Kentucky Law Survey: Evidence

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Evidence
BY ROBERT G. LAWSON*

I. EVIDENCE OF OTHER CRIMES

Almost as often as not the government's case in criminal litigation will contain evidence indicating that the accused committed some offense other than the one for which he is being tried. Consequently a set of rules to control the use of evidence of "other crimes" has evolved. In most jurisdictions it consists of a single rule that prohibits the use of such evidence against a defendant along with a group of exceptions that virtually engulfs the prohibition against admissibility. Kentucky law is so structured. As all lawyers who engage in criminal litigation in this state know, evidence of "other crimes" may be introduced by the government to prove motive, intent, knowledge, identity, absence of mistake or accident, common scheme, and so on and so forth. Since the last survey of evidence law, the Kentucky Supreme Court has decided two cases of significance to this doctrine.

A. Other Crimes to Provide Perspective

The first is Ware v. Commonwealth,¹ a case in which the evidence doctrine under discussion became involved in the issues directly. The litigation started when the defendant was charged with one count of rape against each of two young women. The charges against this defendant were consolidated with charges of rape against two other offenders. All four allegations originated from a criminal episode that commenced late one Saturday evening, continued through the night, and terminated when the women escaped the following morning. Evidence introduced by the state at the consolidated trial indicated that the three defendants took turns throughout the night having non-consensual intercourse with three young women, two of whom were named in the indictments as victims. The evidence against Ware indicated that he had com-

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¹ 537 S.W.2d 174 (Ky. 1976).
mitted several acts of rape against one of the named victims during the period of time in question.

In appealing his conviction, Ware made two arguments that involved the law under discussion. He argued that error was committed because of the consolidation of his case with the cases involving the other two defendants; particularly, he asserted that the jury was permitted to hear to his prejudice evidence about crimes committed by the other defendants. He made this argument despite the fact that the trial judge attempted carefully to keep the testimony confined in its application to the respective defendants. As the Supreme Court said, "[M]ore than once he instructed the jury not to consider the acts of any one of the defendants as substantive evidence against the others." Ware's second argument was that prejudicial error was committed because the trial court failed to admonish the jury to limit its use of evidence that tended to prove that he had engaged in acts of forcible intercourse that were not the subject of charges. For this argument Ware relied on cases indicating that such "other acts" would have to be used for corroborative, to prove lustful disposition, or some other limited purpose. The Supreme Court rejected both arguments.

Before Ware a factual situation such as existed in that case (i.e., one involving multiple criminal acts against a single victim, followed by an indictment for only one offense) would have triggered an application of the evidence doctrine under discussion. The case of Rigsby v. Commonwealth contains a concise statement of the manner in which the evidence issue would have been approached:

Evidence of acts prior and subsequent to the offense charged in the indictment is admissible as tending to establish the

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2 Id. at 177.
3 The defendant's precise argument was as follows:
   It was the theory of defense counsel . . . that whereas each defendant was accused of only one rape of each girl but the evidence covered several rapes of each, the Commonwealth was required to elect which act was to be the basis for the prosecution, and that in the absence of such an election it would be presumed to be the first act proved.
   . . . Hence, it is said, testimony relating to subsequent acts of a similar nature must be limited to corroborative purposes, as tending to show design or a lustful disposition.
4 495 S.W.2d 795 (Ky. 1973).
accused's singular purpose and intent to assault the victim sexually . . . . Testimony as to forced acts of oral sodomy which took place before and after an alleged rape is admissible as res gestae of the offense concerning facts and circumstances surrounding the commission of the act . . . . The lustful inclination of the accused may also be shown in this way. The testimony was followed by an admonition to consider it only as showing design, disposition or intent, if in fact it did so.\footnote{Id. at 799. In an earlier case involving the type of factual situation under discussion, the Court of Appeals had ruled that evidence of the other offenses could be admitted for purposes of corroboration. See Young v. Commonwealth, 335 S.W.2d 949 (Ky. 1960).}

Under these principles, despite the general rule against admissibility of "other crimes" evidence, the testimony about Ware's other acts of rape upon the named victims would have been admissible for the limited purpose of showing design, disposition, lustful inclination, or intent. However, an instruction to the jury to limit the use of the evidence would have been necessary. Since no such instruction was given in Ware's case, his second argument clearly was supported by precedent.

In rejecting Ware's argument, the Supreme Court overruled some earlier decisions and altered the law to the extent revealed in the following statement:

In such a case [i.e., one involving multiple acts against a single victim over a fixed period of time] technicality reigns over substance when the prosecution must stand or fall on the necessity of selecting and proving that one of those acts was committed at a certain time. It makes better sense for the jury to be allowed to base its verdict on a finding of whether the crime in question was committed at any time during the period specified in the indictment and covered by the testimony of the prosecuting witness, thus eliminating the fatuous song and dance in which the jury is permitted to hear about all of the different criminal acts but is admonished (uselessly, we suggest) not to consider them as "substantive" evidence against the defendant, but only insofar as they may tend to show motive or design, or a lustful disposition on his part, or the relationship of the parties, or to corroborate the witness's testimony with respect to the offense for which the defendant is being tried. If the state seeks but one conviction out of a
series of similar criminal acts against the same victim, all of the evidence of all of the acts might as well be treated as and called substantive evidence. That is how the jury will look at it anyway.\(^6\)

The content of this statement relates of course to the “other crimes” of the defendant Ware. But it was extended in its application to cover “other crimes” committed by his co-defendants during the criminal episode from which the charges arose. More specifically, the Supreme Court ruled that an admonition to the jury “not to consider the acts of any one of the defendants as substantive evidence against the others” is unnecessary in a situation such as existed in this case.\(^7\)

The changes in evidence law resulting from this decision are most certainly lacking in monumental importance. As a matter of practical effect, the testimonial information admissible in a case like Ware is the same as it has previously been. Only the manner of its use is different. Nevertheless, it should be recognized that the doctrinal alteration made by the decision is significant, for it serves to eliminate an artificial ritual that probably confused the decision makers. In addition, it should be recognized that Ware may take on some unexpected significance because of the simple explanation given by the Supreme Court for admitting the evidence of Ware’s other crimes in the first place:

In order to determine exactly what did or did not happen at any particular stage in the sequence it was necessary that the jury see the entire picture. In short, evidence that provides necessary perspective is competent. That it may incidentally involve other criminal acts does not perforce render it inadmissible.\(^8\)

For many years the “other crimes” doctrine of Kentucky has included a rule that allows for the introduction of evidence that reveals uncharged crimes which are so interwoven and connected with the crime charged that introduction of the evidence is unavoidable if the prosecution is to be given necessary

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\(^6\) 537 S.W.2d at 178-79 (footnote omitted).
\(^7\) Id. at 179.
\(^8\) Id. (emphasis added).
latitude to prove its case. The statement in *Ware* that permits the introduction of evidence that provides "necessary perspective" should serve well as a corollary to this long-standing rule, if courts are cautious with its application and give appropriate emphasis to the requirement of necessity.

B. *Other Crimes Evidence and Collateral Estoppel*

Occasionally evidence rendered admissible by the doctrine discussed above will consist of indisputable documentary proof of a prior criminal conviction; most of the time, however, the evidence will not be nearly so probative of a defendant's guilt of the other crime. As occurred in *Ware*, one or more witnesses will simply present testimony that is supportive of a conclusion that the accused committed the other offense. Of course, this testimony—like all other—might be false or otherwise erroneous, meaning that there exists a possibility that the accused is actually innocent of the other crime. Reasoning that this factor bears on weight and not on admissibility, courts have refused to treat the possibility of innocence as a sufficient reason to shield a defendant from the use of this kind of information. Suppose, however, that the possibility of innocence of the other crime has been enhanced by the fact that the defendant was formally charged with the other crime, tried in a prior trial, and acquitted of the charge. Should admissibility be affected by this change of circumstances? This question was presented to the Supreme Court of Kentucky in *Commonwealth v. Hillebrand*.

Hillebrand was an official in the City of Louisville Department of Building and Housing Inspection. He was indicted for accepting a bribe from a man named Sutherland. Indicted along with him as an accessory before the fact was a friend by the name of Powers. In the trial of this case the prosecution attempted to introduce evidence which tended to show that Hillebrand and Powers, in dealings with a man named Dunn, had earlier engaged in conduct similar to that involved in the

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9 *See*, e.g., *Caldwell v. Commonwealth*, 503 S.W.2d 485 (Ky. 1972); *Hawkins v. Commonwealth*, 481 S.W.2d 259 (Ky. 1972); *Robinson v. Commonwealth*, 474 S.W.2d 107 (Ky. 1971).

10 536 S.W.2d 451 (Ky. 1976).
charge. Ordinarily the evidence would have been admissible under the "other crimes" rules to show a common scheme or pattern of conduct. However, the situation was not ordinary, since Hillebrand and Powers had earlier been tried for bribery of Dunn and acquitted. In the proceeding involving the alleged bribe of Sutherland, the two defendants argued that any use of evidence about the conduct involved in their earlier acquittal would constitute a violation of their rights under the double jeopardy clause. Persuaded by this argument, the trial court excluded the prosecution's testimony about the defendants' activities with Dunn; in the absence of this evidence the defendants received a second acquittal. The Commonwealth appealed to the Supreme Court in order to obtain a certification of law on the admissibility of such evidence.

The issue on this appeal revolved around a decision of the United States Supreme Court concerning the scope of the double jeopardy clause. This case, Ashe v. Swenson,11 started with an allegation that the defendant, along with several others, robbed the participants in a poker game. Ashe was tried initially for robbery of only one of the participants. The sole issue in this trial was one of identification. The state's evidence was weak, and Ashe was acquitted of the charge. Subsequently, the government proceeded against him for robbery of another of the participants, and brought him to trial for a second time. In this second proceeding, the government's witnesses were about the same, "though . . . their testimony was substantially stronger on the issue of [Ashe's] identity."12 In addition, the government strengthened its case in the second trial "by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative."13 On the second try the defendant was convicted; ultimately he got his case to the Supreme Court of the United States, and presented to that body the question of whether his conviction was violative of the double jeopardy prohibition.

In confronting this issue the Court made an important assumption about the criminal transaction in question,

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12 Id. at 440.
13 Id.
namely, that it consisted not of a single robbery of a poker game but rather multiple robberies through an "act" of robbing a poker game. Presumably, the Court would have considered it appropriate for Ashe to have been charged in a single proceeding with several robberies (one for each participant in the game) and to have received a separate penalty for each. Furthermore, in the jurisdiction in which Ashe was charged there existed no rule requiring joinder by the state of separate offenses arising from a single transaction. Under such circumstances the Ashe case was reduced to the following issue: What is there to prevent the government from proceeding against the defendant successively for each of the robbery offenses? According to the Supreme Court, it is the "principle that bars relitigation between the same parties of issues actually determined at a previous trial."14

This principle, known as collateral estoppel, contemplates that there exist between two parties at least two legal controversies—perhaps more commonly labeled as "causes of action," "claims for relief," or "cases"—each of which has an issue of fact or law in common with the other. It further contemplates that if the two controversies are litigated in successive actions, there shall be issue preclusion against one of the parties in the second action if the common issue is found to have been previously "(1) litigated by the parties; (2) determined by the tribunal; and (3) necessarily so determined."15

The Supreme Court incorporated this principle into the double jeopardy clause in Ashe and applied it to the facts described above. It concluded that in the first trial the parties fully litigated the identification issue, that the issue was determined against the state, and that the determination was essential to the jury's verdict of acquittal. Finally, concluding that the same identification issue was involved in the second trial, the Court ruled that the government violated Ashe's constitutional rights by proceeding against him in the second case.

Without seeming either naive or uninformed, it is possible to wonder what this ruling has to do with the admissibility of evidence. The efforts of a state to take a single, inseparable criminal transaction and carve from it several offenses and

14 Id. at 442.
15 F. James, Civil Procedure 576 (1965).
several prosecutions created the problem presented in *Ashe*. The case involved neither directly nor indirectly matters connected with the admissibility of evidence. Yet, the trial judge assigned to try the *Hillebrand* case concluded that the ruling in *Ashe* foreclosed any possibility of using in a second trial evidence about conduct which had been the subject of an acquittal in a prior trial. He did so apparently in reliance on a decision by a federal court of appeals in *Wingate v. Wainwright*. Consequently, most of the discussion in *Hillebrand* focused on the validity of this federal decision.

*Wingate* started with a charge against the defendant by the state of Florida for robbing a small store. In proving its case, the government called witnesses to testify about two independent robberies allegedly committed by Wingate prior to the one involved in the trial. Ordinarily, under Florida law the evidence would have been admissible to show a common scheme or plan similar to the one involved in the robbery under trial. The problem with admissibility was identical to that which existed in *Hillebrand*; the defendant had been previously tried for the two robberies and acquitted of both. The state courts of Florida resolved the problem in favor of admitting the evidence despite the acquittals, and the defendant proceeded through habeas corpus to challenge that resolution in federal court. He asserted before the federal tribunals that collateral estoppel barred the state from introducing evidence containing the implication that the prior robberies had been committed. The State of Florida countered with the argument that collateral estoppel does not preclude relitigation of issues (including even those settled by an earlier acquittal) unless a defendant is being prosecuted for an offense for which he has been earlier acquitted or some other offense arising from the same criminal transaction. The federal court of appeals, relying on *Ashe v. Swenson*, adopted the defendant’s position. It reasoned that an introduction of evidence about prior conduct for which a defendant has been acquitted serves to force him “to defend against charges or factual allegations which he overcame in the earlier trial.”

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16 464 F.2d 209 (5th Cir. 1972).
18 464 F.2d at 214.
The Supreme Court of Kentucky was strongly urged by defendant's counsel in *Hillebrand* to accept the position adopted in *Wingate*, which was described by the Kentucky Court to be as follows: "[W]here an accused has been acquitted of a charge of crime, no evidence at all relating to that crime can be admitted on a subsequent trial for another offense." Instead of accepting this invitation of *Hillebrand* ’s counsel, the Supreme Court repudiated with strong language the *Wingate* case and declared that decision to have been erroneous on several grounds. The Court then expressed its own viewpoint about the application of collateral estoppel to the situation under discussion:

As we understand the holding in *Ashe v. Swenson*, it is that if an issue of fact has been determined against the prosecution in the trial of an offense, the prosecution cannot again litigate that issue of fact upon a later trial of the same defendant for another offense. Having done this the Court then proceeded to apply *Ashe* to the factual situation presented in *Hillebrand*. Its analysis of the first case involving *Hillebrand* and Powers led to the conclusion that only one issue of fact had been decided against the state, which of course accounted for the acquittal. The Court said that all testimony bearing on that particular issue should have been excluded by the trial judge in the second proceeding against the two defendants. However, according to the Court, all other testimony connected with the conduct involved in the first proceeding should have been admitted against the defendants in the second trial because of its relevancy to the second charge.

In this ruling and in the Court’s pronouncements about *Ashe* there is no lack of clarity. Yet the Court’s response in *Hillebrand* to the broader issue under consideration (i.e., the application of collateral estoppel to the doctrine of “other crimes” evidence) leaves some questions at least partially unanswered. The best way to reveal these questions is by use of a hypothetical case that presents the *Hillebrand* issue in a

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19 536 S.W.2d at 453.
20 Id. (emphasis in original).
21 Id. at 454.
slightly different context.

The hypothetical case involves a charge of forcible rape that arises from a transaction with some rather unusual features. Suppose that without arousing fear or suspicion, an individual [hereinafter called the defendant] manages to get a young woman into his automobile. He then travels with her to various places, during which time several escape possibilities would have been available to an "abducted" individual. After a while the defendant drives to a secluded place, stops the vehicle, and causes the woman by threat to remove her lower garments. By the woman's subsequent account, she is then forced to submit to intercourse and various other sexual acts. Thereafter the defendant returns the young woman to a safe place and, as she departs his company, he suggests that perhaps she should obtain his license number. Promptly the defendant goes to police authorities and reports a consensual act of intercourse with the young woman. He tells the police that he fears a charge of rape because of an argument with the woman, ostensibly resulting from a derogatory statement which he made about the sexual experience.

A report of the incident is indeed made to the police by the young woman; a trial of the defendant for rape is the end result. Naturally the defense is consent. Included in the government's evidence is testimony from two other women who would testify, if permitted, that the defendant raped them under circumstances strikingly similar to those involved in the charge. Each of the other "alleged" episodes, according to the proposed testimony, started with amiable conversation, and included a car ride with several escape possibilities, a subsequent threat which caused the woman to remove her lower garments, sexual acts like those involved in the principal case, a return of the woman to a place of safety, and in one instance a suggestion that the woman should go to the police. Only one problem exists with respect to admissibility of the testimony. Formal rape charges have earlier been leveled against the defendant by each of the witnesses, and, on the basis of "consent" defenses, he has been acquitted of each charge. The resolution of this hypothetical case under the reasoning of *Wingate v. Wainwright* would be quite simple. The testimony in question

\[22 \text{ 464 F.2d 209 (5th Cir. 1972).} \]
(with its obvious implication that the reported offenses occurred despite the acquittals) would force the defendant "to defend again against charges or factual allegations which he overcame in the earlier trial." But how would the case be resolved under the reasoning of Commonwealth v. Hillebrand?

Before attempting to answer this question it should be helpful to describe (by use of this hypothetical) a possible interpretation of Ashe v. Swenson that was apparently not presented to the Kentucky Supreme Court for consideration. This interpretation leads to a conclusion about the application of collateral estoppel to "other crimes" evidence that is directly opposite the conclusion reached in Wingate. It is as follows:

The doctrine of collateral estoppel, when properly defined, contemplates that there exists between two parties two or more legal controversies with a common issue of fact; and the doctrine contemplates that if this common issue is fully litigated and decided in an action involving one of the controversies, it may not be relitigated in an action involving the other. When applied to the hypothetical case, these propositions lead to a conclusion that the three controversies between the accused and the government (i.e., the three alleged rapes and their denials) have no common issues of fact. At least no one could reasonably assert that issues of consent in multiple rape cases with different victims are "common issues" in the same sense that "identification" was a common issue of fact in the Ashe controversies. Thus, a determination against the state on one of the consent issues (through an acquittal) should not trigger application of the doctrine of collateral estoppel in a proceeding involving the other issue; evidence about the prior conduct would be admissible in the second proceeding, despite the acquittal, if the rules of evidence law otherwise qualify it for admissibility.

The federal court of appeals that decided Wingate clearly rejected this interpretation of Ashe. The Supreme Court of Kentucky, as stated above, was strongly critical of the Wingate decision; however, there are two reasonably concrete indica-

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\begin{itemize}
  \item Id. at 214.
  \item 536 S.W.2d 451 (Ky. 1976).
  \item 397 U.S. 436 (1970).
\end{itemize}
tions that the Court did not reject the *Wingate* interpretation of *Ashe* in favor of the one described in the preceding paragraph. First, after setting forth the *Wingate* ruling (i.e., that "no evidence at all relating to [the prior offense] can be admitted on a subsequent trial for another offense"), the Kentucky Court made the following statement in reference to its understanding of *Ashe*: "*Ashe v. Swenson* plainly says that the only evidence that is precluded is evidence of *issues of fact* which necessarily were determined against the prosecution on the prior trial." If taken literally, the position represented by this statement is obviously different only in degree and not in kind from the one adopted in the *Wingate* case. The second, virtually conclusive indication that *Hillebrand* merely adopts a modified version of the *Wingate* interpretation of *Ashe* is the manner in which the Kentucky Court resolved the factual problem before it. On the basis of *Ashe* the Court decided that the prosecution should not have been permitted to introduce evidence connected in any fashion with the "finding" that resulted in the prior acquittal, notwithstanding the fact that this "finding" was not in any way at issue in the subsequent proceeding against *Hillebrand* and *Powers*. In other words, the Court's ruling was compatible in a literal sense with its statement about the *Ashe* case—an acquittal serves to preclude "evidence of *issues of fact* which necessarily were determined against the prosecution on the prior trial." 

How the Supreme Court might apply *Hillebrand* to a factual pattern like that of the hypothetical is not absolutely certain, although the two "indicators" described above would seem to require exclusion of the "other crimes" evidence. A report of the two prior incidents to the jury in the third trial would be meaningless without express testimony (or at least an implication) that the incidents occurred without consent of the women. In the earlier trials the issues of consent with respect to the prior incidents were determined against the government. Under these circumstances the reasoning of *Wingate* and *Hillebrand* would seem to merge and call for the same result.

Whether *Ashe v. Swenson* was intended to have this kind

28 536 S.W.2d at 453.
27 *Id.* at 454 (emphasis in original).
24 *Id.*
of application is a question that is far too complex for consideration in this writing. It is sufficient in this discussion merely to point out that some courts which have confronted the question have given a negative answer.30 As a matter of fact, the court that decided the case from which the hypothetical was extracted ruled that the Double Jeopardy Clause could not be used to bar admissibility of the "other crimes" evidence involved in that litigation.31

II. HEARSAY

A. Admissibility of Medical Records

In this jurisdiction medical records are admitted into evidence under the "regular business entries" exception to the hearsay rule. At one time, records otherwise admissible under this exception could not be introduced unless the person who possessed the information represented by the record was shown to be unavailable as a witness.32 Through the years this requirement changed in character to one that required only a showing of "practical inconvenience" in the production of witnesses. The altered requirement was applied as follows to medical records in a 1948 case, Whittaker v. Thornberry:33 "We conclude that an authenticated hospital chart is admissible in evidence where the party offering it shows the necessity of admitting the record without requiring the person or several persons who made it, or caused it to be made, to testify."34 The necessity requirement mentioned in this case could be satisfied by showing that the inconvenience of producing witnesses outweighed the value of forcing them to appear in person.35

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32 See Gus Dattilo Fruit Co. v. Louisville & Nashville R.R., 37 S.W.2d 856 (Ky. 1931); Louisville & Nashville R.R. v. Daniels, 91 S.W. 691 (Ky. 1906).
33 209 S.W.2d 498 (Ky. 1948).
34 Id. at 501.
35 The Whittaker opinion made this clear through its quotation with approval of a statement from Wigmore's treatise:

Following his reasoning for the admissibility of this character of evidence, Wigmore . . . expresses the conclusion that there is no objection to receiving such entries or transactions "provided the practical inconvenience
The recent case of *Buckler v. Commonwealth* provided the Supreme Court with an opportunity to adjust the manner in which this hearsay exception applies to the evidentiary use of medical records. The defendant in this case killed her two-month-old child, an act which resulted in her arrest and prompt confinement in a state hospital for purposes of psychiatric observation. In support of a defense of insanity, the defendant offered into evidence at the trial of the case medical records which had been compiled during her confinement in the hospital. The offer of proof was made in the absence of any attempt by the defense to obtain the presence at trial of the physicians who made the records. The trial judge ruled the evidence inadmissible under the hearsay rule because of this failure. After deciding that reversible error was committed with this ruling, the Supreme Court described the manner in which medical records must be treated under the hearsay rule:

[T]he necessity requirement for the introduction of this type of hearsay evidence is satisfied by the very nature of the evidence sought to be introduced. We therefore feel it serves no useful purpose to require any further showing of the necessity of admitting the medical records, as we indicated in *Payne v. Commonwealth*. . . . when we stated simply, "Our rule is that records of patients at a hospital, organized on the usual modern plan may be produced in evidence by the custodian of the records." To the extent the holding in *Whittaker v. Thornberry*, supra, requires such further showing of necessity, it is hereby overruled . . . . We therefore conclude that hospital records . . . are admissible into evidence, either on identification of the original by the custodian of the records, or on offer of a certified or sworn copy.  

B. *Opinion Testimony Based on Hearsay*

In this same case the Supreme Court was provided an opportunity to clarify another evidence rule involving the use of hearsay. To support her defense of insanity, Buckler called an expert witness who proposed to testify that the defendant

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of producing on the stand the numerous other persons thus concerned would in a particular case outweigh the probable utility of doing so."

*Id.* at 500.

*541 S.W.2d 935* (Ky. 1976).

*Id.* at 938-39.
was insane at the time of the homicidal act. The trial judge ruled the testimony inadmissible because the opinion of the expert was based in part on hearsay, specifically the excluded medical records described in the preceding section. The issue framed by this ruling (i.e., whether expert opinion that is derived in part from hearsay evidence is admissible) has been confronted on several occasions by the high courts of this state. The decisions preceding Buckler contain at least a degree of inconsistency.

In some cases expert witnesses have clearly been permitted to rely on a limited type of hearsay in formulating and testifying to opinions. For example, in one land condemnation case, an expert was allowed to express an opinion as to the market value of land on the basis of hearsay evidence concerning the sale prices for comparable property. And, in an automobile accident case, an expert was allowed to rely on published "skidmark-speed" tables in formulating and presenting an opinion as to the speed of a vehicle at the time of a collision. In cases involving opinion testimony from medical experts, however, the decisions have been against admissibility. Equitable Life Assur. Soc. v. Kazee is illustrative. A physician testified at the trial of this case that his patient had suffered from a venereal disease; his opinion in this regard was based in part on a test conducted by another physician or perhaps by a technician. The Court of Appeals, declaring this testimony incompetent, ruled that a medical expert could not be permitted to testify on the basis of information provided him by a third person.

In Buckler the Supreme Court overruled Kazee and like cases, and established the following standard by which to measure the admissibility of opinion testimony that is based in part on hearsay evidence:

[We adopt as an exception to the hearsay rule in Kentucky that an expert may properly express an opinion based upon information supplied by third parties which is not in evidence, but upon which the expert customarily relies in the practice of his profession. Our previous opinions to the con-

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38 Stewart v. Department of Highways, 337 S.W.2d 880 (Ky. 1960).
39 Ryan v. Payne, 446 S.W.2d 273 (Ky. 1969).
40 79 S.W.2d 208 (Ky. 1934).
tary are hereby overruled. We emphasize that the type of information which can be utilized by the expert in forming his opinion would be only that produced by qualified personnel and on which the expert would customarily rely in the day-to-day decisions attendant to his profession. Such a limitation, we feel, guarantees a relatively high degree of reliability and frees the expert to use for his testimony the tools on which he normally relies in making a diagnosis. 1

III. IMPEACHMENT BY FELONY CONVICTION

Since their adoption in 1975, and even prior to that, the Federal Rules of Evidence have exerted a substantial influence on the development of Kentucky evidence law. With great frequency these rules are presented by litigants as a “standard” by which to consider evidence issues; and, with nearly equal frequency, the Supreme Court and the court of appeals refer to the rules in resolving evidence questions that appear on appeal. This influence seems to have been fairly pervasive, with one highly notable and important exception. With respect to the impeachment of witnesses by use of felony convictions, Kentucky courts have rejected virtually every principle contained in the federal impeachment provision. This pattern continued during the last year with two decisions that deserve mention in this survey.

A. “Finality” of a Conviction

In Commonwealth v. Duvall 42 the prosecution attempted to prove for purposes of impeachment that the defendant had been convicted of a prior felony offense. At the time of this effort the prior conviction in question had been affirmed by the Supreme Court; however, there was pending in the case a petition for rehearing. (Eventually the petition was denied, but the mandate affirming the conviction was not issued until after the trial in Duvall.) The trial court rejected the prosecution’s offer of evidence on the basis of an old case in which the Court of Appeals had ruled that a judgment of conviction is not final (and thus not admissible for impeachment purposes) until the

1 541 S.W.2d at 940.
42 No. 76-688 (Ky. Mar. 11, 1977)(per curiam).
mandate is issued. Following an acquittal of the defendant, the Commonwealth appealed to the Supreme Court in an attempt to obtain an alteration of this old rule. On appeal the Commonwealth urged the Court to adopt a provision from the federal rules.

Under the federal provision the pendency of an appeal does not prevent a litigant from introducing a criminal conviction for purposes of impeachment. The justification for this position was described by the drafters of the federal rules as follows: "The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment... The pendency of an appeal is, however, a qualifying circumstance properly considerable." The Supreme Court of Kentucky considered this rule and its underlying rationale, and rejected both for the following reason: "We think... that until the litigation is ended and the conviction has survived the appeal it should not be admissible. Until then the defendant's day in court is not over."

B. "Remoteness" of Prior Conviction

At the trial of Hardin v. Commonwealth the prosecution was permitted over objection to introduce into evidence, for the purpose of impeaching the defense's only witness, a fifteen-year-old felony conviction. Of course the rationale for admitting prior convictions for impeachment purposes is that they tend to prove a moral disposition in the witness as he exists at the time of trial. Theorizing that this rationale did not fit his witness very well, and no doubt influenced by a provision contained in the federal rules, the defendant argued on appeal in Hardin that the conviction in question was too remote for admissibility.

The federal rule that influenced the defendant contains an

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43 Foure v. Commonwealth, 283 S.W. 958 (Ky. 1926).
44 Fed. R. Evid. 609(e).
48 See Fed. R. Evid. 609(b).
arbitrary limitation on the admissibility of criminal convictions that have occurred in the distant past. If a conviction is more than ten years old, it may not be used in federal trials for purposes of impeachment unless the trial court determines, in the interest of justice, "that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." In considering Hardin's appeal, the Kentucky Court of Appeals refused to adopt a rule like the federal provision. Instead, it decided that "remote" convictions should be treated as follows:

_Cotton v. Commonwealth_ . . . places upon the trial judge the primary responsibility to weigh "the interest of society in the prosecution of criminal defendants to provide the trial jury with relevant evidence of the witness' untrustworthiness to be believed against the possible prejudice to the witness." Remoteness of the prior conviction does constitute a factor to be considered in the balance; however a set number of years for remoteness cannot be arbitrarily made. The inquiry seeks to discover the relevancy and prejudicial impact of the conviction, but this can only be accomplished on a case by case basis . . . The length of time since the conviction . . . only goes to its effectiveness as an impeachment not its admissibility."

Applying this principle to the factual situation before it, the court of appeals ruled that the fifteen-year-old conviction in question was properly introduced to impeach the defendant's witness.

With respect to the factor of "remoteness," it should be asked: Is there any real difference in substance between the federal rule and the one adopted in _Hardin_? Each of the two places discretion in the hands of the trial court to admit or exclude such evidence; and each clearly indicates that remoteness is an important factor for consideration. Each of the rules requires that the objective of the judge, in exercising his discretion, be to eliminate the possibility of undue prejudice. It is possible, therefore, that the only difference in the two rules is in the manner in which they are stated. If future developments should confirm the validity of this conclusion, they will simul-

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49 _Id._ (emphasis added).
taneously reveal a change in the general tone of the Kentucky rule, which at the present time seems clearly to favor admissibility.

The federal provision, despite the similarities described above, has a decidedly more exclusionary tone and character about it than does the Kentucky rule. A remote conviction is not admissible in federal cases unless the judge determines on the basis of specific facts and circumstances that the probative value of the conviction substantially outweighs its prejudicial effect. The history involved in the adoption of this rule removes all doubt that it was intended to have an exclusionary tenor. In its initial form the federal provision on "remoteness" contained no discretionary power to authorize the use of a conviction more than ten years old.\textsuperscript{51} The discretionary provision was added by Congress, but not for the purpose of altering drastically the character of the rule. The Senate Committee on the Judiciary made this fact undeniably clear in its Report on the Rules:

> Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

> It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact . . . \textsuperscript{52}

\textsuperscript{51} See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, supra note 45, at 296.

C. Alteration in the Admonition Rule

When a prior criminal conviction is introduced into evidence to impeach an accused, there exists an obvious risk that the jury will use the evidence for other than impeachment purposes. To minimize this risk, jurors are instructed by the trial judge as to how they should and should not use the evidence. A failure of the court to provide such an instruction, after a request by an accused, constitutes reversible error.

Not infrequently a criminal defendant will anticipate an impeachment effort by the prosecution, and on his own inform the jury that he has previously been convicted of a felony offense. In a case decided in 1967, Shockley v. Commonwealth, the Court of Appeals ruled that a defendant who so anticipates an impeachment of his character loses the right to have the jury instructed to use the evidence only for purposes of credibility. A strong dissent was filed in that case on the ground that the majority's position authorized the jury in effect "to consider the prior conviction for any and all purposes, including the probability of guilt and the length of sentence to be imposed." During its most recent term the Supreme Court retreated from this position and adopted the following rule:

Since [Shockley v. Commonwealth], the principles applicable to the reception of prior felony convictions were reconsidered and restated in Cotton v. Commonwealth . . . wherein it was made clear that the fact of such a conviction should never be considered by the jury as substantive evidence tending to enhance the likelihood of his being guilty of the charge or charges presently being tried, and that the only way to protect against its being so considered is to admonish the jury to that effect. Unless he waives it by failure to request it, the defendant is entitled to the admonition and a failure to give it is reversible error. To the extent that it holds otherwise, Shockley may be considered overruled.

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53 415 S.W.2d 866 (Ky. 1967).
54 Id. at 873.
55 Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977).