of when the decisions were handed down. It is believed that the proportion is about the same.

2 In discussing the cases herein the principles projected and the comments interpolated are persuasive only and the idea is to challenge the reader to investigate the adherence to or deviation from established precedents to the end that a more efficient and adequate administration of criminal justice may result. Although the writer may be frank or inquisitive he wishes to emphasize that he has the greatest respect for our Honorable Court of Appeals and each and every member thereof. See p. 117 of March, 1923, Kentucky Law Journal.
all of the cases mentioned be thoroughly discussed—merely the outstanding features emphasized.

Errors concerning evidence were the controlling or partial reasons for reversal in thirty-one cases. These included incompetent evidence, insufficient evidence and verdict contrary to evidence cases. Improper instructions in sixteen, defective indictments in three, abuse of discretion of court in failing to sustain motion for continuance two, misconduct of commonwealth’s attorney four, misconduct of judge one, and unconstitutionality one.

A comparison of these figures with those submitted in the discussion of the 1924 cases will show improvement.

The misconduct of the trial judge was held prejudicial in Canterberry v. Commonwealth. It appeared that he on November 23d at 11 a.m. attempted to coerce the jury in a manslaughter case to make a verdict by saying that he would keep the jury together until Saturday, December 4th. A verdict was returned at 1:10 p.m. on the 23d.

The misconduct of the commonwealth’s attorney caused the reversal of Fleming v. Commonwealth. The prosecutor in his argument discredited defendant’s affidavit for a continuance, which error was not cured at the close of argument by the court’s charge not to consider the comment where objection during the argument was overruled. Similar misconduct in referring to “deposition of absent witnesses” as a mere affidavit (where motion for continuance had been overruled) was likewise prejudicial.

Arguing matters not in evidence was the prejudicial misconduct causing reversal of a manslaughter conviction in Park v. Commonwealth. In a murder prosecution, Maiden v. Commonwealth, it was error to admit evidence that accused possessed whiskey and had been indicted for another matter not connected with the crime. The case of Roames v. Commonwealth is quoted giving the exception to the general rule that

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2 222 Ky. 510, 1 (2d) S. W. 976.
4 224 Ky. 176, 5 (2d) S. W. 899.
5 Barnett v. Commonwealth, 225 Ky. 585, 9 (2d) S. W. 715 (Homicide).
6 225 Ky. 340, 8 (2d) S. W. 422.
7 225 Ky. 671, 9 (2d) S. W. 1018.
8 164 Ky. 334, 175 S. W. 669.
evidence of other offenses is inadmissible. An unique feature of this case was that it was prosecuted exclusively by special counsel, neither the commonwealth's attorney nor the county attorney participating in the trial. But as no exception was taken to this by accused it was not error.

A view of the premises when the accused was not present caused the reversal of *Freeman v. Commonwealth.* A view is considered a part of the introduction of evidence against the accused it is plain that a reversal was necessary.

A death penalty case, *Jack v. Commonwealth,* was reversed on account of the prejudicial error incident to the admission of the jailor's testimony that an ordinary magnifying glass test showed that the fatal bullet was fired from the pistol in evidence. A gripping opinion gives a more or less exhaustive dissertation on "Forensic Ballistics" and refers to an article in the November, 1927, issue of Popular Science Monthly. As this is a technical matter the court properly holds that non-expert conclusions are inadmissible until the witness shows he has made a special study of the subject. The court suggests that instructions covering all phases of the case be given upon the next trial including self-defense and voluntary manslaughter.

There was no evidence of conspiracy in *Roberts v. Commonwealth;* hence it was error to instruct thereon. Modification of the self-defense instruction by referring to provocation was not supported by the evidence and was error itself necessitating reversal. This case is another proving the dangerous use of a "bringing-on-the-difficulty" instruction. *Frasure v. Commonwealth* is cited as giving a collection of authorities on instructions regarding murder, manslaughter and self-defense, togethet with the proper limitations of the law.

Improper instructions also caused the reversal of *Raines v. Commonwealth.* The court said "the omission of the word 'feloniously' from the instruction was not prejudicial . . . but the omission of the word 'intentional' or 'wilful' or other
words of like import was prejudicial.” Suggestions for correct instructions for the new trial are given.

Instructions on self-defense should, in particular cases, not only give the accused the right of his own self-defense but also for the defense of others.14

A death conviction is reversed in Mitchell et al. v. Commonwealth15 on account of the prejudicial error of the court in failure to sustain motion for a continuance. Here the homicide was committed on the 24th day of the month, a special term was called on the 26th, indictment returned on the 27th and the case set for trial on the 30th. Many cases are cited upholding the court’s decision.

Hatcher v. Commonwealth16 reverses a conviction for “obtaining property by false pretenses.” An instruction setting out defense that the payee agreed to hold the check until some future day was not given. This was prejudicial error. Although the defendant was indicted under Section 1208, Kentucky Statutes, he was tried for the offense defined in Section 1213a known as the “cold check” law (1914 Act). The cases of Grisson v. Commonwealth17 and Commonwealth v. McCall18 are cited. The Grisson case was prosecuted under Section 1213a for “drawing, uttering, delivering and presenting a check where there were insufficient funds in the depository to meet the same.” The McCall indictment, like the Hatcher one, was for false pretenses and the acquittal had under Section 1213a. The court there held, “The mere giving a worthless check unaccompanied by any false statement is not an offense under this section” (1208). It is pointed out that under Section 1213a, “The offense is complete when the worthless check is given with intent to defraud, and the statute has pointed out the only way in which this offense can be blotted out.” The Hatcher opinion finds that defendant was tried for the offense defined in Section 1213a, (whereas the indictment was under Section 1208) and says, “If, at the time he gave the check, he knew that he had no money on deposit in the bank out of which it could be paid, and he obtained

14 Napier v. Commonwealth, 225 Ky. 384, 9 (2d) S. W. 107; Webster v. Commonwealth, 223 Ky. 363, 3 (2d) S. W. 754.
15 225 Ky. 117, 7 (2d) S. W. 823.
16 224 Ky. 131, 5 (2d) S. W. 882.
17 181 Ky. 189, 203 S. W. 1075.
18 186 Ky. 301, 217 S. W. 109.
goods from the payee named in the check, the offense was complete when the worthless check was given with intent to defraud." The meaning would be clearer if the words "with the intent to defraud" were inserted also after the word "check" is first used in the quotation. The proposition enunciated in the quotation is applicable only to the cold check law and must not be confounded with false pretenses generally, as in the latter "the pretenses must be a false representation as to some past or existing fact or circumstance, and not a mere expression of opinion ..."19 It is interesting to note that the Grisson case is digested under Banks and Banking and the other two cases are digested under False Pretenses. Attention is also called to the fact that the Grisson indictment set out all the statutory phases of the offense covered in the statute. The conviction under the indictment was affirmed and the court says, "The indictment stated a public offense under the statute, and, besides, was free from substantial error." This in spite of the attitude of our Court of Appeals in recent years in holding such indictments in liquor cases bad for duplicity.20

The 1928 Cold Check Act which is now Section 1213a of the 1928 Supplement omits "with the intent to defraud." Persons under twenty-one years of age are exempted from the provisions of this 1928 Act. Query: Under what act will young men under twenty-one and over seventeen be indicted and under what section will they be tried for "cold checking?"

As the verdict was palpably against the weight of the evidence in Webb v. Commonwealth,21 a rape conviction was reversed. The court said, "It can hardly be conceived that she (the prosecutrix) did not consent to the sexual act." The defense insisted that the court erred in not giving affirmative instruction for the defendant on his theory that the prosecutrix voluntarily consented. The court holds this might have been proper, but as the first instruction required the jury to believe to the exclusion of a reasonable doubt that the act was committed forcibly and without consent of the prosecutrix and a reason-

19 Clark 3d Ed. p. 62.
20 See Walker v. Commonwealth, 192 Ky. 257, 232 S. W. 617, and other cases and authorities, including texts, cited by the writer in Volume 11 Kentucky Law Journal, p. 121.
21 223 Ky. 424, 3 (2d) S. W. 1080.
able doubt instruction was also given, the defendant’s rights were fully protected.

Because a somewhat similar instruction was not given "a pistol conviction" was reversed in *Avery v. Commonwealth.*22 The jury chose to believe the evidence of one witness against several others and found the appellant guilty. Although the court holds that it was not necessary to instruct the jury as to the definition of what was meant by the word concealed, the upper court "goes all the way" to Alabama to find what the court considers the best definition of what is meant by carrying a deadly weapon concealed, using some eighteen lines for that purpose. Defendant claimed the pistol was in an automobile and fell out when the door was opened. The prosecuting witness claimed that when the pistol fell the defendant was some eight feet from the automobile. Although apparently the usual "pistol instruction" was given the opinion holds that, "The court should have admonished the jury upon the facts in this case that appellant was not upon trial on a charge of having the pistol concealed in the automobile, and that the jury should find him guilty only in the event they believe in accordance with the instruction that he had the pistol concealed upon or about his person as detailed by the witness for the Commonwealth." The opinion contains this explanatory sentence, "We are not called upon to decide in this case whether it would be a violation of the statute for a man to have concealed a deadly weapon in his automobile in close proximity to his person and we must decline to pass on that question." This is a very interesting and rather complete opinion, but it is difficult for the writer to see wherein the substantial rights of defendant were prejudiced by failure to give the admonishment as indicated therein.

The whole court properly sat when determining the constitutionality of Section 4243a1-3 providing for the cutting of weeds and similar obstructions along the highway. A demurrer had been sustained to the indictment and the indictment dismissed on the ground that the statute was unconstitutional. In *Commonwealth v. Watson*23 the statute is held to be not unconstitutional as discriminatory or taking property for public use

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*223 Ky. 248, 3 (2d) S. W. 624.*

*223 Ky. 427, 3 (2d) S. W. 1077.*
without due compensation. Similar duties, such as the duty to work the road, to assist an officer in the performance of his duty, or to permit the destruction of one's property when circumstances require it, commanded by statutes providing for like hardships, have been held valid. The Washington Supreme Court upheld an act requiring the owner of land abutting on the highway to cut weeds growing upon the highway and made the costs thereof a lien on his land. All that remains now is for the weed law to be enforced.

A negro was held to be entitled to a peremptory instruction on a charge of detaining a woman against her will. Just how this prosecution reached the appellate court is difficult to understand in view of the failure of the record to show any evidence of detention whatever. While the conduct of the accused in walking along the street at 6:30 a.m. with his person exposed was most reprehensible there was no more attempt on his part to detain the prosecutrix than the other three ladies accompanying her, and there was none as to any. The late Tinsley case, where the authorities are collected, is cited and the court fittingly says, "An examination of these authorities will show that in each instance the defendant was guilty of some overt act calculated to detain the woman either by obstructing her free movements, placing her in fear, or by threats of some nature which were calculated to interfere with the exercise of her own free will."

A two-year seduction conviction is reversed in Dalton v. Commonwealth because evidence in chief for the Commonwealth was admitted after defendant had concluded his evidence. The opinion admits that the trial court has wide discretion in such matters, citing cases to support that doctrine, but holds that the instant case is in fact an abuse of the discretion of the trial court, but as the evidence was incompetent and certainly prejudicial the reversal is made on that ground rather than the abuse of the trial court's discretion. As considerable evidence was admitted relating to the pregnancy of the prose-

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27 *Pardue v. Commonwealth*, 224 Ky. 783, 7 (2d) S. W. 211.
220 Ky. 121, 300 S. W. 363.
226 Ky. 127, 10 (2d) S. W. 609.
cutrix and regarding the birth of a child the court admonishes
that on another trial such evidence should not be allowed, citing
in support thereof Jordan v. Commonwealth. 28

Another seduction conviction in which the punishment was
fixed at one year, Curry v. Commonwealth, 29 was reversed on
account of the trial court's failure to allow cross-examination of
prosecutrix to develop pertinent evidence tending to contradict
her statements at the trial with those theretofore made. While
the Jordan case is not cited in the Curry opinion, nevertheless
"the court had a trying experience and this resulted in some
confusion in the rulings, one instance of which is that on the
final argument the commonwealth's attorney insisted upon dis-
cussing the birth of prosecutrix's baby, claiming this had been
admitted in the evidence, until he was corrected by the court."
One witness had testified to seeing prosecutrix and another
young man together "about two months before her baby was
born." This evidence, according to the opinion, was apparently
withdrawn.

Granting that the Jordan opinion is sound in so far as it
holds that "It was manifestly prejudicial error to permit the
Commonwealth to exhibit before the jury a child young as this
one was, for no other purpose than to excite the sympathy of the
jury . . .", nevertheless it is difficult for the writer to sup-
port the proposition that evidence as to whether prosecutrix
became pregnant or a child was born is not relevant or admis-
sible to corroborate prosecutrix. The seduction statute provides
punishment for one who "under promise of marriage, (shall)
seduce and have carnal knowledge of any female under twenty-
one years of age, and he shall be guilty of a felony." The writer
can think of nothing more conclusive as to a young unmarried
woman's having had carnal knowledge with some one than the
fact that she became pregnant and gave birth to a child. If such
evidence is competent in a rape case, 30 a fortiori such evidence
should be permitted in seduction where, if proven, it is evident
that there was complete sexual surrender and much more prob-
ability of conception.

28 180 Ky. 379, 202 S. W. 896, 1 A. L. R. 617.
29 225 Ky. 261, 8 (2d) S. W. 386.
30 Drain v. Commonwealth, 124 S. W. 856.
As to whether or not a witness is an accomplice the jury is to decide under certain circumstances and the court's failure to instruct the jury in regard thereto is the reversible error in *Fryman v. Commonwealth* (transporting liquor), the court continuing to adhere to the Stringer doctrine wherein the court holds that there are accomplices in misdemeanors and that Section 241 of the Criminal Code is applicable to both misdemeanors and felonies.

Two convictions for violation of the liquor law and former conviction thereunder were reversed. In *Billings v. Commonwealth*, the reversible error was failure to submit the question whether the defendant was exceeding the speed limit when arrested without a warrant as that feature really determined the admissibility of evidence regarding the liquor found. Trial court assumed that in the presence of the officers the defendant was running his automobile when arrested at a greater speed than allowed by law, whereas that issue should have gone to the jury. The incriminatory evidence introduced would have been properly admissible only in the event that an offense was being committed in the presence of the officers at the time of accused's transporting of the liquors. The opinion is elaborate, Wigmore, Chamberlayne, Greenleaf and the Harvard Law Review being cited, showing that great confusion has been created on this point as well as contrariety of opinions. The authors of the law review article conclude, "The considerations discussed are . . . abstruse and difficult," and doubt is expressed as to whether they have "sufficient practical value to make the discussion worth while except as a form of mental exercise." Nevertheless an ordinary circuit court judge in Kentucky is supposed apparently to know these niceties of the law sufficiently to properly instruct his jury and rule on the admissibility of evidence. As the trial court in the Billings case seemed lacking in this particular, the case was reversed.

The error in the three-year conviction of *Pruett v. Commonwealth* is more patent. To convict one of manufacturing intoxicating liquor it must appear that he had theretofore been

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n 225 Ky. 308, 10 (2d) S. W. 302.
**n 193 Ky. 716, 243 S. W. 944.
**n 223 Ky. 381, 3 (2d) S. W. 770.
**n 225 Ky. 665, 9 (2d) S. W. 984.
convicted of unlawful manufacture, whereas Pruett's former conviction was under a blanket indictment charging "unlawfully manufacturing, selling, giving away, keeping to sell, and having in possession and transporting, spirituous, vinous and intoxicating liquor. . . ." Although defendant confessed to a fine which was imposed by the court on the blanket indictment, he had failed to plead guilty to any specific violation. Under Section 3 of the Rash-Gullion Act and the decisions of the court regarding blanket indictments in liquor cases the reversal was imperative. Another felony conviction was reversed because the evidence failed to show that the former conviction was for an offense committed after March 22, 1922, when the Rash-Gullion Act became effective.3

An old friend of the court showed up when appellant in *Keifner v. Commonwealth*35 appeared, for the court admits "appellant bears a bad reputation for illicit dealing in liquor and his name is a familiar one in our courts" (citing other appeals by appellant). Apparently only a small amount of white whiskey was found "in a toilet room," according to the statement made by a woman employee who had the liquor in her hands. The court holds that an instruction should have been given in substance that if the whiskey was on appellant's property without his knowledge or consent and not by his direction or authority he was not in the unlawful possession of the whiskey and should be acquitted. It is doubtful in the writer's mind whether this sort of "self-defense instruction" is either proper or necessary if the usual liquor instructions are given.

The report of a grand jury read in the presence of the trial jury at the psychological moment during the lower court trial of *Miller v. Commonwealth*37 was the fatal error. The report lamented the inquisitorial belief that, "The liquor sellers are not content to merely violate this law but are going further, and attempting to, and are, having witnesses summoned before this body, and in the trial of cases perjure themselves." Other similar comments were made in the report urging "determined opposition by all good citizens." The higher court holds that there is no difference in principle between this case and *Shaw*

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3 *Hardy v. Commonwealth*, 224 Ky. 540, 6 (2d) S. W. 689.
35 *225 Ky. 160, 7 (2d) S. W. 1086.
37 *225 Ky. 744, 9 (2d) S. W. 1088.*
v. Commonwealth, in which the trial judge, in impanelling his petit jurors and just after their selection for service during the term, said to them, "It was their duty in all trials for violations of the liquor law to disregard the evidence of the accused as unworthy of belief." The whole court sat in the case and there is no dissenting opinion. Circuit judges, grand juries and commonwealth's attorneys will take due notice and govern themselves accordingly.

Another fatally defective indictment was the cause for reversal in Middleton v. Commonwealth. The accusative portion alleged the name of the purchaser of the intoxicating liquor, but the descriptive portion did not. The court cites Deaton v. Commonwealth to support the opinion.

A father's alleged incompetency should have been made a question for the jury, otherwise his consent to search land he owned on which his sons were tenants did not bind the sons who were in charge of the place living with their father. Consequently the evidence as a result of this search so consented to was incompetent and improper as there was no search warrant. There was proof available that the father had paralysis which had affected him mentally as well as physically and that the sheriff would say that he was decrepit and in poor health and in poor condition. The court excluded all of the testimony as to the mental condition of the elder Gilliland and declined to instruct the jury with reference thereto. In reversing this case the court says, inter alia:

"It might not be amiss to add that it is with some reluctance that we find ourselves compelled to reverse the judgment, since there was abundant evidence to establish the defendants' guilt; but it is the duty of courts and officers to obey and observe mandatory requirements of the Constitution, and there is no provision in it more sacred to the individual, nor which the founders of our constitutional form of government more highly cherished, or for which they more strenuously contended, than the one upholding the right of the people to security in their persons, houses, papers and possessions from unreasonable search and seizure, and which is contained in Section 10 of our Constitution."

The wife jointly was indicted with her husband for possessing apparatus for manufacturing liquors and convicted. The verdict called for a $300.00 fine and a thirty-day imprisonment.

206 Ky. 781, 268 S. W. 550.
226 Ky. 220, 19 (2d) S. W. 312.
220 Ky. 343, 295 S. W. 167.
Gilliland v. Commonwealth, 224 Ky. 453, 6 (2d) S. W. 467.
sentence. The court believed the husband undoubtedly to be
guilty. It said:

"We do not believe that the punishment of the actual violator, or
the benefits from a vigilant enforcement of the law, requires or demands
the raising of any presumption of guilt against the wife under such a
state of fact. Of course, we do not mean to hold that a married woman
can not commit the offense under consideration, or similar ones, but we
do declare her conviction must be sustained by something with more
probative force, and of more tendency to convict, than the mere infer-
ence to be drawn from the fact of her being the wife of a husband with
whom she resides in the household where the contraband goods were
discovered."

A conviction for unlawful possession was reversed in
*Kohler v. Commonwealth*,43 on account of incompetent evidence
having been introduced; county patrolmen presuming to execute
an order of delivery gave evidence concerning the liquor. As
they are only authorized to make arrests and searches and
seizures, the evidence as to the offense against the prohibition
law committed in their presence was, under the *Youman case*,44
cited by the court, incompetent. The court emphasizes that a
motion for a peremptory instruction brings into question the suf-
ficiency of the evidence and not the competency of the witnesses.
The court insists that the Commonwealth’s theory of the alleged
competency of the evidence on account of its being committed in
the presence of these witnesses (officials) is not tenable because
the "presence of the officers in defendant’s dwelling was the very
thing that was unlawful in this case."

The same doctrine was applied in *Harvey v. Commonwealth*,45 where a conviction for selling liquor was reversed be-
cause of insufficiency of affidavit for a search warrant issued by a
police judge. It is pointed out that if the affidavit for the issu-
ance of a search warrant is oral merely, it will be presumed to
be all right, but if written it is subject to the most penetrating
scrutiny. The court also refuses to say that an insufficient affi-
davit for a search warrant might not be amended after the search
warrant is issued. This is rather interesting. Emphasis is made
that the "ultimate fact of guilt should be stated in the affidavit."
It is peculiar to the laity that a search warrant would be deemed
necessary in a case where the "ultimate fact of guilt" was

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43 *Gullett v. Commonwealth*, 225 Ky. 194, 7 (2d) S. W. 1050.
44 *222 Ky. 671, 1 (2d) S. W. 1072.
45 *193 Ky. 536, 237 S. W. 6.
46 *226 Ky. 36, 10 (2d) S. W. 471.
known and sworn to. A warrant for the arrest of the defendant without any search could then be instituted and a conviction had without wasting time with a search and putting the officers to that extra trouble. The answer to this, of course, is that there would be difficulty in convicting a liquor violator on evidence of one man and it would require corroboration and the liquor, if seized lawfully, would be conclusive corroboration.

The Youman doctrine has been subject to considerable criticism and its alleged unsoundness challenged in the Kentucky Law Journal. Considerable of its "wetness" was "dried up" by the affirmance of Kendall v. Commonwealth and Chapman v. Commonwealth, under which such evidence may be admitted if given by private citizens, but inadmissible if from officers.

A state organization's letter asking more co-operation on the part of the county attorneys when assembled in annual convention in December, 1928, provoked a reply in part as follows:

"We wish to direct your attention to another and perhaps greater hindrance to the enforcement of all laws and particularly the liquor laws of our State and Nation. It is the principle established recently by our Court of Appeals to the effect that any evidence obtained by an illegal search or in any illegal way is inadmissible and can not be used against the accused.

"By the establishing of this principle in Kentucky, we have departed from the well-nigh universal rule to the contrary, not more than four or five courts in our United States agreeing with our Court of Appeals.

"It is said by one of our most distinguished authorities on Evidence, Professor Wigmore, that 'such a rule is misguided sentimental. For the sake of indirectly and contingently protecting the Fourth Amendment (of the United States Constitution) this view appears indifferent to the direct and immediate result, viz.: of making justice inefficient and codding the criminal classes of the population. It puts supreme courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the overzealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or pandeere.' (4 Wig. on Evidence 637, Sec. 2134.)."

The able dissenting opinion of Judge McCandless (now Chief Justice) in Morse v. Commonwealth is somewhat along the same line and to the same effect.

JOHN JUNIOR HOWE

Attorney at Law,
Covington, Kentucky.

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"Vol. 11, p. 124 et seq.
47 202 Ky. 169, 259 S. W. 71.
48 206 Ky. 433, 267 S. W. 181; see 14 Ky. Law Journal 133.
49 204 Ky. 672, 265 S. W. 37."