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Kentucky Law Survey: Evidence

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Evidence

BY ROBERT G. LAWSON*

I. IMPEACHMENT OF AN ACCUSED BY FELONY CONVICTIONS

In *Martin v. Commonwealth*[1] the defendant, who stood charged with murder and with being a habitual criminal, elected to testify in his own defense. During his cross-examination the prosecution was permitted to prove the commission of five prior felony offenses—three for breaking and entering, one for forgery and one for operating a motor vehicle without the owner's consent. This evidence was offered and received exclusively for the purpose of impeaching the defendant's testimony. Following a conviction for murder, the defendant appealed, presenting the use of his prior criminal record as his principal claim for appellate relief. The Court of Appeals, finding no error in the trial court's action, affirmed the conviction.

The most significant aspect of this decision was the apparent ease with which the issue was resolved. In recent years the Kentucky Court of Appeals has viewed the admissibility of an accused's prior convictions as an evidence problem of special difficulty, involving considerable risk of distortion to the decision-making process. A very cautious attitude toward the use of such evidence has guided the Court in recent decisions. But the *Martin* case is clearly different. It does not reflect an attitude of caution on this issue and, therefore, suggests a need for review of developments in this important area of impeachment doctrine. Such a review must necessarily center around the case of *Cotton v. Commonwealth.*[2]

A. *The "Cotton" Doctrine*

Before 1970 it was possible to impeach the testimony of a criminal defendant by proof of a prior conviction for *any* felony

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[1] 507 S.W.2d 485 (Ky. 1974).

[2] 454 S.W.2d 698 (Ky. 1970).

offense. The nature of the criminal act underlying that conviction was of no significance to the issue of admissibility. A prior conviction for murder was as admissible for this purpose as a prior conviction for perjury. However, the method by which such evidence had to be introduced served in large measure to conceal the identity of the prior offense. Impeachment of this type had to start with a question to the defendant about the existence of prior felony convictions. An affirmative response to this inquiry (*i.e.*, an admission by the defendant of a prior conviction) completed the impeachment process. Introduction of extrinsic proof of the conviction was foreclosed by the admission, and the jury was left without knowledge of the specific offense previously committed by the accused. Only a denial of the existence of prior convictions would authorize the prosecution to go behind the defendant's testimony, and even then merely to the extent of proving a single prior felony conviction.[3] In 1970 the Court of Appeals decided *Cotton v. Commonwealth*, which made substantial modifications in this law, and, in doing so, adopted an approach to the impeachment of an accused that is as enlightened as any that exists in this country.

The first important change made by the *Cotton* decision resulted from a reconsideration of the threshold requirement of "relevancy," as applied to testimonial credibility. The "old" rule, which authorized the use of any felony conviction, was based on a belief that evidence of the commission of a serious crime establishes a "general readiness to do evil" from which it is possible to infer "a readiness to lie in the particular case."[4] Concern over the validity of this belief surfaced in *Cotton* and ultimately led to the conclusion that the relevancy of a criminal act, when offered for credibility purposes, should be dependent on the logical relationship of the act to the actor's disposition for truthfulness. The consequence of the *Cotton* decision is a much more restricted rule of admissibility than prevailed under previous doctrine. A felony conviction is now admissible only if the conduct from which it resulted involved an element of "falsehood" or "dishonesty." The change in "credibility"

[3] Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966).
[4] Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

law that was accomplished by this part of the case is sufficiently significant to assure *Cotton* ultimate recognition as an exceptional opinion. Yet, the second major change that resulted from the decision is probably even more important.

For many years the Kentucky law of evidence, in its treatment of an accused as a witness, was influenced by a single thought—that once a criminal defendant relinquishes his right of refusal to testify he is like all other witnesses for all purposes. The intellectual defect in this notion should be obvious. The defendant in a criminal case is the total *purpose* of the proceedings. He is the nucleus around which everything in the case revolves. In no way is it possible for him to be like an "ordinary" witness. The Court of Appeals recognized this reality in *Cotton* and rejected the long-standing practice of automatic admission of "relevant" convictions against an accused. Substituted in its place was an approach that requires a trial court judge to exercise "sound judicial discretion" in ruling on the admissibility of such evidence:

> The exercise of discretion by the trial judge in this area should primarily consist of weighing . . . [the need of the jury] for relevant evidence of the witness' untrustworthiness . . . against the possible prejudice to the witness . . . in being convicted not of the crime for which he is charged but of some crime for which he has been convicted and punished on some prior occasion.[5]

The attitude toward impeachment of an accused reflected in this quotation is identical to that adopted by a federal court of appeals in *Luck v. United States*.[6] The importance of this part of the "*Cotton* doctrine" is fully revealed by the recognition accorded the *Luck* opinion. It has been described by evidence writers as a "revolutionary" step,[7] a "landmark decision,"[8] and as "the most practical method for balancing the interests of both prosecutor and defense."[9] With no features to distinguish

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[5] Cotton v. Commonwealth, 454 S.W.2d 698, 701 (Ky. 1970).

[6] 348 F.2d 763 (D.C. Cir. 1965).

[7] Peltz, *More Than a Matter of Luck*, 19 N.Y.L. FORUM 833, 837 (1974).

[8] Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330, 339 (1970).

[9] Spector, *Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOYOLA U.L.J. 247, 253 (1970).

it from *Luck,* the *Cotton* decision is deserving of the same credit.

B. *Subsequent Developments*

In the years that have elasped since this important decision, the Court of Appeals has been confronted on several occasions with the general problem of impeachment of a defendant by use of previous convictions. Both parts of the case have been the subject of additional consideration. Subsequent cases dealing with the first aspect of *Cotton* have served merely to elucidate the guideline formulated in the 1970 case, which itself was fairly specific in describing the types of conduct that would be considered relevant to credibility:

> By crimes involving dishonesty, stealing, and false swearing, we mean such felonies as perjury, subornation of perjury, obtaining money or property under false pretenses, forgery, embezzlement, counterfeiting, fraudulent alterations, misappropriation of funds, false personation, passing checks without sufficient funds or on non-existent banks, fraudulent destruction of papers or wills, fraudulent concealment, making false entries, and all felonies involving theft or stealing.[10]

Consistent with this observation, income tax evasion,[11] armed robbery,[12] automobile theft,[13] and grand larceny[14] have all been adjudged to have the necessary relationship to credibility. Admissibility has been refused for prior convictions of rape,[15] morals offenses,[16] and misdemeanors.[17] The only questionable decision is *Martin v. Commonwealth,* the case used to introduce this discussion. In *Martin* the Court of Appeals ruled that a prior burglary conviction could be used to impeach the credibility of a witness, a ruling that is questionable only in the sense that burglary is a crime that does not *necessarily* involve "dishonesty or false statement." However, with most burgla-

[10] Cotton v. Commonwealth, 454 S.W.2d 698, 702 (Ky. 1970).
[11] Bogie v. Commonwealth, 467 S.W.2d 767 (Ky. 1971).
[12] Thomas v. Commonwealth, 487 S.W.2d 955 (Ky. 1972).
[13] Blair v. Commonwealth, 458 S.W.2d 761 (Ky. 1970).
[14] Iles v. Commonwealth, 476 S.W.2d 170 (Ky. 1972).
[15] Harris v. Commonwealth, 469 S.W.2d 68 (Ky. 1971).
[16] Dixon v. Commonwealth, 487 S.W.2d 928 (Ky. 1972).
[17] Terry v. Commonwealth, 471 S.W.2d 730 (Ky. 1971).

ries committed for the purpose of theft, even this ruling is generally consistent with the thrust of *Cotton*.

Subsequent application by the Court of Appeals of the second part of the *Cotton* decision is more difficult to appraise. In only two cases has the discretionary power of trial judges to exclude relevant convictions been the subject of direct consideration. The first was *Iles v. Commonwealth*,[18] a case that involved a charge of operating a motor vehicle without the consent of the owner. After his testimony on direct examination, the defendant was cross-examined concerning his participation in several prior offenses of automobile theft. On the basis of several defects in this cross-examination,[19] the Court of Appeals declared that the impeachment of the defendant was contrary to the "letter and spirit of the rule of *Cotton*."[20] The Court reached this conclusion partly because the cross-examination included references to criminal acts that were similar to the one charged. Special concern was expressed in the opinion about the use of such evidence, though in this instance it seemed to be a concern attributable primarily to the number of prior offenses brought to the jury's attention.[21] The decision in *Iles* resulted in a reversal of the defendant's conviction. Despite this fact, and despite the expression of concern described above, the Court of Appeals did not seem to be as sensitive as it had been in the *Cotton* case to the danger of prejudice to an accused from this type of evidence.

The apparent change in the Court's attitude, which can only be sensed in the *Iles* opinion, surfaced in concrete form in a second case that involved consideration of the "discretionary power" aspect of *Cotton*. In *Blair v. Commonwealth*[22] the defendant was charged with automobile theft. After testifying in his own defense, he was impeached by use of a prior felony

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[18] 476 S.W.2d 170 (Ky. 1972).

[19] The Court of Appeals mentioned several defects in the cross-examination. Among them were: (1) A failure to confine the questioning to *felony* offenses; (2) a failure to inquire about *convictions* and, in place thereof, to inquire about *imprisonment*; and (3) initiation of the cross-examination without an in-chambers hearing, as required by the *Cotton* case.

[20] Iles v. Commonwealth, 476 S.W.2d 170, 172 (Ky. 1972).

[21] The Court expressed a fear that the evidence brought to the jury's attention served to brand the defendant "as a chronic car thief, rather than to impeach his credibility." *Id.*

[22] 458 S.W.2d 761 (Ky. 1970).

conviction for theft of an automobile. Following his conviction, the defendant appealed, arguing that the identity of the two crimes—that charged in the case being heard and that underneath his prior conviction—should have compelled an exclusion of the evidence under the principles of *Cotton*. The Court rejected his argument and ruled that the action of the trial court in admitting the evidence was not an abuse of discretion.[23]

C. *Conclusion*

The decision in *Cotton v. Commonwealth* was as progressive as any impeachment case decided in this country in recent years. Some of its potential benefit, however, will not be realized unless and until there is generated a greater awareness than presently exists of the danger involved in the use of information about an accused's prior criminal behavior. It is elementary, of course, that such evidence is admissible only on the theory that a jury can use it in the assessment of credibility without otherwise using it in the determination of guilt or innocence. The mental gymnastics demanded of jurors by this theory is so obviously difficult that the problem should be constantly borne in mind by those who consider the admissiblity of such evidence. In fact, if scientific evaluations of interpersonal perception may be relied upon for guidance, the task demanded of jurors in the use of this evidence is probably beyond their psychological powers. The following statements are extracted from the most authoritative works on the mental processes utilized in forming impressions about other people:

> There is an attempt to form an impression of the entire person. The subject can see the person only as a unit; he cannot form an impression of one-half or of one-quarter of the person. This is the case even when the factual basis is meager; the impression then strives to become complete, reaching out toward other compatible qualities.[24]
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[23] It should be noted that the real import of this decision is clouded somewhat as a consequence of the way in which evidence about the accused's prior misconduct was first introduced into the case. The prior conviction was revealed initially, but without a designation of its type, in response to a question put to the defendant during direct examination, *i.e.*, from his own counsel.

[24] Asch, *Forming Impressions of Personality*, 41 J. ABNORM. & SOC. PSYCHOL. 258, 284 (1946).

> But it should be stressed that the observer always tends to see the subject as a unitary whole, however fragmentary the cues. He is not a sum of his physical, dynamic and other qualities any more than a chair is perceived as an addition of certain dimensions and colours. At first sight . . . he is an individual, and the information about more detailed qualities which is obtained from subsequent cues is integrated into this whole.[25]

The implication of these scientific statements is that jurors will use information about an accused's prior criminal behavior, along with all other data, to structure a single, integrated impression of him; such a use of this evidence is clearly inconsistent with the theory under which the evidence is admitted.

In this same body of scientific data there are some other evaluative observations that have unmistakable importance to this area of evidence law. They contain a warning concerning the enormous influence which information of deviant behavior has on judgments made about the person to whom that information relates. Statements such as the following are commonplace in the literature on interpersonal perception:

> A man is under suspicion of murder. During the investigation certain definite abnormalities of his sexual behavior come to light, even though there is no evidence that they are related in any way to the committed murder. Again, the frequent reaction in many people, if verbalized, would read something like this: "This man whose sexual life deviates so strangely from the norm can also be expected to deviate from other social norms in any other respect."[26]
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> Sometimes the perception of a single behavioral consequence may be decisive for the way in which important traits in a person's character manifest themselves to us, especially when the relevant product deviates from what we perceive as the typical product. . . . If a man has committed a crime, many will perceive his personality in terms of this one behavioral consequence. To many people, a murderer is a murderer and nothing else. They see in him only the abstract charac-

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[25] P. VERNON, PERSONALITY ASSESSMENT: A CRITICAL SURVEY 32-33 (1964).

[26] Ichheiser, *Misunderstandings in Human Relations*, 55 AMER. J. SOCIOL. 26, 27-28 (1949).

teristic of being a murderer; and this single characteristic swallows up all the rest of his human nature . . . .[27]

A clearer signal of the danger that accompanies evidence of a defendant's prior misconduct than is contained in these observations cannot be provided. A more certain need to restrict the use of such evidence to situations in which absolute necessity for it is shown cannot better be demonstrated. Although the Court of Appeals has done well with this area of the law, it has not yet accentuated this need for selective use of such evidence. When it does, decisions like *Martin v. Commonwealth,* where five prior felony convictions were admitted to impeach a criminal defendant, will be highly unusual.

II. VEHICULAR ACCIDENTS AND EXPERT OPINION

Two people are riding on a piece of farm equipment that is being pulled along a highway by a farm tractor. An automobile approaches from the rear and collides with the equipment and tractor. Four people are killed, including the two drivers and one of the passengers on the equipment. A state trooper and a coroner investigate the scene of the accident and find the following circumstances: (1) the tractor was torn into two parts by the collision and knocked 275 feet from the point of impact; (2) the farm equipment was rendered unidentifiable; (3) one body is found 210 feet from the place of collision; and (4) the automobile traveled 394 feet from tne point of impact. The trooper and coroner are experienced and trained accident investigators. At a trial involving claims arising from the accident, the two investigators propose to testify that the automobile was traveling at approximately 100 miles per hour at the time of collision. Should the testimony be admitted? This issue is one that has been the subject of frequent litigation before the Kentucky Court of Appeals.

The attitude of the Court toward the issue, at one time at least, was dominated by a belief that this type of evidence had limited probative value:

It has been said that violent impacts of moving bodies

[27] F. FROM, PERCEPTION OF OTHER PEOPLE 46 (1971).

> sometimes have freakish effects. . . . It is virtually impossible to reconstruct, even roughly, the dynamics of an automobile accident. . . . This court has yet to see the case where it can be done post factum from the positions of the vehicles. There are simply too many unknown and unknowable factors.[28]

On another occasion, in response to an attempt by a litigant to get the Court to adopt a more favorable posture toward such evidence, the Court declared: "[I]f there should be a change in policy regarding opinion evidence it might be wiser to restrict than to enlarge its scope. Certainly we are not as yet prepared to let traffic experts thus invade the province of the jury."[29] Yet, in the case from which the above facts were taken, *Kentucky Farm Bureau Mutual Insurance Co. v. Vanover,* the Court ruled that the opinions relating to speed were properly admitted by the trial court.[30] The apparent difference between the Court's previously declared attitude toward such evidence and its ruling in this case suggests this as an area that might be the subject of fruitful evaluation.

A. *A Brief Review of Recent Decisions*

A description of "recent" decisions involving this kind of evidence could begin at nearly any point in time. For purposes of this discussion, the decision in *Hoover Motor Express Co. v. Edwards' Executrix*[31] is selected as the point of departure. A wrongful death action from an automobile-truck collision on an icy highway was the subject of litigation in this case. To support a claim of negligence, the plaintiff, using two truck drivers as "expert witnesses," was allowed to introduce evidence of a reasonable rate of speed for a truck under the conditions prevailing at the time of the accident. The Court of Appeals ruled that this evidence was improperly admitted because the opinions expressed by the witnesses constituted "an unwarranted invasion of the province of the jury."[32] Two reasons explain the selection of this case as the beginning point for discussion:

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[28] Steely v. Hancock, 340 S.W.2d 467, 470 (Ky. 1960).
[29] Hargadon v. Louisville & Nashville R.R., 375 S.W.2d 834, 839 (Ky. 1964).
[30] Kentucky Farm Bureau Mut. Ins. Co. v. Vanover, 506 S.W.2d 517 (Ky. 1974).
[31] 277 S.W.2d 475 (Ky. 1955).
[32] *Id.* at 478.

First, the rationale for the decision—invasion of the jury's function—has been a major factor in the development of this area of law; and second, the decision is part of a group of early cases (decided during the ten years between 1955 and 1965) in which the Court of Appeals exercised exceptional caution in authorizing the use of this kind of evidence.

A typical example of the cases in this group is *Redding v. Independent Contracting Co.*[33] At the trial of this case, state troopers who had investigated the accident were allowed to estimate the speed of one of the vehicles at the time of impact. Their opinions were based on observations at the scene, particularly the condition of the vehicles. As in *Hoover*, the Court of Appeals found the testimony to be improper and the evidence derived from it "clearly incompetent and valueless."[34] It reached the same conclusion in a subsequent case[35] involving a dispute over testimony of a police officer who had investigated a vehicular collision on a narrow bridge. In his testimony this witness proposed to express an opinion as to the speed of one of the vehicles at the time of impact, as well as an opinion with respect to which vehicle arrived first on the bridge. The Court ruled both opinions inadmissible, the first because of inadequate qualifications of the witness, and the second because "it was solely the jury's prerogative to resolve this question."[36] The reason used to justify exclusion of this second opinion was also the basis for a decision of similar effect in *Hargadon v. Louisville & Nashville R.R. Co.*,[37] a case that involved a wrongful death claim arising from a train-truck collision at a railroad crossing. A state police officer, who was qualified as an expert on traffic safety, offered to testify that the crossing in question was "very hazardous" and "more dangerous than normal." Such testimony, said the Court of Appeals in ruling it inadmissible, would "invade the province of the jury."[38]

In only one case decided during this ten year period did the Court of Appeals rule in favor of admissibility of the kind of

[33] 333 S.W.2d 269 (Ky. 1960).
[34] *Id.* at 271.
[35] Eldridge v. Pike, 396 S.W.2d 314 (Ky. 1965).
[36] *Id.* at 317.
[37] 375 S.W.2d 834 (Ky. 1964).
[38] *Id.* at 839.

evidence under discussion. That case, *Sellers v. Cayce Mill Supply Co.*,[39] involved litigation over an accident between two vehicles moving along a highway in opposite directions. The evidence in question was opinion testimony as to the point of impact, presented by a state trooper who had investigated the accident scene. A claim was made by the opponent of this evidence that such testimony would usurp the function of the jury, the claim successfully asserted in the cases described above. The response of the Court of Appeals, in rejecting the opponent's assertion, was simply that the testimony was not conclusive on the issue of negligence, and, therefore, was properly admitted by the trial court.

Notwithstanding this last decision, the attitude of the Court of Appeals during this period was broadly negative toward the use of expert testimony about vehicular accidents. The cases that have been decided in the last ten years, however, reflect an attitude toward such information that is decidedly more favorable. One of the first decisions to reflect this change of attitude was *Moore v. Wheeler*.[40] The expert witness here was a state trooper who had investigated an accident shortly after its occurrence. After testifying that he had investigated hundreds of such accidents and had received special training for that part of his duties, he was permitted to express an opinion as to the speed of one of the vehicles. His opinion was based on two observations: skid marks found at the scene and the condition of the car. The Court of Appeals distinguished its earlier decisions by citing to the special qualifications of this witness, and ruled that the use of this evidence was proper. In a second case[41] involving the same type of opinion testimony, the Court again ruled in favor of admissibility and on this occasion provided some guidance for lower courts:

> We believe that expert testimony as to the speed of an automobile from the length of skid marks, the force of impact, the type of vehicle, conditions of the road and all surrounding factors is competent. In order for one to qualify as an expert it must be shown that he has had some special training and experience in this field.[42]

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[39] 349 S.W.2d 677 (Ky. 1961).
[40] 425 S.W.2d 541 (Ky. 1968).
[41] Ryan v. Payne, 446 S.W.2d 273 (Ky. 1969).
[42] *Id.* at 277.

The positive attitude reflected in this decision manifested itself again about a year later in the case of *Mulberry v. Howard*.[43] Rejecting an argument that testimony of this type infringed on the jury's role, the Court of Appeals ruled that a trained police officer, after an investigation of an accident scene, could express an opinion as to the point on a highway where the collision occurred. On the basis of these three decisions, it is possible to conclude that a more liberal approach toward the use of expert testimony about vehicular accidents has evolved.

B. *A Suggestion for Future Consideration*

A balanced approach is necessary in dealing with the admissibility of expert testimony concerning vehicular accidents. Without such evidence, the jury will frequently be left to its own speculation about the speed of a vehicle, the point of impact of a collision, or some other critical matter. Expert testimony on such issues will often assist the jury in its effort to reconstruct the accident. At the same time, however, it is important to recognize the ability and willingness of litigants to produce expert testimony that is itself based on pure speculation, that has no real probative worth, and, more significantly, that might not be recognizable as worthless by jurors. The recent decisions of the Kentucky Court of Appeals, including the one used to introduce this discussion,[44] reflect the kind of balanced approach needed to respond properly to issues involving this type of expert testimony.

Nevertheless, two things could be done to further improve this area of evidence law. Because of the liberalization in attitude toward this evidence that has evolved during the last two decades, it is difficult to put the Court's opinions together and extract a clear-cut standard by which to measure the admissibility of expert accident testimony. Lower courts and litigants, therefore, are left in large measure to find the most recent prior decision with "facts" like those of the case in litigation. An articulation by the Court of a general standard for use in resolving evidentiary issues of this type would add considerable clarity to the law.

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[43] 457 S.W.2d 827 (Ky. 1970).

[44] Kentucky Farm Bureau Mut. Ins. Co. v. Vanover, 506 S.W.2d 517 (Ky. 1974).

Many years ago Wigmore suggested a standard for this purpose; no one has since proposed a better one. He said that the only true criterion of admissibility in this situation is the following:

> On *this subject* can a jury from *this person* receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally . . . .[45]

Two thoughts underlie the guideline which Wigmore suggested: First, the circumstances under which this evidence issue can present itself are truly endless in variation; and second, the question of admissibility of such opinion evidence can best be resolved by use of a test that is tied closely to the reason for the "opinion rule." Recognizing that the only legitimate basis for excluding opinion evidence is that it is unhelpful to the jury and, therefore, a waste of time,[46] Wigmore thought the issue of admissibility should be simply whether or not the jury could receive assistance from the testimony of the witness.[47] His thought about this matter is likely to have increasing influence in this area of the law, since his guideline was recently adopted in the Federal Rules of Evidence.[48] It is a standard, therefore, that is worthy of consideration by the Court of Appeals.

The second way in which the Court could improve this part of the law involves the idea that certain kinds of opinion

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[45] 7 J. WIGMORE, EVIDENCE § 1923, at 21 (3d ed. 1940).

[46] *Id.* at § 1918.

[47] Another noted evidence scholar agreed with Wigmore in this regard, as indicated by the following statement:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Ladd, *Expert Testimony,* 5 VAND. L. REV. 414, 418 (1952).

[48] Rule 702 of these Rules is entitled "Testimony by Experts" and provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702 (Pub. L. No. 93-595, Jan. 2, 1975).

evidence, if admitted, can "invade the province of the jury." This idea has been used in several areas of evidence law and, until recently, has been well embedded. It is frequently employed by Kentucky courts. Again, it would be worthwhile for the Court of Appeals to consider an evaluation by Wigmore. With respect to this idea as a basis for excluding opinion evidence, he declared:

> [T]he phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the ["opinion"] rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the jury's function; nor could if he desired . . . . [H]e *could not* usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.[49]

On occasion the Court of Appeals has made the same point presented here by Wigmore. For example, in responding to a "usurpation" claim in *Sellers v. Cayce Mill Supply Co.*,[50] the Court remarked that expert testimony about the point of impact of a collision would not conclusively fix negligence and that the jury would ultimately assume responsibility for deciding the issue. However, the Court has not, as suggested by Wigmore, entirely repudiated the claim. On the contrary, it has frequently cited "invasion of the province of the jury" as the reason for a decision.

Elimination of the concept "invasion of the province of the jury" as a basis for responding to issues about expert testimony would not substantially affect the admissibility of opinion evidence. It would simply compel a more direct, and hopefully more appropriate, consideration of the admissibility question. The most recent case in which the Court of Appeals applied this idea to justify its decision can be utilized to demonstrate the impact of this suggested change. *Claycomb v. Howard*[51] involved litigation over a rear end collision between two vehicles traveling in the same direction. A police officer, who had

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[49] J. WIGMORE, *supra* note 45, at § 1920.
[50] 349 S.W.2d 677 (Ky. 1961).
[51] 493 S.W.2d 714 (Ky. 1973).

investigated the accident scene, was permitted, over objection, to testify that the speed of the plaintiff's car at the time of the collision was "unsafe" and "unreasonable" under the conditions that prevailed. Such evidence, said the Court, "invades the province of the jury"[52] and is inadmissible.

Without this concept, how could the issue of admissibility of such opinion evidence be resolved? The standard suggested above for determining the admissibility of any opinion evidence is fully adequate to resolve this issue. *On this subject can a jury receive appreciable help from this witness?* The decision under this approach would be identical to the *Claycomb* decision. In those situations where expert testimony is directed toward an answer to a legal issue, the jury is as capable of making the determination as any expert witness. Thus, such testimony would be of no assistance to the jury and would always be excluded.[53] An adoption of this approach by the Court of Appeals would eliminate what Wigmore has characterized as "empty rhetoric" and, at the same time, would remove a factor that has caused the resolution of opinion evidence issues to be more difficult than they should be.

III. BURDEN OF PROOF IN CRIMINAL CASES

A statute that was enacted during the most recent legislative session is as important to the law of evidence in Kentucky as any case decided during the past year.[54] It is a part of the state's new Penal Code and contains the following relevant provisions:

> (1) The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt, except as provided in subsection (3). This provision, however, does not require disproof of any element that is entitled a "defense," as that term is used in this Code, unless the evidence

[52] *Id.* at 717.

[53] Several of the cases described above would be resolved in the same way. The *Hoover* case (testimony by an expert with respect to a "safe" speed) and the *Hargadon* case (testimony by an expert that a crossing was a "dangerous" one, "more dangerous than normal") are examples. There is one other case, not described above, that would have the same result. It is Service Lines, Inc. v. Mitchell, 419 S.W.2d 525 (Ky. 1967), a case that involved testimony by an officer that a collision would not have occurred had a disabled vehicle been off the highway.

[54] KY. REV. STAT. § 500.070 (1974) [hereinafter cited as KRS].

> tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.
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> . . . .
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> (3) The defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct.[55]

Unless applied with caution, with understanding of its legislative history and in relationship to the law it replaces, this statute will be troublesome for courts. In the discussion that follows an attempt is made to provide some of the data essential to such an application.

A. *The State's Burden of Proof*

One of the most fundamental features of the criminal process is that which imposes on the state the burden of proof. The statute under discussion, in its beginning sentence, does no less: "The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt . . . ." By means of this provision, assuming "burden of proof" to be used in a conventional sense, the legislature has allocated to the state two distinct responsibilities related to the process of persuasion.[56] One of the two, commonly labeled "the duty of going forward with evidence," is an obligation of proof owed to the trial court judge. The other, known as the "risk of nonpersuasion," is an obligation of proof owed to the jury. Difficulty has been experienced in this jurisdiction only with the first of these responsibilities, and almost always that difficulty has involved the well-known concept called "sufficiency of the evidence."[57] Consideration of this part of the new statute (*i.e.*, that which imposes the burden of proof on the state for "every element of the case"), therefore, can be confined to one inquiry. What standard of measurement must be used in deciding if the state's responsibility to go forward with the evidence has been satisfied? To state this differently, as it attempts to prove the

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[55] *Id.*

[56] Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 384 (Ky. 1940).

[57] *See* Lawson, *The Law of Presumptions: A Look at Confusion, Kentucky Style*, 57 KY. L.J. 7 (1968).

elements of a crime, what must the prosecution do to avoid a directed verdict of acquittal?

The division of responsibility between judge and jury in criminal trials allocates to the jury the duty of resolving issues of fact. In structuring the criminal process, however, the law has imposed on the judge a restricted obligation to consider factual issues. He is compelled to keep the jury within the "bounds of reasonable action,"[58] as it undertakes the principal fact-finding mission. The conceptual tool provided for this task is that part of the burden of proof concept described as the "duty to go forward with evidence." Through the years the courts of this state have had considerable difficulty in the use of this tool, with most of that difficulty revolving around the problem of formulating a standard by which to make the necessary judgements about evidence.[59] Recently, however, the Court of Appeals adopted a test for this purpose that cannot be improved:

> Running throughout the decisions, and the slightly varying language in which the rule has been stated, the element of *reasonableness* is constant. If the totality of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond reasonable doubt, then the evidence is sufficient, albeit circumstantial. If the evidence cannot meet that test, it is insufficient.[60]

The circumstances under which judgments about the sufficiency of evidence must be made are literally infinite in variation. Consequently, there is no better way to confront "sufficiency" issues in criminal cases than to inquire if "reasonable minds might fairly find guilt beyond reasonable doubt." As indicated by the above quotation, the Court of Appeals has recently recognized this fact. And, there being no indication that the Legislature intended to affect this feature of previous doctrine, the Court is virtually certain to construe the new statute accordingly. If Kentucky Revised Statutes § 500.070 [hereinafter cited as KRS] is given this application, no change in the burden of proof imposed upon the state will

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[58] 9 J. WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

[59] *See* Lawson, *supra* note 57, at 8-10.

[60] Hodges v. Commonwealth, 473 S.W.2d 811, 813-14 (Ky. 1971).

have been accomplished by the new Penal Code. With respect to every element of a crime, the state will have to satisfy an initial responsibility to go forward with evidence and, if a jury case is made, will have to assume the risk of non-persuasion.

B. *The Defendant's Burden of Proof*

Except in the context of the principles which prevailed before enactment of KRS § 500.070, it is possible neither to understand nor to describe the burden of proof imposed by this statute on a criminal defendant. As a fundamental part of legal doctrine, the law has long recognized that an accused can be required to bear the burden of proof on certain elements of a case. It has also recognized that this sovereign power to affect in a critical way the ability of a person to defend himself against criminal charges should be exercised grudgingly. Thus, under the "old" law, burdens of proof were imposed on an accused only where allocation of such responsibility was adjudged essential to a fair administration of justice. Even then, the law was extremely careful to impose on the defendant no more of an obligation than was absolutely essential to the ends of justice. It was in the exercise of this caution that the "old" law found it necessary to categorize defensive elements of criminal cases into two general groups. Solely for purposes of description, the two are labeled below as "defenses" and "affirmative defenses."[61]

The burden of proof previously imposed on a defendant with respect to elements termed "affirmative defenses" was not unique; the accused was required to bear the burden of going forward with evidence and, after a jury case was made, to bear

[61] The labels used here to describe the two types of defensive elements that exist in the criminal law are new to Kentucky jurisprudence. That the legal doctrine beneath the labels is not new, however, is made clear in the document from which they are drawn:

> This section is not intended to change existing law. Presently there are elements of a case upon which a defendant has merely the burden of going forward with evidence, *i.e.*, a duty to introduce such elements as issues in the case . . . . Similarly, there are elements of a case upon which the defendant has the burden of proof, *i.e.*, a duty to persuade the jury that the elements exist.

KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 135, Commentary (Final Draft 1971).

the risk of non-persuasion. However, very few elements in the criminal law were accorded this treatment. Insanity was probably the most notable such element. Reliance on this defense, before adoption of the new Penal Code, required that the accused raise the issue through introduction of evidence and, in the end, that he persuade the jury of his insanity.[62]

Reliance on a defensive element of the other type did not involve obligations of proof as burdensome for an accused as those that attached to "affirmative defenses." With respect to "defenses," the dual responsibility of the burden of proof concept was divided between the two litigants. The burden of going forward with evidence was allocated to the defendant, but the ultimate responsibility—the risk of non-persuasion—was imposed on the state. Self-defense is an example of an element that was given this treatment.[63] This approach to proof responsibility, not peculiar to Kentucky law, has widely prevailed in this country for many years. What is the rationale for this approach? Why force an accused to initiate proof on an issue such as self-defense and then require the prosecution to persuade the jury on the issue?

The factors underneath a given choice to allocate the burden of proof on an issue to one litigant rather than the other are numerous and difficult to describe.[64] Those that are most important in criminal litigation are: (1) fairness to the accused, meaning by this that because the state seeks to inflict punishment, it should be required to establish the justification for such punishment; (2) relative access of the litigants to relevant evidence; and (3) administrative needs of the judicial process. When these factors are applied to an element such as self-defense, it is difficult at first glance to see any reason for classifying it as a defensive element. When measured in terms of the first two factors—"fairness" and "relative access to evidence"—self-defense seems indistinguishable from those elements of a crime, such as act, causation, and intent, which the prosecution is routinely required to prove. Stated differ-

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[62] *See, e.g.*, Henderson v. Commonwealth, 507 S.W.2d 454 (Ky. 1974); Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963); Tunget v. Commonwealth, 198 S.W.2d 785 (Ky. 1947).

[63] *See, e.g.*, Carnes v. Commonwealth, 142 S.W. 723 (Ky. 1912).

[64] *See* James, *Burdens of Proof*, 47 VA. L. REV. 51, 58 (1961).

ently, since criminal sanctions are imposed on a person who kills *without justification,* there seems to be as much reason to require the state to prove an absence of justification as there is to require it to prove the act of killing.

On the other hand, when administrative needs of the judicial process are considered, there surfaces a reason to require that the accused initiate the controversy over such an issue as this, *i.e.,* to inject the element of self-defense into a case. Without this requirement, in every homicide and assault case the prosecution would have to prove absence of self-defense (and all other defenses of justification) to avoid a directed verdict of acquittal. In other kinds of cases, it would have to do the same with respect to intoxication, entrapment, duress, insanity, and so forth. Thus, every factor that could serve to excuse an otherwise criminal act would have to be negated by the state to prevent a premature termination of the litigation; such an exercise would obviously involve an enormous waste of time and energy. It was solely to avoid this waste that the law created the concept labeled here as a "defense." And because the problem toward which it was directed could be solved by simply requiring an accused to inject "defensive elements" into a case, it was necessary to impose on him only the burden of going forward with evidence on such elements. Upon satisfaction of that obligation, the prosecution's burden of proof on such defensive elements was not unlike its responsibility with respect to the elements of a crime. Enough evidence had to be introduced to make a jury case and, once that was accomplished, the risk of non-persuasion had to be assumed.

The context in which the Penal Code was considered and enacted included this pre-existing law on burden of proof. How did the General Assembly intend to affect the then existing law with the enactment of KRS § 500.070? In answering this question it is necessary to begin with a consideration of the proposal from which the statute originated. The following provision was contained in the state's first penal code bill:[65]

> (1) Except as provided in Subsection (2), the Commonwealth has the burden of proving every element of the case beyond a reasonable doubt. This provision, however, does not

[65] H.B. 197, Ky. Gen. Assem., Reg. Sess. (1972).

> require disproof of any element that is entitled a "defense," as that term is used in this code, until the defendant has made such an element an issue in the case by introducing evidence to support it.
>
> (2) When a defense declared by this code to be an "affirmative defense" is raised at trial, the defendant has the burden of establishing such defense.[66]

The purpose of this proposal is obvious and unmistakable. Had the statute been enacted in this form, the prior law would have been adopted in its entirety and without change. Two kinds of defensive elements would have been recognized, each imposing a different burden of proof on an accused. With an understanding of the problems perceived in this proposal by those who considered the Penal Code at various stages of its development, the relationship between the new statute and the "old" law should be discernible. Only two such problems existed.[67]

One of the problems can be described as technical in nature, since it involved a concern over use of the words "affirmative defense" in the criminal law. Solution of this problem required only a slight change in the language of the original bill. The objectionable words ("affirmative defense") were eliminated in favor of those now contained in KRS § 500.070(3) ("in exculpation of his conduct"). With this alteration there was no intention to change the substance of the original proposal. Therefore, it is certain that the Penal Code contains defensive elements on which an accused must satisfy both responsibilities of the burden of proof concept.[68] He will have to initiate controversy on such elements through the introduction of evidence and, after a jury case is made he will have to assume the risk of non-persuasion.

The other problem perceived in the original proposal was viewed by the drafters of the Code to be of substantial importance. It involved a fear that the proposal's first subsection

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[66] *Id.* at § 8.

[67] Most of the information about these problems cannot be documented. The writer was involved with the development of the Penal Code over a five year period and worked with the Legislative Research Commission in the 1974 legislative session, during which the Code was enacted. His access to the information described here resulted from that involvement.

[68] Two such elements are "insanity" (KRS § 504.020(3)), and "mistake as to capacity to consent" in statutory rape situations (KRS § 510.030).

would cause severe difficulty for courts in every instance in which evidence is offered by a defendant to support what is labeled here a "defense." The specific concern was over "sufficiency" issues, *i.e.,* how a court should confront a motion for directed verdict based on evidence offered by a defendant in support of some defensive element, such as self-defense. It seems clear that the original proposal was not intended to deal with this matter at all. Such "sufficiency" issues were to be resolved under pre-Code principles or under principles developed through the judicial process. In other words, there would have been no legislative guidelines for determination of such issues.

The change made in the first subsection of the original proposal was designed to remedy this perceived shortcoming by providing a statutory basis upon which courts could respond to claims for directed verdicts based on evidence supporting a defensive element. As finally enacted, this part of the statute provides that the prosecution does not have to assume the burden of proof on such elements unless the defendant's proof, if uncontested, would entitle him to a directed verdict of acquittal. Without question, this provision is susceptible to several widely divergent interpretations. However, if construed in light of its historical development, the following conclusions seem most appropriate. First, with respect to elements in the Penal Code that carry the label "defenses," the General Assembly intended, with its modification of the original proposal, not to affect the risk of non-persuasion. After a jury issue is made on such an element (with self-defense being perhaps the best example), jury instructions will be designed so as to impose upon the state the risk of non-persuasion on that element. Second, the enactment manifests no intention to change the standard of measurement previously used to determine whether or not a directed verdict based on a defensive element should be granted. Before the Code, the Court of Appeals had ruled that the responsibility of a trial court, in dealing with such claims was not unlike its responsibility in responding to requests for directed verdicts based on alleged failures of the state to prove affirmative elements of a crime (such as act, intent, causation, etc.). On the basis of the evidence before the court, could a reasonable jury believe to the exclusion of a reasonable doubt

that the defendant is guilty of the offense charged? This is the test previously used.[69] It cannot be improved, for it recognizes that the trial judge's role is simply to keep the jury within the bounds of reasonable action as it performs the major fact-finding function. An interpretation of KRS § 500.070 that is consistent with these conclusions should serve to further what this writer believes to have been the not-so-obvious intention of the legislature—namely, to leave the prior law of burden of proof largely undisturbed. Such an interpretation should also serve to avoid difficulty with this part of the law.

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[69] *See, e.g.*, Gailey v. Commonwealth, 508 S.W.2d 574 (Ky. 1974); Wheeler v. Commonwealth, 472 S.W.2d 254 (Ky. 1971).