"After finding forty-eight per cent of criminal cases appealed to the State Supreme Court in the last four years have been reversed, Robert W. Otto, Attorney General (Missouri) declared today 80 per cent of the cases reversed were on defective instructions to the jury," says the Kansas City Star of January 19, 1925.

Former studies of the Kentucky cases made by the writer heretofore were so interesting that a review of the 1924 decisions in criminal cases with the idea of presenting a sort of "box score" to check up on the "hits" and "misses"—especially the latter—was undertaken by him and the readers of the Kentucky Law Journal have the benefit of it.

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The lofty object of the writer is the same as that expressed when writing about the 1922 cases.2

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

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. Altho 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.
Few, if any, 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 all of the cases mentioned be thoroughly discussed—merely the outstanding features emphasized. Many dangers and pitfalls will thus be brought to light for the benefit of those prosecuting or defending persons accused of crime and the proclivities and niceties of judicial psychology and perspicacity may be called to the attention of the general practitioner as well as the student of law.

Errors concerning evidence were the controlling or partial reasons for reversal in fifty-one cases. These included incompetent-evidence, insufficient-evidence and verdict-contrary-to-evidence cases. Improper instructions in 38, defective indictments in 12, abuse of discretion of court in failing to sustain motion for continuance, change of venue, 9, lack of jurisdiction, 2, misconduct of Commonwealth's attorney, 2, misconduct of juror and abuse of police power, 1 each, also contributed. In 1922 errors in evidence and instructions contributed to 39 and 21 reversals respectively. In 1924 errors in evidence contributed to the reversal of 10 murder cases and 27 liquor cases, instructions to 14 and 11 respectively. The search warrant hurdle is the hard one to get over. The analysis of the results in Kentucky shows a different "proximate cause" than that in Missouri, but it seems that evidence and instructions combined were three times more prevalent than all other errors put together. If we are to improve our "batting averages" as judges, prosecutors and defenders, it will be well for us to give these two branches of the practice more careful study.

*Vaughan v. Commonwealth*\(^3\) reverses a life sentence on a murder charge where the crime was perpetrated in a church during services at a time when the victim had no warning that he was about to be killed by being shot five or six times. The case is reversed because the manslaughter instruction was erroneously omitted, according to the higher court. The opinion says, "The record is barren of any proof of malice other than that inferred from the homicide itself." There is in fact

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\(^3\)204 Ky. 229, 263 S. W. 752.
every evidence of premeditation and it is difficult to understand why the manslaughter instruction was deemed necessary. Chief Justice Sampson dissent in an opinion which is a gem in its completeness, saying in part:

"Murder is abroad in the land and the more courts quibble about the unimportant things in homicide cases, the more crimes of like nature will be committed and the more quibbling will be necessary. What we need in this country as a check upon crime is a strong, wholesome administration of speedy justice, and a quick rejection of unfounded defenses which delay trials and impede the course of justice. We give too much attention to alleged errors on appeals which have no substance or merit."

In *Menser v. Commonwealth*, a conviction is reversed because the court gave a "brought-on-the-difficulty-instruction" which was erroneous and prejudicial. Such an instruction unless in proper form and warranted by the facts is a very dangerous one. Instructions giving undue prominence to certain facts in *Murphy v. Commonwealth*, and thereby qualifying the right of self-defense in *Howard v. Commonwealth*, were held erroneous as was also a defensive instruction given in *Fox v. Commonwealth*, where the court erroneously refused to allow a reargument of the case after giving an instruction on accomplices. The lower court in *Fugate v. Commonwealth*, trying one charged with conspiracy to murder, erroneously refused to give the conspiracy instruction because only one accused was being then tried. Fourteen of the homicide reversals were caused, partially at any rate, on account of improper instructions. Seven of the homicide reversals were not due in any way to the instructions. The misconduct of the Commonwealth's attorney in improper argument by unwarranted references to intoxicating liquor caused the reversal of *Wireman v. Commonwealth*, and repeating improper questions upset the conviction in *Foure v. Commonwealth*.

Apparently the first woman convicted under, and undoubtedly the first to appeal from conviction of Ken-

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*201 Ky. 607, 257 S. W. 1033.*
*205 Ky. 493, 266 S. W. 33.*
*203 Ky. 711, 216 S. W. 246.*
*202 Ky. 41, 238 S. W. 950.*
*202 Ky. 509, 260 S. W. 338.*
*203 Ky. 57, 261 S. W. 362.*
*205 Ky. 62, 295 S. W. 443.*
tucky Statutes, 1155, as amended in 1922, was Phoebe Maden. Her five-year sentence was reversed on account of an erroneous instruction, the limits of punishment being fixed according to the evidence where the boy victim was between 12 and 16 years, instead of in accordance with the charge where the boy was alleged to be "under eighteen." Query: Will a few such convictions tend to reform the "present double standard of morals?"

*Gilbert v. Commonwealth* reverses a ten-year rape conviction because evidence of intercourse with other men was not admitted after jury had learned of prosecutrix's pregnancy. Her pregnancy may be proven by the Commonwealth for the purpose of corroborating her statement that appellant did have carnal knowledge of her, the court holds, citing *Druin v. Commonwealth*, nevertheless *Jordan v. Commonwealth* holds that evidence as to whether prosecutrix in a seduction case became pregnant or a child was born is not relevant or admissible to corroborate her. Those interested in the trials of such cases should take due notice of the admissibility of these corroborating circumstances in rape only, not in seduction.

Although defendant testified, he had not put his character in issue and consequently questions propounded by the Commonwealth's attorney to rebuttal witness should be confined to the accused's reputation for truth and veracity. *Garten v. Commonwealth*. In a murder trial, *Foure v. Commonwealth*, the court gives the proper form of question in the impeachment of a witness as follows:

"From his general reputation for morals and for truth and veracity, state whether or not in your opinion and judgment he (the witness) is entitled to full faith and credit when on oath." As there is no feature of evidence any more technical than the interrogation of reputation witnesses, the active practitioner would do well to keep these cases in mind.

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1. 202 Ky. 782, 261 S. W. 273.
2. 204 Ky. 505, 264 S. W. 1095.
3. 124 S. W. 856.
4. 130 Ky. 379, 202 S. W. 896.
5. 202 Ky. 666, 261 S. W. 22.
6. 205 Ky. 62, 265 S. W. 442.
Although a magistrate has the power to summon witnesses before him for examination on oath concerning any public offense (Criminal Code, section 32) nevertheless a circuit judge cannot hold a court of inquiry. *Ketcham v. Commonwealth.*17 The grand jury is the inquisitorial part of the circuit court. A circuit judge who saw enough to make a proper affidavit before some judicial officer for the purpose of having a search warrant issued, nevertheless cannot issue such a warrant himself without a formal affidavit. This is the holding in *Clarke v. Commonwealth.*18 Nor can a justice of the peace.

A trial judge in a misdemeanor case when the accused is absent in person but present by counsel refused counsel the privilege of entering a plea of "not guilty" in behalf of his absent client. A judge so refusing caused the reversal of two cases. *Williams v. Commonwealth.*19

One reason why some appeals are not affirmed is that the lower court through inadvertence or otherwise refuses to follow the directions of the upper court. "Strange the lower court permitted the evidence . . . after both the lower court and this court has ruled such evidence inadmissible on the first trial. In *Addington v. Commonwealth*20 the court said, "Where our rulings and directions on the first appeal are for any reason not followed on a subsequent trial" the case will be reversed again as was done on second appeal in homicide case of *Philpot v. Commonwealth.*21

It is frequently heard that a party may not contradict his own witness but this is not correct. *Couch v. Commonwealth,*22 citing many cases, correctly lays down the rule:

"A party may contradict his own witness whether (1) by other evidence, or (2) by showing that the witness has made statements different from his testimony, but in the latter case he may not be contradicted by showing inconsistent statements by him if he has only given merely negative evidence, or has failed to make for the party introducing him the statements apparently expected of him, but where he states facts distinctly prejudicial to the party introducing him, or clearly favorable to the adversary of such party, then the party introducing him may properly be permitted to show by other witnesses

17 204 Ky. 168, 263 S. W. 725.
18 202 Ky. 750, 251 S. W. 265.
19 205 Ky. 580, 266 S. W. 250.
20 205 Ky. 636, 266 S. W. 384.
21 202 Ky. 677, 261 S. W. 7.
that such witness introduced by him had made different or inconsistent statements." See Civil Code, section 596, and notes; also Criminal Code, section 221, n. 23, etc.

A motion and grounds for new trial verified by the oath of accused must be accepted as true where Commonwealth's attorney made no effort to controvert statement therein by filing a counter affidavit. Accused had absented himself from trial due to misinformation from deputy sheriff and a witness. Conviction of prohibition law carrying maximum penalty was reversed. *Damon v. Commonwealth.*

A diagram should not be drawn upon the floor of the court room and referred to in the testimony, but if such diagram is used a copy should accompany record, says *Anderson v. Commonwealth,* where an 18 year homicide verdict is reversed because the verdict was flagrantly against the evidence.

A second violation of the prohibition law wherein the punishment of the accused had been fixed at one year in the penitentiary was reversed on account of an erroneous instruction in *McKiney v. Commonwealth.* The Court of Appeals held that the "Commonwealth must establish by evidence defendant's guilt in the present case and his former conviction of an offense of the same kind." A case decided January 16, 1825, however, holds that the second conviction to warrant imposition of increased penalty need not be for the identical offense. *Johnson v. Commonwealth.* No mention is made of the McKinley case.

The indictments in some of the cases reversed were bad for duplicity, the several phases of the statute being embraced in the indictments, contrary to *Walker v. Commonwealth,* and other cases decided in 1922, which were evidently overlooked by the draftsmen of the indictments. Where election is made in time and there is no variance in the proof, convictions will be affirmed. In one case where the Commonwealth was put on election it elected to try for "harboring a moonshine still." As there is no such offense, the conviction in *Baker v. Commonwealth* was reversed.

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23 204 Ky. 765, 265 S. W. 333.
24 205 Ky. 369, 265 S. W. 824.
25 202 Ky. 757, 261 S. W. 276.
26 206 Ky. 594, 268 S. W. 302.
27 193 Ky. 426, 232 S. W. 617.
28 202 Ky. 181, 259 S. W. 35.
An indictment charging "drunkenness" states no offense. It must be at a place or under circumstances as designated in the statute. *Maynard v. Commonwealth*.

Nor is there such an offense as "operating a moonshine still." *Potter v. Commonwealth*.

Where the Commonwealth elected to try for unlawfully manufacturing intoxicating liquors and the court erroneously instructed the jury on "operating a moonshine still" (no such offense) a conviction was reversed in *Johnson v. Commonwealth*.

Although the opinion endeavored to show wherein the substantial rights of the accused were prejudiced, the reasoning is not over convincing.

Indictments not bad for duplicity but certainly worthy of comment for "singularity" were those for violation of the liquor law found and returned by a grand jury which had never been empaneled or instructed by the circuit court or any judge of the court authorized by law to do so. The grand jury had been instructed by the Commonwealth's attorney and among other irregularities was the lack of signature of any judge to the orders showing the return of the indictment. The indictments were void and bail bonds on such indictments were also void. Consequently *Meredith, et al. v. Commonwealth* was affirmed as to two forfeitures of bail bonds on two valid indictments but reversed as to nine invalid ones.

"Carrying liquor in one's stomach is not transporting within the meaning of the prohibition act." A conviction is reversed in *Rush v. Commonwealth*, the verdict being flagrantly against the evidence. Officers, who saw the neck of a bottle sticking out of a sack in an automobile but could not tell what was in the bottle, had no right to seize the sack and its contents which proved to be moonshine whisky, and *Adkins v. Commonwealth* is reversed, the court holding the facts in this case "very different" from "in sight" cases.

In reversing a liquor case the court said:

"From the record it appears to us that he was convicted solely be-

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202 Ky. 684, 261 S. W. 10.
202 Ky. 710, 261 S. W. 256.
202 Ky. 714, 261 S. W. 255.
201 Ky. 809, 258 S. W. 686.
206 Ky. 206, 286 S. W. 1046.
202 Ky. 86, 259 S. W. 32.
cause liquor was found on the adjoining premises, a pathway was found leading from his premises to the place where the liquor was found, and his reputation for observing the laws against the possession, use and sale of intoxicating liquor was shown to be bad."

So the court held in *Layer v. Commonwealth,* a this was not enough to sustain a conviction.

"Whenever a case involves a constitutional question, either federal or state . . . both sections hear the argument, if oral, and consider it, whether oral or written, and pass on the questions involved." Millers' Ky. Appellate Practice, section 120, citing Rule 11.

*Abraham v. Commonwealth,* *Nester v. Commonwealth,* and *Simmons v. Commonwealth* are cases involving the liquor law in which the lower court is reversed and in which constitutional questions are discussed. Neither the official report nor the unofficial report shows "whole court sitting" in any of these cases. The Simmons case reverses a one-year penitentiary sentence for second conviction and *inter alia* the court says:

"It is earnestly insisted for the Commonwealth that the witness in the performance of his duty as a peace officer in investigating the unusual noise which he heard, had a legal right under the circumstances to enter the building through the open door and to knock upon the door of appellant's room; that this being true, the fact that the door came open when he knocked upon it, thus disclosing appellant in the possession of moonshine whiskey, was not the result of an illegal act upon the part of the witness. With this we cannot agree."

The writer in an article in the March, 1923, Kentucky Law Journal (p. 124) commented on the case of *Youman v. Commonwealth,* holding articles obtained by search without a warrant inadmissible in evidence. A constitutional question was involved and the writer expressed the presumption that the whole court sat although the official report was silent as to specific mention of it. The fact that there was no dissenting opinion was at that time referred to. The writer cited and quoted numerous texts and opinions at length which caused him to reach the conclusion that the Youman decision was unsound. This is the case, the reasoning of which, Dean John H. Wigmore,
the "great American Greenleaf," denominated "misguided sentimentality."

A "dugout" illicit stillhouse, located at a place on appellant's farm, a quarter of a mile from the dwelling, was held to be a "house" within section 10, Kentucky Constitution, relating to searches and seizures in *Morse v. Commonwealth.*\(^4\) A conviction was thereby reversed. The whole court sat, Chief Judge Sampson and Judge McCandless dissenting. The latter, in a minority opinion which is a classic, pays his respects to the Youman decision and to the "drastic" majority opinion in the Morse case. In fifteen pages of the official report he reviews the precedents, harking back as far as 1637, citing some, but in a large measure augmenting the authorities collated in the Kentucky Law Journal, *supra,* and after exhaustive research, says: "So far as my observation extends, in all the history of the common law no instance can be found in which, if otherwise competent, evidence was excluded because illegally obtained." He cogently answers the alleged Youman logic as follows:

"The Fourth Amendment is a guaranty of sacred rights, not a rule of evidence. Its object and purpose is to protect society, not to free criminals. It denounces the acts of unreasonable search and seizure, but provides no penalties or methods of enforcement."

"For its violation, however, the wronged person, whether good or bad, may have his action for the trespass and also prosecute the offender at common law. To grant immunity to a criminal whose guilt is uncovered by the search, a remedy that may not be invoked by the innocent, is to favor the criminal and in effect to place a premium on crime."

"Certainly there is nothing in the language of 'the provision that either expressly or impliedly authorized such a construction, and in adopting the rule, it seems to me, the court places itself in a very embarrassing attitude. The acts denounced are the unlawful invasion of the rights of privacy; the act is complete when the search or seizure is made, and should not be confused with the subsequent use of the evidence thereby seized."

The paragraphs of the Youman decision ending "... the law-abiding public ... are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender," are quoted and Judge McCandless says:

"If instead of intoxicating liquor the officers had found in Youman's residence the mutilated body of a murdered man, together with sufficient evidence to fix the crime of murder upon Youman, would the

\(^{40}\) 204 Ky. 672, 265 S. W. 37.
same conclusion have been reached? Could the same patriotic sentiments have been so eloquently expressed?"

He reaches the conclusion that the Youman "rule is not based upon a sound premise and will not stand the test of time."

After "listening in" for so long a time and having been distracted by so much "static" in the way of "coddling the criminal classes" by excluding competent incriminating evidence, it is certainly gratifying to receive the ringing tones of Judge McCandless' perfect "broadcasting."

Considerable of the virility was emasculated from the Youman doctrine, or it might be more appropriate to say that a great deal of its "wetness" was "dried up" by the affirmance of Kendall v. Commonwealth.\textsuperscript{41} From the opinion we quote:

"While we have held in a number of cases that a public officer charged with the enforcement of the prohibition laws may not as a witness give evidence against a defendant which was obtained by unlawful means, as by trespassing upon the premises of the accused, we have never extended this rule to evidence given by private citizens. The testimony of Uloth was competent against appellant although it would not have been had he acted in an official capacity." \ldots

"Whatever one may think of his conduct in spying upon the premises of another, he was not disqualified as a witness by such act. The case of Mattingly v. Commonwealth,\textsuperscript{42} upon which appellant relies, does not announce a contrary rule, for in that case the trespassers were public officials engaged in attempting to enforce the prohibition laws."

The case of Chapman v. Commonwealth\textsuperscript{43} is to the same effect. It says: "Nor can the fact that a private individual assumes to be a public officer, or assumes to act under a search warrant, change his status so as to affect the competency of the evidence so disclosed.

Thus we see our court has reached the conclusion that the wilful unlawful acts of a private citizen are of more competent and convincing evidential effect than those of an officer acting

\textsuperscript{41} 202 Ky. 169, 259 S. W. 71.
\textsuperscript{42} 197 Ky. 583, 247 S. W. 938.
\textsuperscript{43} 206 Ky. 439, 267 S. W. 181.
conscientiously, but not clothed with every technical vestige required by those who apparently prefer to see two guilty escape rather than that one be punished. Maybe some day when the Wigmore logic and the Harno reasoning have completely sunk in, the iniquitous Youman doctrine will be superseded in its entirety.

The forfeiture of a whole farm of 155 acres under Acts of 1922, chapter 33, section 13, because intoxicating liquors had been manufactured thereon was reversed in Rickman v. Commonwealth, the Court of Appeals holding that the forfeiture of the entire farm "would be to carry the police power further than necessary to abate the nuisance and that only that part of the premises which is so used should be forfeited." Although the opinion by Commissioner Hobson states that the court considered the question "in full bench" there is no statement at the end of the opinion "whole court sitting." The then Chief Justice (Sampson), however, delivered an able dissenting opinion, in which he states, "It seems impossible to give the act any effect without giving it its full effect." He quotes, in haec verba, the concluding portion of section 13 reading as follows:

"The forfeiture herein provided for shall extend to the whole of the farm, premises, building or structure owned by defendant or to such thereof as he has any interest in, including all land and all buildings in one boundary, and shall not be construed to mean a part thereof."

He reiterates the language "shall not be construed to mean a part thereof" and says "had each member of the House of Representatives and the whole body of the Senate attempted to make it more definite and certain that the whole of a farm was to be sold in case of forfeiture and not a part thereof, more apt words could not have been employed than those copied above." In providing for the forfeiture of the whole of any such farm and not a part thereof the Legislature made it as emphatic as if it had said in the slang of the day, "And I don't mean maybe."

The then Chief Justice says: "Whether such act should be

42 Ill. Law Review, pp. 303.
43 204 Ky. 348, 265 S. W. 452.
44 265 S. W. 609.

passed addressed itself to the legislative will. With that the courts have nothing to do." . . . "I apprehend that there will be great difficulty under the rule laid down in the majority opinion in determining with exactness how much of a given farm on which an illicit still is found shall be subject to forfeiture." . . . "Shall the court be permitted to say that the forfeiture would work too great a hardship?" . . . "I think the court invaded a legislative province when it struck from the forfeiture act the whole of the clause declaring that forfeitures shall extend to the whole of a farm, including all the land in one boundary, and shall not be construed to mean a part thereof." (The italics used in discussing the Rickman case are Judge Sampson's.)

When the learned Chief Justice is so impressed by the majority opinion would it be at all surprising if the ordinary lay mind should reach the conclusion that the highest court of the state has engaged in unwarranted judicial repeal of valid legislation?

John Junior Howe,
Commonwealth's Attorney.

Carrollton, Ky.