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The 1967-68 Kentucky Court of Appeals Review

Kentucky Law Journal

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I. INTRODUCTION

For the past five years the *Kentucky Law Journal* has featured a review of all decisions handed down by the Kentucky Court of Appeals during the preceding term. Last year the emphasis of the Review was changed somewhat, and cases which recommended themselves to the Journal as having far-reaching significance were given extended analysis and discussion. This year the Review has evolved one step further. The Court’s decisions have been carefully analyzed, and from this analysis an attempt has been made to select those cases which have or will have the greatest impact on Kentucky law. Those considered to be unimportant have been omitted. The cases selected for comment have been treated in depth, *i.e.*, they have been thoroughly analyzed, discussed, criticized, and, where necessary, alternative solutions have been suggested. Thus, the 1966-67 Court of Appeals Review contains only those cases which will significantly affect Kentucky law. It is hoped that by so limiting the Court of Appeals Review, the *Journal* may provide a greater service to judges and practitioners throughout the Commonwealth.
II. ADMINISTRATIVE LAW

Kentucky Revised Statutes [hereinafter referred to as KRS] 44.070 authorizes the Board of Claims to "compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth." (Emphasis added.) *Auto-mobile Insurance Co. v. Commonwealth, Department of Highways* involved a finding by the Board of Claims that the plaintiff, an insurance company, was not a "person" within the purview of KRS 44.070 and therefore, could not seek indemnification from the Commonwealth. 2

The Court of Appeals reversed the Board, reasoning that since the plaintiff was pursuing the subrogated claim of its insured, a person, it stood in his position. By so finding, the Court was able to hold that under KRS 44.070, a "tort-feasor (or person subrogated to his rights), who has settled a claim based on the negligence of the joint tort-feasors, should be able to recover the Commonwealth's share of the obligation when the latter is one of the joint tort-feasors." 3

*Goodwin v. City of Louisville,* 4 *Louisville and Jefferson County Planning and Zoning Commission v. Stoker,* 5 and *Kentucky Board of Hairdressers and Cosmetologists v. Stevens* 6 guarantee parties adversely affected by the findings of an administrative agency "direct judicial relief without exhaustion of administrative remedies when there are no disputed factual questions" 7 and the only question is the validity or applicability of a statute or ordinance. This term, in *Har-rison's Sanitarium, Inc. v. Commonwealth, Department of Health,* 8 the rule was extended under limited circumstances to administrative regulations. 9 Violation of the regulations involved in the case 10 would

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1 414 S.W.2d 578 (Ky. 1967).
2 The appellants sought contribution from the Commonwealth on a claim for wrongful death arising out of a highway accident. It was alleged that the "decedent's death was caused and brought about by the joint and concurrent negligence . . . of [the appellant's] insured and agents of the Commonwealth." *Id.* at 579.
3 *Id.* at 580.
4 309 Ky. 11, 215 S.W.2d 557 (1948).
5 259 S.W.2d 448 (Ky. 1953).
6 393 S.W.2d 856 (Ky. 1965).
7 *Harrison's Sanitarium, Inc. v. Commonwealth, Dep't of Health,* 417 S.W.2d 137, 138 (Ky. 1967).
8 417 S.W.2d 137 (Ky. 1967).
9 The Court found that an administrative regulation, properly adopted and filed, was analogous to an ordinance or statute since all three have the full effect of law and require enforcement. Once promulgated, a regulation is as final as a legislative act. *Id.* at 138.
10 The appellants, operators of nursing homes, challenged the validity, as applied to them, of certain regulations of the Department of Health, the Department of Economic Security, and the Louisville and Jefferson County Board of (Continued on next page)
have subjected the appellants to criminal sanctions as well as a forfeiture of their licenses. Moreover, the regulations made previously lawful conduct unlawful. Thus, the Court felt justified in granting judicial review without exhaustion of administrative remedies. However, it indicated that a different result might have ensued if the "administrative avenues had been opened first by some affirmative action to penalize or revoke the license of one or more of the appellants." In addition to dispensing with the requirement of exhaustion of administrative remedies, the Court held that the possibility of criminal sanctions eliminated the requirement for the appellants to plead an "irreparable injury with no adequate remedy at law."

In American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, the Court of Appeals held that "judicial review of administrative action [was] limited to the question of arbitrariness of the administrative body." Board of Education of Ashland School District v. Chattin, following American Beauty Homes, applied this rule to the review of a school board's actions in dismissing teachers. Chattin limited the circuit court to an

(Footnote continued from preceding page)

Health. These regulations had the "effect of increasing the minimum room size and space per bed required in nursing and rest homes, thereby reducing the number of resident patients the various plaintiff institutions [were] licensed to accommodate." Id.

11 Id. at 139.
12 Id.
13 Id.
14 The circuit court had dismissed the plaintiffs' suit and request for injunctive relief on two grounds: 1) The administrative remedies at law had not been exhausted; and 2) An "irreparable injury with no adequate remedy at law" had not been pleaded in their complaint. With regard to the latter point, the Court adopted the view of the Supreme Court that "enforcement of regulations may be enjoined whenever a violator is subject to criminal penalty, without any special showing of irreparable injury or threat of enforcement." Id., citing 3 K. Davis, ADMINISTRATIVE LAW § 21.06 (1958). The circuit court was ordered to issue a temporary injunction restraining the enforcement of the regulation since there was "no emergency situation by reason of which the public interest [was] likely to suffer from a stay of enforcement pending disposition of the litigation in the trial court." 417 S.W.2d at 139.

15 379 S.W.2d 450 (Ky. 1964). American Beauty Homes, a zoning case, stands for the proposition that the Legislature may not require the judiciary to hear de novo a matter previously determined by a planning and zoning commission in the exercise of a legislative function, i.e., the doctrine of separation of powers forbids the Legislature from thrusting legislative powers and functions upon the judiciary. KY. CONST. § 27 provides:

The powers of the government of the Commonwealth shall be divided into three distinct departments and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

16 Osborne v. Bullitt County Bd. of Educ., 415 S.W.2d 607, 610 (Ky. 1967).
17 376 S.W.2d 693 (Ky. 1964).
examination of the record compiled by the school board, i.e., no de novo hearing was allowed.

Last term, the Court of Appeals in Osborne v. Bullitt County Board of Education18 overruled Chattin's application of the American Beauty Homes' rule to review of teacher dismissals. By so doing, the Court reconsidered19 the de novo implications of KRS 161.790(6) which provides:

The teacher shall have a right to make an appeal both as to law and as to fact to the circuit court . . . . The court shall examine the transcript and record of the hearing before the board of education and shall hold such additional hearings as it may deem advisable, at which it may consider other evidence in addition to such transcript and record. (Emphasis added.)

In order to retreat from its position in Chattin, the Court had to find that the de novo implications of KRS 161.790(6) did not violate the doctrine of separation of powers.20 Relying heavily upon two Alabama cases21 and the writings of Louis L. Jaffe,22 the Court reasoned that a board of education, when trying a teacher, is not purely administrative, but it takes on quasi-judicial characteristics. In such a role, the requirements of due process must be met. To insure due process, the Court continued, the Legislature "may properly require a trial de novo . . . without doing violence to the constitutional requirement of separation of powers."23 Apparently, the Court has qualified American Beauty Homes so that the Legislature may provide de novo hearings for those administrative decisions which have resulted from quasi-judicial proceedings.24

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18 415 S.W.2d 607 (Ky. 1967).
19 In Chattin, the Court had held that the de novo implications of Ky. Rev. Stat. [hereinafter cited as KRS] § 161.790(5), predecessor of KRS § 161.790(6), were unconstitutional as a violation of the separation of powers. See note 15 supra.
20 See note 15 and 19 supra.
21 Ex Parte Darnell, 262 Ala. 71, 76 So. 2d 770 (1955); State ex rel. Steele v. Board of Educ. of Fairfield, 252 Ala. 254, 40 So. 2d 689 (1949). Both cases deal with the same situation as was before the Court in Osborne, i.e., discharge of a teacher for misconduct.
22 L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATION ACTION 103 (1965).
23 415 S.W.2d at 612. The Court said that de novo review was especially important where due process had not been observed in the administrative proceedings. In Osborne, the Court intimated that due process had been violated because the appellant was not allowed to conduct a voir dire type of examination of the Board members and the charges were too vague and indefinite to furnish the appellant with sufficient notice.
24 In a case comment on American Beauty Homes in 53 Ky. L. J. 388, 392 (1965), it was urged and hoped that "when the proper case arises, the Court will . . . permit some latitude of judgment as to the weight of the evidence presented to the board."
III. COMMERCIAL LAW

With the advent of technological innovations and the industrial revolution, the pace of trading and distribution of goods quickened. But although commercial intercourse responded dynamically to the techniques of mass production, the common law rules governing commercial transactions remained agonizingly static. The Uniform Commercial Code is the successor to many uniform acts designed to contemporize commercial law.\(^1\) Although, by adopting the Code in 1958,\(^2\) Kentucky took the initial step toward predictable results in suits arising out of business transactions, the scarcity of case law since the effective date of the enactment reflects the unfortunate reluctance of the legal profession to utilize the Code to its fullest extent. During the past year, the Court of Appeals construed only two previously uninterpreted sections of the statute.

A. Sales

In *Permalum Window & Awning Manufacturing Co. v. Permalum Window Manufacturing Corp.*,\(^3\) the Court settled a dispute involving the terms of a shipment contract and a subsequent waiver of objections to defects in materials delivered. The plaintiff, a New York corporation, sued the Kentucky defendant for money due on a mutual account. The parties had entered into a contract whereby the plaintiff agreed to provide raw materials for the defendant, who in turn would fill the plaintiff's orders for aluminum windows. The cost of the finished product was to be balanced against the cost of the raw materials to determine which party owed money on the account. The plaintiff was to pay freight f.o.b. Louisville for the manufactured windows, and the defendant agreed to pay common carrier charges for the raw materials f.o.b. New York. When the plaintiff was notified that prices for the finished product would have to be raised, he terminated the business relationship and brought suit for $8,541.23 claimed due on the account. The Kentucky corporation counterclaimed for overpayment and $10,-

\(^{1}\) The Code was adopted by the American Law Institute and National Conference of Commissioners on Uniform State Laws and was endorsed by the American Bar Association in 1952. Its predecessors included the Uniform Negotiable Instruments Law (1896), Uniform Warehouse Receipts Act (1906), Uniform Sales Act (1906), Uniform Bills of Lading Act (1909), Uniform Stock Transfer Act (1909), Uniform Conditional Sales Act (1918), and the Uniform Trust Receipts Act (1933).

\(^{2}\) KRS ch. 355 (1962). Kentucky was the third state to adopt the Code, preceded only by Pennsylvania and Massachusetts. Presently, all states except Arizona, Idaho, Louisiana, and Mississippi, have adopted the UCC. The District of Columbia and the Virgin Islands have also adopted the Code.

\(^{3}\) 412 S.W.2d 863 (Ky. 1967).
000 for breach of contract, alleging that the materials shipped by the plaintiff were defective. From a decision for the plaintiff, defendant appealed, contending that there had been insufficient evidence to prove sale and delivery of the goods and, furthermore, that the materials were defective.

The Court concluded that the testimony and records introduced at trial were sufficient to establish a sale. In disposing of the problem of proof of delivery, the Court referred to the shipping agreement, noting the specificity of the Uniform Commercial Code on f.o.b. contracts. It was determined that the parties had a shipment contract, and evidence that the seller shipped the goods was sufficient to establish delivery in the absence of an affirmative pleading that the goods were not received. The seller's duty was to tender delivery by placing the materials in the hands of a carrier, bearing the expense and risk of loss only until the goods were in the carrier's possession. Proof of this fact constituted proof of delivery.

Turning to the question of the alleged defective quality of the goods, the Court held that the defendant's delay in objecting worked an estoppel. Although this is undoubtedly a correct disposition of the issue, the sole authority relied upon to support this holding was a case decided more than thirty-five years before Kentucky adopted the Code. This is unfortunate because the Code sets forth specific procedures for raising objections to the quality of goods received. The buyer has a right to inspect the goods before payment or acceptance as long as he does so within a reasonable time, and if defects are revealed, he has a right to reject the goods. For effective rejection,
the buyer must seasonably notify the seller, and failure to particularize the objections in the notice may constitute waiver of the right. Where a shipment is rejected in whole or in part, the seller is given a right to cure the defect within the contract time by delivery of conforming goods. Acceptance of a shipment occurs when the buyer signifies he will keep the goods, fails to make an effective rejection after he has had a reasonable time to inspect, or does any act inconsistent with the seller's ownership of the goods.

In the instant case, there was no indication that the appellant had notified appellee of any objections to the quality of the goods shipped or had attempted to reject them in any manner. Rather, he continued receiving the raw materials, using them to manufacture the windows, and delivering the windows in accordance with the contract terms. This clearly indicated acceptance within the meaning of the Code.

Once goods have been accepted, a buyer is precluded from later attempting to reject them. However, acceptance may be revoked within a reasonable time if the buyer subsequently discovers a latent defect in the materials. There is no evidence to support this in *Permalum*. Thus, the logical conclusion is that the appellant had accepted the goods and that this barred him from raising objections to the goods' quality at the trial. Although the proper result was reached by the Court, it is most regrettable that the Code was not used to dispose of an issue so explicitly covered by it.

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(Footnote continued from preceding page)

10 KRS § 855.2-602 (1962).
11 KRS § 855.2-605(1) (1962) provides:
   (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach
      (a) where the seller could have cured it if stated seasonably; or
      (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.
12 KRS § 355.2-508 (1962).
13 KRS § 355.2-606 (1962).
14 KRS § 355.2-607 (1962). Clause (3) of this section states that where tender of delivery has been accepted (but acceptance of the shipment has not yet occurred), the buyer must notify the seller of a breach within a reasonable time after he discovers or should have discovered the breach, or he will be barred from any remedy.
15 KRS § 355.2-608 (1962).
B. Negotiable Instruments

_Buehrer v. Gates_\(^{16}\) involved a check executed as payment for an assignment of mineral leases. The instrument, which recited that it was payment in full for 1,010 acres, was returned by the bank marked "insufficient funds," whereupon the plaintiff brought suit. The check was made an exhibit by the plaintiff. Defendant pleaded lack of consideration but did not offer any evidence at trial. He appealed from an adverse judgment on the basis that the plaintiff had failed to prove consideration.

Under the Uniform Commercial Code, the holder of an instrument takes it subject to all valid claims and defenses available in a simple contract action, including failure of consideration.\(^{17}\) However, production of the instrument entitles the holder to recover when the signatures are admitted or established unless a valid defense is also established.\(^{18}\) Relying on this principle, the Court held that the burden of proving failure of consideration was on the defendant.\(^{19}\) This holding and the pertinent Code provisions seem to be consonant with the policy of upholding the validity of commercial transactions.

\(^{16}\) 411 S.W.2d 676 (Ky. 1967).
\(^{17}\) KRS § 355.3-306(c) (1962).
\(^{18}\) KRS § 355.3-307 (1962) provides that when a signature is admitted or established, the holder is entitled to recover when he produces the instrument unless a defense is established. As indicated in the text of the decision, this is a departure from the earlier rule that the negotiable form of an instrument raised a presumption that it was issued for valuable consideration.
\(^{19}\) Although the foregoing provisions were controlling, the Court found that the plaintiff had introduced ample evidence to prove consideration.
IV. CONDEMNATION

A. Procedure

A jury view of condemned or damaged property is almost, if not absolutely, essential to enable the jury to intelligently understand the testimony regarding the value of property.\(^1\) KRS 177.087, recognizing the importance of a jury view of condemned property, provides that the "jury, on the application of either party, shall be sent by the court . . . to view the land and material."\(^2\) (Emphasis added.) On numerous occasions the Court of Appeals has held it reversible error to deny a request for a jury view.\(^3\) It has stated: "The peremptory language of the statute [KRS 177.087] has been consistently held to make it the duty of the trial court, at the request of either party, to permit the jury to go upon the land sought to be taken or damaged."\(^4\)

Although the Court has stressed the peremptory language of the statute, if the jury awards compensation higher than that estimated by any witness, the judgment will be reversed.\(^5\) Therefore, while a jury view is mandatory upon request, the jury is not allowed to base its verdict solely upon that view.\(^6\) A balance is struck by allowing the jury to consider the view in connection with their own knowledge and experience in determining the weight of conflicting testimony. Thus, damages may be fixed in light of both evidence and view.\(^7\)

The law and policy underlying jury views become important in light of recent condemnation developments. In *Commonwealth, Department of Highways v. Hackworth*,\(^8\) dictum indicated that the trial court may, in the exercise of sound discretion, refuse to allow a jury view when buildings have been relocated.\(^9\) Following *Hackworth*, the Court, in *Commonwealth, Department of Highways v. Jewell*,\(^10\) upheld a trial judge's decision denying a jury view of condemned property. In *Jewell*,

\(^1\) P. Nichols, Eminent Domain § 18.3 (1962).
\(^2\) KRS § 177.087 (1962) applies to the right to a jury view in highway eminent domain proceedings while KRS § 416.050 (1962) is applicable to rail-road eminent domain proceedings.
\(^3\) *Commonwealth, Dep't of Highways v. Bates*, 408 S.W.2d 424 (Ky. 1966); *Commonwealth, Dep't of Highways v. Garland*, 394 S.W.2d 450 (Ky. 1965); *Commonwealth, Dep't of Highways v. Farra*, 338 S.W.2d 696 (Ky. 1960).
\(^4\) *Commonwealth, Dep't of Highways v. Farra*, 338 S.W.2d 696, 698 (Ky. 1960).
\(^5\) *Commonwealth, Dep't of Highways v. Doolin*, 411 S.W.2d 44 (Ky. 1967).
\(^6\) *Pierson v. Commonwealth, Dep't of Highways*, 350 S.W.2d 487, 489 (Ky. 1961).
\(^7\) *Tennessee Gas Transmission Co. v. Huddleston*, 312 Ky. 833, 836, 229 S.W.2d 933, 934 (1950).
\(^8\) *400 S.W.2d 217* (Ky. 1966).
\(^9\) Id. at 220.
\(^10\) *405 S.W.2d 678* (Ky. 1966).
a view of the property would have required the jury to walk approximately two miles over fences and rough terrain. The allegation was made that some of the jurors, including one woman, were physically unable to make the journey. In sustaining the trial judge's decision, the Court stated:

Under the difficult circumstances, we think the trial judge had a discretion and did not abuse it in overruling appellant's motion notwithstanding the use of the word shall in connection with the statutory right of either litigant to have the jury view the land affected by condemnation.11

The import of Jewell is to give the trial judge discretion to deny a jury view when access to the property is difficult; the import of Hackworth is to grant the trial judge discretion to deny a jury view of property on which the buildings have been relocated or changed.12

Is the next step to allow the trial judge to deny a jury view when there is adverse weather?

The two judges dissenting in Jewell urged that "shall' as used in KRS 177.087 makes a requested jury view mandatory" and that to construe it otherwise would be to chip at the foundation of an established area of law.13 This dissent, coupled with decisions of the Court in Jewell and Hackworth, presents three factors to be considered when deciding whether a jury view should be granted: 1) the interpretation of KRS 177.087 and in particular the term "shall" contained therein; 2) the value of a jury view to an intelligent and just disposition of the condemnation proceeding; and 3) the expediency and safety involved in getting the jury to the location in question.

KRS 446.010 provides: "as used in the statute [s] ... of this state, unless the context requires otherwise: ... 'shall' is mandatory."14 The context of the word "shall" in KRS 177.087 may seem to require an interpretation that it is mandatory; however, jury views in other types of condemnation actions have been at the discretion of the trial judge.15 Likewise, in highway condemnation, when the jury view would be extremely difficult, the trial judge should be given discretion to deny

11 Id. at 680.
12 But see Commonwealth, Dep't of Highways v. Bates, 408 S.W.2d 424, 425 (Ky. 1966). In Bates, the Court held that absent evidence showing that there had been a substantial change in the building and that because of this change a view would not be helpful or would be misleading, it was reversible error to deny a request to view a residence which had been removed from condemned property. 13 405 S.W.2d at 679.
14 See cases cited supra note 3 for a determination of the use of "shall" as directory or mandatory.
15 KRS § 416.050 (1962) applies to railroad eminent domain proceedings and provides: "Upon the request of either party, the jury may be sent by the court ... to view the land or material." (Emphasis added.)
such a view. In such a case the jurors' knowledge and understanding of the property involved could be greatly increased by the use of color pictures. The expediency and safety of having the jury view condemned property is a value judgment to be made within the discretion of the trial judge, and the abuse of such discretion can be reviewed on appeal.

In the past the Court has indicated that "shall" as used in KRS 177.087 is to be construed as mandatory. The Court has also indicated that this interpretation is to apply to the future. Interests other than the proper interpretation of "shall" have, however, entered the problem of a party's right to have a jury view in a condemnation proceeding. The Court's attempts to preserve precedent in statutory interpretation have been noble, and the information gained by jurors during a view is important. However, the protection of the jurors' health is essential. These interests have created confusion in this area, but it would seem that granting the trial judge discretion to deny a jury view is the soundest course.

B. REVERSE CONDEMNATION

"Where private property is taken for public use, or where there is a trespass thereon which amounts to such taking, the state's immunity from suit is waived" by Sections 13 and 242 of the Kentucky Constitution, i.e., "reverse condemnation" results. "Reverse con-

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16 Id., at 679. The Court stated: "KRS 177.087 makes it mandatory that the jury be allowed to view the premises on motion of either party. . . . Even so, there may be unusual or extreme circumstances, such as in the present case, in which the court may have discretion."
17 5 P. NICHOLS, supra note 1, at § 18.3(3).
18 See Lehman v. Williams, 301 Ky. 729, 731, 193 S.W.2d 161, 162 (1946), citing Kentucky State Park Commission v. Wilder, 256 Ky. 313, 317, 76 S.W.2d 4, 6 (1934), which provides:
As appears from the record, the state has taken private property for public use without compensating some of the joint owners thereof. Section 13 of our Constitution, which is included in the Bill of Rights, forbids such a taking and section 242 of the Constitution likewise provides that just compensation shall be made for private property taken, injured, or destroyed for public use. Under these express provisions, an appropriate action will lie against the Commonwealth as well as against corporations or individuals for damages growing out of the taking, injuring, or destroying of private property for public purposes.

This is the interpretation given Sections 13 and 242 of the Kentucky Constitution. Ky. Const. § 13: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being previously made to him." Ky. Const. § 242: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them."
demnation" is a legal fiction which allows the injured party to waive the tort and sue on an implied promise to pay. The fiction is permitted to enable the landowner to receive compensation for his property without the delay incidental to obtaining specific legislative approval for a tort action against the Commonwealth.

In the early case of Commonwealth, Department of Highways v. Davidson, the landowner contended that at the time his property was acquired for a right of way, he was told that a private road was to be built, but that after completion, the road was used by his neighbors. In Davidson, the Court reversed an award by the lower court and held that no condemnation in reverse would lie where the Highway Department did nothing beyond that allowed by the right of way deed. This term the Court, in Commonwealth, Department of Highways v. Gamble, reversed an award because the incident out of which the alleged damages arose was construction in accordance with a right of way deed. The landowner had attempted to recover on a "reverse condemnation" theory for drainage flowing from the construction. By way of dictum, the Court indicated its readiness to extend the Davidson theory to drainage damages resulting from construction work in accordance with a right of way deed.

The reasoning adopted by the Court in Davidson and Gamble apparently indicates that in the absence of negligence, mistake, or bad faith there can be no reverse condemnation when alleged damages arise from construction in accordance with the terms of the right of

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19 For a discussion of reverse condemnation in Kentucky, see Oberst, Claims Against the State of Kentucky—Reverse Eminent Domain, 42 Ky. L. J. 163 (1953).
20 Curlin v. Ashby, 264 S.W.2d 671, 672 (Ky. 1954).
21 383 S.W.2d 346 (Ky. 1964).
22 The Court stated:
The reverse condemnation principle rests on the premise of the taking, destroying or injuring of property by the sovereign without any color of right or title so to do. In the case before us the Commonwealth has done nothing beyond that which the right of way deeds authorized. It has constructed the road according to the plans, just as specified by the deeds. Thus, there has been no taking, destruction, or injury to the Davidson's property other than authorized by the deed—hence, there can be no condemnation in reverse. Id. at 348.
23 415 S.W.2d 101 (Ky. 1967).
24 Id.
25 Id. at 103. The Court stated:
Although there was no pleading of such damages, the Gambles in their testimony sought to show damages from improper drainage. It is sufficient to say that there was no evidence that the construction work by the Department of Highways in any way departed from the plans incorporated in the deed, wherefore, under Commonwealth, Department of Highways v. Davidson, Ky., 383 S.W.2d 346, no claim can be prosecuted for the drainage damages.
way deed. Such decisions will discourage suits in "reverse condemnation." Therefore, if relief is to be gained, the injured party must turn to the Board of Claims. The Board provides a method whereby private citizens can collect for damages inflicted by the Commonwealth or its employees. Encouraging "reverse condemnation" cases to be brought before the Board should be continued so long as the amount of the claim is under ten thousand dollars. The justification for the Board's hearing these claims rather than the circuit courts is that "reverse condemnation" is merely a tort action cloaked with a legal fiction in order to by-pass the sovereign immunity principle. The theory should be discarded and the action brought before the authority established to hear tort claims against the Commonwealth.

C. VALUATION AND THE ADMISSIBILITY OF EVIDENCE

The problems of valuation and admissibility of evidence are so interrelated as to necessitate concurrent consideration. The underlying problem in arriving at just compensation in a condemnation action is the determination of the before and after valuation. The Court continues to employ the widely accepted method of determining the market value by using the willing buyer-willing seller concept.

20 For a discussion of the Board of Claims in Kentucky, see Lewis & Oberst, Claims Against the State of Kentucky—The Board of Claims, 42 Ky L.J. 334 (1953).

21 KRS §§ 44.070-110 (1962).

22 Lewis & Oberst, supra note 26, at 356 n.67 which states: "Indeed, if either the Board or the circuit courts must lose their jurisdiction over these claims (both will probably continue to hear them) the act would seem to oust the circuit courts of their jurisdiction."

23 "Just compensation, as the term implies, is compensation that is just to the public as well as to the owner of the property taken." Sackman, The Right to Condemn, 29 ALBANY L. REV. 177, 190 (1965). However, an analysis of the Court's decisions indicates that it continues to employ the fundamental test of "what has the owner lost, not what has the taker gained?" This test is set out in Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910); e.g., Jones v. Commonwealth, Dep't of Highways, 413 S.W.2d 65 (Ky. 1967). See 27 AM. JUR. 2d Eminent Domain § 282 (1966). See generally Note, Just Compensation for Real Estate Condemnation, 15 CLEV.-MAR. L. REV. 171 (1966).

24 Market value is the best measure by which just compensation may be awarded. See, e.g., City of Newport Municipal Housing Comm'n v. Turner Advertising Co., 394 S.W.2d 767 (Ky. 1960). The legal obligation is to pay just compensation for the taking. U.S. CONST. amend. V. The market value test is merely a commonly used means toward this end. See Sackman, supra note 29; see also Winner, Rules of Evidence in Eminent Domain Cases, 15 ARIZ. L. REV. 10 (1959-59).

25 The traditional definition of market value is the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted which may reasonably be utilized. Commonwealth, Dep't of Highways v. Claypool, 405 S.W.2d 674 (Ky. 1966); City of Newport Municipal Housing Comm'n v. Turner Advertising Co., 394 S.W.2d 767 (Ky. 1960); Commonwealth v. Begley, 272 Ky. 289, 114 S.W.2d 127 (1938); See also Sackman, supra note 29.
In Commonwealth, Department of Highways v. Claypool, the Court made an important distinction between the measure of compensation used in a condemnation action and that used in a non-condemnation action. In Claypool, part of a tract of land was condemned, and on appeal the issue arose as to when the after valuation should be determined. The Court held that where the need for compensation arises from a partial taking the measure of compensation is the difference between the fair market value of the whole property immediately before the taking and the fair market value of the remaining property immediately after the taking. The Court based its reasoning on the sound premise that in a condemnation action, the taking itself is the act which caused the need for compensation, and the probable completion of subsequent improvements by the condemnor is only one factor which may be considered in determining this value.

The Court distinguished Claypool from those cases where damage was caused by government work on adjacent property. In these instances, there is no taking and the after valuation is to be made only after the work which has caused the need for compensation is fully completed. Thus, the measure of damages would be the difference between the fair market value of the property before it was generally known that the construction would take place and its fair market value immediately after completion of the work. In Claypool, the Court clarified and soundly reaffirmed the long-used market value test and

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32 405 S.W.2d 674 (Ky. 1966).

33 The first use of the market value test in Kentucky was apparently in instructions, see Commonwealth, Dep't of Highways v. Priest, 357 S.W.2d 302 (Ky. 1965); the "taking" date is set out in Commonwealth, Dep't of Highways v. Wood, 380 S.W.2d 73 (Ky. 1964).

34 There is no dichotomy between taking and resulting damages. All of the factors which affect the value of the land are subsumed under the before and after valuation instruction. Commonwealth, Dep't of Highways v. Sherrod, 367 S.W.2d 844 (Ky. 1963).

35 City of Ashland v. Queen, 254 Ky. 329, 71 S.W.2d 650 (1934); Hutcherson v. Louisville & N. R.R., 247 Ky. 317, 57 S.W.2d 12 (1933); Watson v. Chesapeake & O. Ry., 238 Ky. 31, 36 S.W.2d 641 (1931).

36 In Commonwealth, Dep't of Highways v. Claypool, 405 S.W.2d 674 (Ky. 1966), the Court, referring to cases where damage was caused by government work on adjacent property, stated that since there was no taking there could be no damage until the work was completed. However, while it is obviously possible for a landowner to sustain damage before such work is fully completed, the Court has apparently ruled, in order to avoid multiple litigation, that no assessment of damage can be made until the work is finished.

37 See, e.g., City of Dayton v. Rewald, 168 Ky. 398, 182 S.W. 931 (1916).

38 See 4. P. Nichols, supra note 1, at § 14.232(1) where it states, "The simplicity of the application of the before and after rule commends itself to the courts as the method most likely to attain a result that is fair both to condemnor and condemnee." See also, L. ORCEL, VALUATION UNDER EMINENT DOMAIN §§ 51-52 (1953); but see Sackman, supra note 29; for other measures of valuation see 27 AM. JUR. 2D Eminent Domain § 310 (1969).
distinguished it from that used in non-condemnation actions. This should facilitate accurate jury instructions and result in fewer appeals.\textsuperscript{38}

A significant step forward was taken in \textit{Commonwealth, Department of Highways v. Standard Oil Co.},\textsuperscript{40} when the Court held that the trial court's refusal to allow a landowner to use the accepted and recognized formula of the gasoline industry\textsuperscript{41} to prove the value of his land was reversible error. The formula related the land value directly to the gallons of gasoline sold at the service station. The trial court allowed the owner to prove the number of gallons sold, but refused to permit him to use the formula to relate this to the value of his land. While the Court reiterated its position that loss of business profits is a non-compensable item in condemnation actions, it distinguished this from the income producing quality of the real estate which is a compensable item.\textsuperscript{42}

In resolving this problem of first impression in Kentucky, the Court relied heavily on \textit{St. Louis Housing Authority v. Bainter}.\textsuperscript{43} There, property used for a gasoline station was condemned and on appeal the Supreme Court of Missouri held that evidence as to the custom and practice in the gasoline industry of using gallons of gasoline sold as the primary factor in determining the market value of service station property was properly admitted. The Missouri Court specifically rejected an argument advanced by the dissent in \textit{Standard Oil} that evidence of market value based upon gallonage is speculative and uncertain because it depends upon such highly variable items as management, hours of operation, and discounting practices.

In \textit{Standard Oil}, the Court soundly permitted a widely accepted business standard to be used to directly relate the value of the condemned land to the product sold on the land. The use of such standards

\textsuperscript{38} \textit{Commonwealth, Dep't of Highways v. Claypool}, 405 S.W.2d 674 (Ky. 1966), overruled \textit{Commonwealth, Dep't of Highways v. Wood}, 380 S.W.2d 73 (Ky. 1964) and \textit{Commonwealth, Dep't of Highways v. Baldwin}, 229 S.W.2d 744 (Ky. 1950) to the extent that they held when the after valuation was to be made.\textsuperscript{40}

\textsuperscript{40} \textit{414 S.W.2d 570 (Ky. 1966).}

\textsuperscript{41} \textit{Id. at 571.}

\textsuperscript{42} \text{Lost business profits is a noncompensable item in condemnation actions since they depend largely on the individual skill of the owner and are therefore too speculative and uncertain. \textit{City of Newport Municipal Housing Comm'n v. Turner Advertising, Inc.}, 394 S.W.2d 787 (Ky. 1966); \textit{Henderson v. City of Lexington}, 132 Ky. 390, 111 S.W. 818 (1908). \textit{Contra, e.g., Korf v. Fleming}, 289 Iowa 501, 32 N.W.2d 85 (1948); \textit{In re Park Site}, 247 Mich. 1, 225 N.W. 498 (1929). However, the income producing quality of the real estate is compensable because it depends upon more certain factors such as location and suitability for a particular business. \textit{Commonwealth, Dep't of Highways v. Smith}, 358 S.W.2d 487 (Ky. 1962). \textit{See 27 Am. Jur. 2d Eminent Domain} § 285 (1966).

\textsuperscript{43} \textit{297 S.W.2d 529 (Mo. 1957).} This case was one of first impression in Missouri.
can provide an important factor for the jury's consideration in arriving at fair market value. 

Although uncertainty may occur in the use of such standards, it is difficult to justify the rejection of evidence that businesses rely on in the conduct of their affairs. Because Standard Oil is the first affirmation of this practice in Kentucky, the Court should at its first opportunity set appropriate evidentiary standards. While the use of widely accepted business standards should be encouraged, sound evidentiary guidelines can prevent the obvious danger inherent in the indiscriminate use of unreliable standards. The flood of appeals which would otherwise result with increasing attempts to introduce such standards in condemnation actions can also be prevented.

In Jones v. Commonwealth, Department of Highways, the Court applied a universally accepted doctrine for the first time in Kentucky. The landowner appellants had purchased two non-contiguous tracts of land which had recently been subdivided for residential construction. One parcel was used for a residence and the other was bottomland for use as a recreational area and buffer between the road and the residential area. Because other land owners in the subdivision had previously exercised the option to purchase buffer lots, appellant's buffer lot was not contiguous to his residential lot. However, deed restrictions prevented the buffer from being used for any other purpose.

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44 Rental value is generally held to be an important factor in determining fair market value. See, e.g., State v. Hollis, 93 Ariz. 200, 379 P.2d 750 (1963); State, Dep't of Highways v. Varino, 129 So. 2d 495 (La. 1961). See 29A C.J.S. Eminent Domain § 168 (1965). Evidence as to the gallons of gasoline sold on the condemned premises was admitted in State Highway Comm'n v. Ellis, 382 S.W.2d 225 (Mo. 1964), but the first use of a business formula to directly relate the gallons sold to the rental value of the land as a factor in the market value determination appears to have been in St. Louis Housing Authority v. Bainter, 297 S.W.2d 529 (Mo. 1957). The use of such a standard when it is widely accepted by industry is consistent with the modern practice of allowing all relevant factors to be considered as evidence in condemnation valuations. 29A C.J.S. Eminent Domain § 273 (1965).

45 In Wade v. Carolina Tel. & Tel. Co., 147 N.C. 219, 60 S.E. 987 (1908), the court upheld the use of expert opinion testimony as evidence in a condemnation valuation action. It reasoned that the jury must know the value of the property which the owner is deprived of and any evidence tending to show this value should be regarded as competent. No amount of purely factual data would enable a lay jury to do anything but speculate as to the value of the property. The court stated, "It is difficult to perceive why testimony, which experience has taught is generally found to be relied upon by men in their important business affairs outside, should be rejected inside the court house." Id. at 219, 60 S.E. at 989.

Reliable business and industrial standards, as in the Standard Oil case, can perform a functional role similar to that of expert testimony in enabling a jury to arrive at the elusive concept of value.

46 413 S.W.2d 65 (Ky. 1967).

47 See City of Williamstown v. Wallace, 316 S.W.2d 373 (Ky. 1958), where separate parcels were devoted to a single use, but where non-unity of title defeat compensation. See also Commonwealth, Dep't of Highways v. Slusher, 371 S.W.2d 851 (Ky. 1963).
A portion of the bottomland was condemned, but none of the residential land was taken. The Court held that because the two parcels were devoted to a single use they were entitled to be considered as one for condemnation valuation purposes, even though they were non-contiguous. The "unity rule," is widely accepted and the main issue, as in Jones, is whether or not the parcels are devoted to a single use. Where two or more separate tracts under common ownership are devoted to a single use so that the taking of one would impair the value of the other, non-contiguity should not deny the owner just compensation. While contiguity is a factor to be considered in determining whether or not the property is devoted to a single use, it is not conclusive. Thus, integrated use, not physical contiguity, is the principal test. The measure of compensation is the same for owners of separate tracts devoted to a single use as for owners of single tracts. Thus, the "unity rule" facilitates just compensation to the property owner and the Court is on firm ground in adopting it.

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51 Id.

52 In Commonwealth, Dep't of Highways v. Rogers, 399 S.W.2d 706 (Ky. 1965), a single tract of land was devoted to two separate and distinct uses, but when one part was condemned, the Court held that the tract would be considered as two separate tracts for valuation purposes in order to avoid duplication of damages. This rule is in line with a majority of other jurisdictions. See, e.g., Cameron v. Chicago M. & St. P. Ry., 51 Minn. 153, 53 N.W. 199 (1892). See 27 Am. Jur. 2d Eminent Domain § 315 (1966). For a development of the unity doctrine see Rezzolla, Unity of Use and Unity of Ownership in Eminent Domain, 70 Dick. L. Rev. 139 (1966).
V. CONFLICTS

A. CHOICE OF LAW

The lex loci delicti—the law of the place of the wrong—has been the traditional solution, applied in a long line of Kentucky cases, for resolving choice of law questions in multi-state tort cases. However, in recent years various jurisdictions have cast aside the mechanical lex loci delicti, "rules" approach and have adopted versions of the Restatement Second approach, often called the "center-of-gravity" or "most significant contacts theory." This approach, while in a sense more flexible than the lex loci delicti, is nevertheless merely another rules approach. For some torts, specific choice of law rules apply, but in most tort cases, a court must apply the law of the state of the most significant relationship, regardless of the fact-law pattern. The state of the most significant relationship is determined by "weighing" the contacts quantitatively. Although this weighing process may allow a

1. Restatement of the Conflicts of Laws §§ 377-78 (1934):

§ 377 The Place of Wrong

The place of wrong is the state where the last event necessary to make the actor liable for the alleged tort took place.

§ 378 Law Governing Plaintiff's Injury

The Law of the Place of the Wrong determines whether a person has sustained a legal injury.

2. This rule began with Louisville & N. R.R. v. Whitlow's Adm'r, 114 Ky. 470, 43 S.W. 711 (1897). A few recent cases employing the lex loci delicti rule are Stewart v. Martin, 349 S.W.2d 702 (Ky. 1961); Carter v. Driver, 316 S.W.2d 378 (Ky. 1958); Drahmann's Adm'x v. Brink's Adm'x, 290 S.W.2d 449 (Ky. 1956). In these cases the Court gave no reason for following the rule except stare decisis. The rule was first questioned in Ansback v. Greenberg, 256 S.W.2d 1 (Ky. 1952), where it was argued that application of a Georgia guest statute was against public policy as reflected in the Kentucky Constitution, Sections 14, 54, and 241, which, when read together, forbid legislative enactment of a guest statute. See note 10 infra. The Court rejected the argument and followed the rules approach of the first Restatement. See Sedler, Babcock v. Jackson in Kentucky: Judicial Method and the Policy Centered Conflict of Laws, 56 Ky. L.J. 27 (1967), for a comprehensive historical development of the lex loci rules approach.


4. Restatement (Second) of the Conflict of Laws § 379(a) (Tent. Draft No. 9, 1964):

In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issues involved, in which event the local law of the latter state will govern.

5. Intra-family immunity is governed by the law of the family domicile. Restatement (Second) of the Conflict of Laws § 390(g) (Tent. Draft No. 8, 1963).
court to reach a desirable result, the Restatement Second approach requires the same application to any case classified as a tort, irrespective of the fact-law pattern presented. This, in essence, is simply an expanded rules approach.

Another method of solving choice of law problems in multi-state tort cases is the policy-centered approach. The underlying premise of this theory is that a court should not make a choice of law on the basis of a rigid rule which applies to all cases classified as torts. Decisions should be reached on a case-by-case basis, utilizing prior decisions as precedent in accord with the common law tradition. In resolving the question of which of several laws to apply, a court should first determine the pertinent social and economic policies underlying the conflicting laws. After discovering these policies, the court should then determine which state has an interest in applying its policies, as reflected in its law, to the particular fact situation. Will the policies of the state be promoted by applying its law to the facts, and will the result be fair to the parties? Does the state have a valid "governmental interest" in having its law applied? These inquiries form the basic procedural structure of the policy-centered methodology.

In *Wessling v. Paris*, a case certain to become a landmark in Kentucky conflicts law, the Court of Appeals rejected the lex loci delicti approach and adopted a version of the policy-centered methodology. The fact pattern was that Helen Wessling was a passenger in a car owned and operated by her host, Lenice Paris. Both were Kentucky residents, and the car was garaged and licensed in Kentucky. There was an accident in Indiana, and Helen Wessling was injured. She brought suit in Kentucky. The law pattern revealed that Indiana had a guest statute, granting drivers immunity from suits by pas-

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6 This was the "rules" approach of the first *Restatement*, and it is similar to the civil law whereby a codified set of rules is applied to all cases falling within a broad classification, regardless of the fact-law pattern. See Sedler, * supra* note 2, at 41.

7 This explanation of the policy-centered approach has been vastly simplified and condensed. For an excellent and comprehensive treatment of policy-centered conflicts incorporating the views of prevailing conflicts theorists see Sedler, * supra* note 2. Contra Moreland, *Conflicts of Law—Choice of Law in Torts—A Critique*, 56 Ky. L. J. 5 (1967).

8 417 S.W.2d 259 (Ky. 1967).

9 IND. STAT. ANN. § 47.1021 (1965), provides:
The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or for death of a guest, while being transported without payment therefor, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.
sengers. Kentucky had no guest statute. Under Kentucky law Helen Wessling had a cause of action, but under Indiana law, her cause of action would be barred. So the issue was simply whether Helen Wessling had a cause of action.

Under the traditional lex loci rule, Kentucky law would be displaced and Indiana law applied by the Kentucky Court. However, the Court declined to adhere to stare decisis, saying that the time had come to reexamine the lex loci rule since the only reason for its continued application was that it was a well-established precedent. The Court found that the traditional “rules” approach, while simple and convenient avoided “the necessity of examining the true legal relationship of the parties or other considerations which might be more consonant with a just result.”

In applying Kentucky law, the Court adopted a policy-centered approach to the solution of conflict problems. The Court noted that Kentucky's public policy, as embodied in the Constitution, was to allow recovery as a matter of social justice. The apparent policy behind Indiana's law was to protect Indiana drivers from suits by guest passengers. The parties involved were Kentucky residents and domiciliaries; the trip began and was to end in Kentucky, and the car was garaged and licensed in Kentucky. Thus, the Court concluded that Indiana had no interest in applying its law since its protective policy only extended to drivers who are Indiana residents or to those suing in Indiana courts. In addition, no issue of Indiana highway safety was

10 The 1930 General Assembly enacted a guest statute which barred a cause of action by passengers unless an accident resulted from an intentional act of the owner or operator. BALDWIN, SUPPLEMENT TO CARROLL'S KENTUCKY STATUTES § 12-7 (1931). Then a year later, in Ludwig v. Johnson, 243 Ky. 534, 49 S.W.2d 547 (1932), the Court declared the guest statute to be unconstitutional and void since it violated three sections of the Kentucky Constitution. Section 14 provides that every person shall have a remedy for injuries done; Section 241 allows recovery of damages for death; Section 54 prohibits the General Assembly from limiting the amount to be recovered for injuries resulting in death or for injuries to person or property. Reading these sections together, the Court found that the guest statute violated “[t]he spirit of the Constitution as well as its letter.” 243 Ky. at 542, 49 S.W.2d at 351. As a result, guest statutes are against Kentucky public policy as embodied in its Constitution.

11 In tort conflicts cases in Kentucky, this fact-law pattern has been common. This situation is also typical of other non-guest statute states bordered by states having guest statutes.


13 The real policy reason for guest statutes is not grounded in social justice for drivers but economic protection for insurance companies against collusive suits. The Court failed to mention the true underlying policy behind Indiana's law, but this was not fatal since Indiana would have had no interest in promoting that policy under the facts of this case. See Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 405 (1963), where the insurability considerations are analyzed and applied in the policy-centered approach.
involved. Accordingly, the Court reasoned that Kentucky had a "more significant relationship" with the occurrence and the parties, and thus Kentucky law should govern the rights and liabilities of these Kentucky residents.

The Court was clearly justified in abandoning the lex loci rule. Indiana legislators were considering Indiana residents and Indiana interests (insurance) when they enacted the Indiana guest statute. Common sense dictates that if Indiana has no realistic interest in the case, there is no reason for a Kentucky court to apply Indiana law, particularly when Kentucky has compelling interests in applying its own law. From a practical standpoint, the results reached must be fair to the parties, and the different interests of the states in our federal system must be accommodated. The "rules" approach cannot achieve these goals; it considers no interests and blindly follows predetermined standards. The policy-centered approach, however, allows a realistic appraisal of which states' interests should be promoted to achieve a just result in an individual case.

B. RECOGNITION OF FOREIGN DECREES

Three significant child custody cases were decided by the Court of Appeals last term. Brengle v. Hurst involved the issue of whether Kentucky should give full faith and credit to a foreign custody decree when Kentucky had an interest in the affected child's custody. Walden v. Johnson and Batchelor v. Fulcher indicated when a court could and should take jurisdiction to adjudicate child custody.

In Brengle, the mother of two small girls was awarded custody under a 1961 Indiana divorce decree. The mother and children moved

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14 Had insurance reasons been considered, Indiana would still have no interest in protecting Indiana insurance companies and policy holders where the car was garaged in Kentucky. Since insurance rates are determined by the geographical area in which the car is garaged, an accident occurring in Indiana involving a car garaged in Kentucky would have no effect on Indiana insurance interests.

15 The Court cited the Restatement Second rule as precedent. The Restatement Second has been called another version of the "rules" approach since a decision can be rendered by counting the sheer number of contacts a particular state may have. In this sense, the Restatement Second is another "rules" approach, for no policy behind the laws is considered and no interest analysis is made after the states having the relevant contacts are determined. In Wessling, however, the Court is construing the contacts or relationships qualitatively by considering policies and interests, thus achieving a policy-centered result. For other courts that have adopted the policy-centered approach, see Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967), and Clark v. Clark, 107 N.H. 851, 222 A.2d 205 (1966).

16 408 S.W.2d 418 (Ky. 1966).

17 417 S.W.2d 220 (Ky. 1967).

18 415 S.W.2d 828 (Ky. 1967).
to Kentucky shortly after the divorce, but, in 1966, the father obtained custody under an Indiana judgment. Since Indiana had retained sufficient jurisdiction over the children's status to justify the transfer of custody, the husband filed a habeas corpus action in Kentucky to enforce the Indiana judgment. The lower court held that full faith and credit required enforcement of the judgment without a hearing on the merits.

In a well-reasoned opinion grounded on sound precedent, the Court of Appeals reversed and held that, in child custody matters, full faith and credit does not require recognition of a foreign custody order if the forum has a substantial, bona fide interest in the child's welfare, and that such recognition should not be given without a hearing on the merits. Kentucky's interest in the children's welfare was predicated on their bona fide residency in the state from 1961 to 1966. The effect of the decision is that full faith and credit is not controlling in child custody cases, and, regardless of another state's ruling, Kentucky can take jurisdiction in the interest of the children's welfare.

Brengle is indicative of the developing approach in child custody cases which allows the lower court full discretion to consider the welfare of the children. Ehrenzweig labels this approach the Kansas Rule of Independent Investigation:

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The Court does not mention domicile of the children or the mother, saying only that the mother in good faith established residency in Kentucky and that the children have been citizens of Kentucky for several years. From this language, the Court is apparently using the words residency and domicile interchangeably as many courts do.

In May v. Anderson, 345 U.S. 528 (1953), the Supreme Court held that in a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, Ohio was not bound by full faith and credit to give effect to a Wisconsin decree awarding custody of children to their father when the Wisconsin decree was rendered without personal jurisdiction over the mother. But the decision was split 4-1-4, with Justice Frankfurter concurring in the result. He said that in child custody cases the full faith and credit clause does not require Ohio to accept the disposition made in Wisconsin since the child's welfare has a strong claim upon Ohio. A state must not forget its responsibility because of another state's prior adjudication. Frankfurter turned the decision on the welfare of the child, and not on lack of jurisdiction over the mother. Thus the precise holding of this case is questionable. At any rate, the Supreme Court cases are inconclusive as to the extent, if any, to which a custody decree is entitled to full faith and credit in a sister state. See also Ford v. Ford, 371 U.S. 187 (1962), and Kovacs v. Brewer, 356 U.S. 604 (1957).

A. Ehrenzweig, Conflict of Laws §§ 86-89 (1962). Here Ehrenzweig outlined the development of the "welfare of the child" approach. He stated that courts have long abandoned the much criticized view that a custody decree is in rem with the res being the status of the parents or children. See Stumberg, The Status of Children in the Conflict of Laws, 3 U. Cin. L. Rev. 42, 61 (1940). See also R. LeFlar, The Conflict of Laws § 160 (1959), for a discussion of the same "welfare of the child trend."
The courts of several states have abandoned any pretense of recognizing foreign [custody] decrees on grounds of full faith and credit or comity, and have claimed complete discretion in reexamining the merits of such decrees. . . . This approach has been adopted most emphatically by the Supreme Court of Kansas; as between the parents themselves, they may be bound by a former adjudication . . . but the state, in its relation of parens patriae, looks to the welfare of the child at the time the inquiry is being made, and for that purpose former adjudication between parents is evidentiary only and not controlling.22

In adopting this rule of full discretion, the Court of Appeals first established that another state's custody decree can be modified.23 Then the Court indicated that jurisdiction can be accepted and prior custody orders disregarded when the children have "acquired new residences in the interim or are personally before the second court."24 Although the children were seized from Indiana, the Court found that they were bona fide Kentucky residents. Accordingly, Kentucky had such a substantial interest in the welfare of the children as to warrant a hearing on the merits of the habeas corpus proceeding.25 The decision is an excellent example of the Kansas Independent Investigation or full discretion rule, and the result reached is sound.26


23 May v. Anderson, 345 U.S. 528 (1953); Halvey v. Halvey, 330 U.S. 610 (1949); Kovacs v. Brewer, 350 U.S. 604 (1956). See also Ford v. Ford, 371 U.S. 187 (1962). In these cases the Court held that a custody decree could be modified, reserving for future decision the question of whether the full faith and credit clause or the emerging welfare full discretion approach should be the rationale for decision.

24 The Court cited R. LEFLAR, supra note 21, at § 180 as authority for jurisdiction based on residence or personal presence before the court. The Court evidently is using the words residence and domicile interchangeably, for it mentioned that Leflar cited Rodney v. Adams, 268 S.W.2d 940 (Ky., 1954) as precedent. In Rodney, citing numerous Kentucky cases, the Court held that it could not take jurisdiction to determine child custody unless the child was domiciled in Kentucky, and likewise, it would not recognize a decree of a foreign court awarding custody of a child who was not domiciled in the foreign state when the custody proceedings were instituted, except when the child had been involved in violation of a statute or a court order for the purpose of avoiding jurisdiction. So, now in Kentucky the basis for jurisdiction in custody cases appears to be either domicile or residency.

25 See Annot., 4 A.L.R.3d 1277 (1965) for an excellent annotation of habeas corpus modifying custody.

26 The correctness of the decision has been borne out by the RESTATMENT (SECOND) OF THE CONFLICT OF LAWS § 79 (Proposed Official Draft, 1967) which states:

The welfare of the child is always the overriding consideration. For this reason, probably the majority of courts have not felt themselves bound by full faith and credit, even in the absence of changed conditions, to enforce without question the provisions of a custody decree rendered in another state. . . . Such a reexamination is particularly likely to be made

(Continued on next page)
Walden v. Johnson\textsuperscript{27} and Batchelor v. Fulcher\textsuperscript{28} reach different conclusions as to the proper bases of jurisdiction in child custody cases. Walden was a habeas corpus proceeding to determine immediate possession, rather than permanent custody, of a six-year-old child.\textsuperscript{29}

The child's mother died in 1961 and the father in 1966. Vonda Walden, a paternal aunt, took the child from Indiana to his father's funeral in Kentucky. While there, the paternal grandparents assumed control of the child and refused to permit the aunt to return him to Indiana. The father's will had appointed the aunt guardian, and the Indiana probate court directed her "to take physical custody of said minor child."\textsuperscript{30}

Shortly thereafter, the Kentucky court appointed the grandmother guardian, and the aunt instituted a habeas corpus proceeding to regain possession of the child. The Court did not consider full faith and credit, but rather decided which state had jurisdiction to determine the right to immediate possession or control of the child.

At the outset, the Court stated that Indiana "would have jurisdiction to make a custody award, and the fact that the child was temporarily residing in Kentucky in no way affected that jurisdiction."\textsuperscript{31}

The Court did not decide that Indiana had sole jurisdiction, and it indicated that temporary residence or presence might give Kentucky a sufficient interest in the child's welfare to take jurisdiction and determine whether the natural guardians (grandparents) had a right of control.

\textsuperscript{27} 417 S.W.2d 220 (Ky. 1966).
\textsuperscript{28} 415 S.W.2d 828 (Ky. 1966).
\textsuperscript{29} In Chamblee v. Chamblee, 248 S.W.2d 442 (Ky. 1952), the Court ruled that the question of ultimate right to custody was not in issue in a habeas corpus proceeding, pointing out that equity courts have exclusive jurisdiction to determine questions of custody. In Chamblee, the Court cited Wright v. Wright, 305 Ky. 680, 205 S.W.2d 491 (1947), which also pointed out the distinction between the immediate right to possession of the child (the true issue in a habeas corpus proceeding), and the permanent right of ultimate custody, justiciable only in an equity court. Thus, the Court correctly limited its decision to that of immediate possession or control of the child.

\textsuperscript{30} Walden v. Johnson, 417 S.W.2d 220 (Ky. 1967).
\textsuperscript{31} Id. at 222. See also Annot., 9 A.L.R.2d 454 (1950): A decree awarding custody of a child . . . will be considered binding and recognizable in another state where at the time of its rendition the child was domiciled in the state of the decree, and consequently the court of that state had jurisdiction even though the child was physically outside such state at this time.

Here the decree was not for custody, but to appoint a guardian. According to Restatement (Second) of the Conflict of Laws § 79 (Proposed Official Draft 1967), there is in actual practice no sharp distinction to be drawn between the two decrees, for the same type of legal relationship is created between the child and the person to whose care he is appointed. A child's custody is normally awarded to a parent in a divorce decree while a guardian may be appointed to take care of a child whose parents are dead.
or possession greater than the statutorily appointed guardian. However, Kentucky's claim to jurisdiction was denied because, in this case, temporary presence was insufficient to give "custodial jurisdiction" of the child. The one month detention in Kentucky neither converted the child into a bona fide Kentucky resident nor changed his domicile. The Court concluded that "in all other cases we have examined where the trial court went into the question of the child's best welfare and its ultimate custody, jurisdiction was assumed on the ground that the child was a bona fide resident of, or domiciled in Kentucky."

Brengle was easily distinguished since in that case the children were bona fide residents of Kentucky; thus, the state had a parens patriae interest in their welfare. In effect, Walden indicated that there was an insufficient basis on which jurisdiction could or should be assumed. This may indicate that the Court realizes jurisdiction could be assumed, but should not be unless an adequate interest in the welfare of the child can be shown. For an interest to be adequate, the state must be parens patriae because of the child's bona fide residency or domicile. Thus, Walden indicated that jurisdiction should not be exercised on the basis of temporary residency or the mere presence of a child detained in the forum. The Court recognized the Indiana order, not on full faith and credit, but as a matter of comity.

Batchelor v. Fulcher, involved a suit between a mother and father over the custody of their two small children. The mother was granted a Florida divorce in 1965, without adjudication of the children's custody. Later that year, the father obtained an Indiana divorce giving him custody of the children. The Indiana court, however, did not have personal jurisdiction over the mother. The mother later seized the children, returned to Kentucky, and filed this action seeking permanent custody. The father was personally served when he went to Kentucky to regain the children.

The Court first concluded that Indiana's lack of personal jurisdiction over the mother rendered their custody decree unenforceable in Kentucky. Thus, the mother was not deprived of her right to seek custody of her children in Kentucky. The majority cited May v. Anderson for the proposition that without personal jurisdiction over both parties, a

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32 417 S.W.2d at 223.
33 In distinguishing full faith and credit from comity, the Court here is undoubtedly reaffirming Brengle, departing from the full faith and credit rationale for recognition of custody decrees to that of full discretion. This approach is called by Ehrenzweig "comity without compensation" in that "a state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel." A. Ehrenzweig, supra note 21, at § 47(b). See also May v. Anderson, 345 U.S. 528, 535 (1953).
34 345 U.S. 528 (1953).
court's decree is not entitled to full faith and credit. On this issue a long
dissent sought to distinguish the May case to show that the Indiana child
custody decree should be upheld. The dissent thought the issue was "whether the Indiana judgment should be accorded full faith and credit by the courts of Kentucky. . . ." The dissent forgot the full discretion approach adopted in Brengle. Under Brengle, full faith and credit no longer requires recognition of enforceable foreign child custody decrees, for regardless of a prior adjudication, the welfare of the child is the chief concern. Thus, if the courts of Kentucky have jurisdiction, full faith and credit is irrelevant because the court can reach a result based on its own independent investigation.

As seen in Walden, the bases for jurisdiction in custody cases had been bona fide residency or domicile. Temporary residence or mere presence was never considered sufficient. However, Batchelor adopted the developing concept of concurrent jurisdiction which recognizes that presence alone is sufficient. The Restatement of Conflicts of Law adopts this theory and promulgates three independent bases:

A state has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of the person of a child or adult
(a) who is domiciled in the state, or
(b) who is present in the state, or
(c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state. Presence, as a basis, was justified in that the state where the child is physically present is the state most immediately concerned. Moreover, its courts have direct access to the child and may be most qualified to decide the child's best interest. The Restatement further states that "each of these bases of judicial jurisdiction provides a reasonable and suitable basis upon which a court may proceed in a proper case. . . ." (Emphasis added.)

The Restatement carefully points out that a court having jurisdiction will not necessarily entertain the suit, and where jurisdiction is based only on physical presence, the state should refuse to entertain the action unless necessary for the child's best interests. This reasoning closely follows the leading case advocating concurrent jurisdiction in child custody cases, Sampsell v. Superior Court. There, Justice Traynor stated that "courts of two or more states may have concurrent jurisdiction . . . in the interest of the child. . . ." This doctrine is

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35 415 S.W.2d at 831.
37 Id.
38 32 Cal. 2d 763, 197 P.2d 739, 750 (1948).
39 Id.
tempered by the fact that a court should decline such jurisdiction where "the other state has a more substantial interest in the child."\textsuperscript{40}

The Court of Appeals, citing the Restatement, showed that two concurrent bases of jurisdiction were present\textsuperscript{41}—presence of the children and personal jurisdiction over the contending parties. Thus, jurisdiction existed technically. However, in deciding whether to exercise that jurisdiction, the welfare of the child should be the overriding consideration. Under the facts of this case, it is not clear whether Kentucky should have taken jurisdiction to reexamine the Indiana decree. In fact, the Restatement says: "As a matter of policy, such decrees will frequently not be reexamined when a parent, who is dissatisfied with the first award, brings the child into the State of the forum for the sole purpose of obtaining a re-determination of the custody issue."\textsuperscript{42} So

\textsuperscript{40}Id.

\textsuperscript{41}An earlier Kentucky case, Stafford v. Stafford, 287 Ky. 804, 155 S.W.2d 220 (1941), seemed to recognize concurrent jurisdiction. There, the mother was granted custody of minor children by a West Virginia divorce decree. Before the judgment was rendered, the father had taken the children to Kentucky. The mother then filed a petition in Kentucky seeking custody of the children which was denied. The Court, on appeal, recognized that West Virginia had jurisdiction to render a custody decree, but denied that West Virginia had sole jurisdiction. The Court cited Workman v. Workman, 191 Ky. 124, 127, 229 S.W. 379, 380 (1921) to the effect that "no consideration short of a statutory inhibition will interfere with the power of a chancellor to adjudge the custody of an infant to whomsoever it might appear the welfare and happiness of the infant demands—whether that person be a resident or nonresident of this state."

In Stafford, the Court took jurisdiction and gave custody to the mother, a nonresident, after a thorough analysis of facts relating to the child's welfare. There, as in Batchelor, both parents were before the Court, and the child, while not a domicile of Kentucky, was present in the state. An important factual difference is that in Stafford, the nonresident mother came into the state to regain custody; in Batchelor, the Kentucky mother was suing in Kentucky for a change of custody after bringing the child to Kentucky for this purpose. The child was present for one month in Stafford while only for three days in Batchelor.

\textsuperscript{42}RESTATMENT (SECOND) OF THE CONFLICT OF LAWS § 79 (Proposed Official Draft 1967). See also Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345, 357-74 (1953), for an excellent discussion of the considerations a court should weigh in taking jurisdiction. Ehrenzweig discusses the "clean hands" doctrine, which he deems the "true rule" in child custody cases. An automatic application of the rule of full discretion does not represent desirable or existing law in the case of a parent who, dissatisfied with a custody award, seeks a redetermination of the issue in the courts of another state. "To encourage such scheming is clearly harmful particularly where the second court's jurisdiction has been obtained in bad faith." Id. at 358. Thus, Ehrenzweig concludes that "[T]he petitioner's 'clean hands' are the most important criterion for the application for any one of the tools available to courts desirous of reexamining the merits of a foreign decree." Id. at 359.

The Stafford case is cited in Annot., 4 A.L.R.2d 54 (1949), as authority for the view that

notwithstanding an admittedly valid foreign custodial award, some cases hold that a court has power to award the custody of a child domiciled without the state, even though such child has been unlawfully removed or abducted into the state or detained therein without permission.

In addition, Annot., 4 A.L.R.2d 57 (1949) states:

(Continued on next page)
while the rule laid down is doubtlessly correct, the result reached may be questionable.

This case is important as the first distinct recognition in Kentucky of concurrent jurisdiction in child custody cases. The domicile or bona fide residence of a child no longer has exclusive jurisdiction. The theory of concurrent jurisdiction naturally flows from the full discretion approach, for how could a court exercise full discretion without exercising jurisdiction. Thus, courts using concurrent jurisdiction may now "assume or declare jurisdiction over domestic and foreign children, of domestic and foreign parents, without regard to earlier decrees of other courts and obsolete formulas, whenever the welfare of the child so requires and the rights of the parties have realistically been fairly protected." 43

Batchelor is confusing, however, due to the prior Walden case which held that only bona fide residency or domicile were adequate bases of jurisdiction. However, if Walden failed to take jurisdiction because Kentucky had no interest and not because it lacked a jurisdictional base, the two decisions can be reconciled. Another possible means of reconciliation may be that Walden was concerned with a decree appointing a guardian for temporary custody of the child, and Batchelor was concerned with a "permanent" custody decree. The significance of this basis is doubtful since "in actual practice . . . no sharp distinction may be drawn between the two kinds of decrees." 44 In addition, the permanent versus temporary distinction may be invalid since courts can change "permanent" custody decrees as the welfare of a child may dictate. Since reconciliation of the two cases is difficult, the apparent conflict between Walden and Batchelor must await a later case for clarification.

(Footnote continued from preceding page)
even though the child has been removed from the foreign state without the knowledge or consent of one in lawful custody under a foreign custody decree, nevertheless courts of a state to which such child has been removed have been held in many cases to have the power to make an award on the merits.

Here it is important to distinguish between having the power and deciding whether or not to exercise it. In Stafford, the mother seeking custody had clean hands, while in Batchelor, the mother seized the child and came to Kentucky to seek a redetermination of a prior decree.

VI. CONSTITUTIONAL LAW

A. CREATION OF ADDITIONAL JUDGESHIPS

Asbury v. Robinson\(^1\) lends credence to those who believe that the Kentucky Constitution is, in certain areas, hopelessly outdated. Asbury involves the Court of Appeals’ interpretation of Section 188 of the Constitution which provides:

Each county having a city of twenty thousand inhabitants, and a population, including said city, of forty thousand or more, may constitute a district, and when its population reaches seventy-five thousand, the General Assembly may provide that it shall have an additional Judge, and such district may have a Judge for each additional fifty thousand population above one hundred thousand. And in such counties the General Assembly shall, by proper laws, direct in what manner the Court shall be held and the business therein conducted. (Emphasis added.)

The respondent took office after the 1966 General Assembly authorized an additional judge for the Thirty-Second Circuit Court District which is located in Boyd County.\(^2\) An original proceeding\(^3\) was initiated in the Court of Appeals seeking an order to prohibit the respondent from acting in his new capacity. The order was sought on the grounds that the judgeship was unconstitutional because the county did not have the constitutionally required population of seventy-five thousand. In denying the relief prayed for, the Court adhered to Runyon v. Smith\(^4\) which held that the General Assembly’s reorganization of existing judicial districts was a proper exercise of its power. That case had relied on Section 188 of the Kentucky Constitution as complemented by Sections 128 and 132.

While it is difficult to criticize the creation of additional judgeships, it is evident that the reasoning behind the opinion is somewhat strained. The Constitution clearly states the population requirement for authorization of a new judgeship. But Asbury, like Runyon, indicates that Section 188 is neither the sole nor controlling requirement that must be satisfied before the Legislature can act. These cases declare that Sections 128 and 132 are also bases for the Legislature to create additional posts. The former allows the General

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\(^1\) 409 S.W.2d 508 (Ky. 1966).
\(^3\) Propriety for the original proceeding here is based, as the Court states, on Harrod v. Meigs, 340 S.W.2d 601, 603 (Ky. 1960), where it states that it is necessary that such an action be allowed since the very court the petitioner challenges would hear the case if the Court of Appeals refused to hear the original proceeding.
\(^4\) 308 Ky. 73, 212 S.W.2d 521 (1948). Runyon was the first decision to overrule Scott v. McCrerey, 148 Ky. 791, 147 S.W. 903 (1912). Scott held that the required population must be met before an additional judgeship can be created.
Assembly to have "due regard to the territory, business and population" in dividing the state into judicial districts; the latter provision authorizes the General Assembly to act "when deemed necessary." Runyon declares:

Immediate difficulty would ensue were we to lift section 138 out of the Constitution and consider it alone.... All the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the purposes of all the provisions.... Thus the various provisions of the Constitution relating to the creation of districts should be construed together and if possible they should be harmonized.5 (Emphasis added.)

By following Runyon and construing Section 138 in light of Sections 128 and 132, the Court reached a questionable decision.

Sections 128 and 132 set out the criteria for the Legislature to consider in creating additional districts. The Court was asked to construe only the criteria for creating additional judgeships—an entirely different matter.6 While Section 138 can undoubtedly seek support from Sections 128 and 132 in determining whether a new district is to be created, it is doubtful whether these complementary provisions can lend support to the independent clause in Section 138 dealing with additional judgeships. Granted, the analysis is grammatical, but the provisions for judgeships and districts are two independent clauses separated by a comma. When reference is made to only one clause, it is difficult to comprehend how this reference can be interpreted to apply to the other independent clause. Perhaps public necessity and expanded business should be considered in establishing an additional judgeship for Boyd County. Unfortunately, these criteria are applicable only to creating additional districts—not judgeships.

5 Id. at 75, 212 S.W.2d at 522. In declaring this policy of constitutional construction, Runyon admits that the population requirement has not been met to create a new judicial district, but that "the docket in each of the counties (Pike and Harlan) is so congested that with the pre-existing setup there is such delay as to deny persons the constitutional right as provided in Section 14 of the Constitution." Id. at 77, 212 S.W.2d at 523.

6 Close analysis of Sections 128 and 132 discloses that these provisions speak in terms of judicial districts only. Sec. 128 provides in part: "the General Assembly, having due regard to territory, business and population, shall divide the State into a sufficient number of judicial districts to carry into effect the provisions of this Constitution concerning Circuit Courts."

Sec. 132 provides:
The General Assembly, when deemed necessary, may establish additional districts; but the whole number of districts, exclusive of counties having a population of one hundred and fifty thousand, shall not exceed at any time one for every sixty thousand of population of the State according to the last enumeration.
An analogy to the reasoning used here reveals the treacherous ground upon which the Court stepped. The legal profession has felt for sometime that the Court of Appeals is sorely overworked. The absence of specific constitutional provisions, however, has prevented the General Assembly from constitutionally establishing intermediate appellate courts. Would public necessity allow their creation? Hardly! The dilemma in *Asbury* points out the short sightedness of the framers of the Constitution. It is becoming increasingly apparent that the Constitution should be revised to provide for exigencies such as that presented in *Asbury*. Admittedly, the population requirement should not be the sole criterion in light of today's expanded judicial activity. However, the defect in the Constitution is still present. It can be removed only by the prescribed methods of constitutional revision. Judicial interpretation should not be the means of revising the Constitution; it should be reformed in accordance with the law.

B. SEPARATION OF ALLEGIANCE

The Separation of Allegiance Clause of the Kentucky Constitution was the subject of interpretation and refinement last term. In *Lasher v. Commonwealth*, the appellant was successful in obtaining a ruling that a rural mail carrier can hold office as a member of a county school board. Unfortunately for him, however, the Court held the ruling should have purely prospective application, and he was ousted. Lasher had been a member of the Livingston County School Board while employed as a mail carrier. The circuit court dismissed him from the Board because his position as a mail carrier was considered "an office of trust or profit under the United States" within the meaning of Section 237 of the Kentucky Constitution.

The early case of *Waddle v. Hughes* had held that a mailman

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8 Ky. Const. § 237 provides in part: "No member of Congress or person holding or exercising an office of trust or profit under the United States . . . shall be eligible to hold or exercise any office of trust or profit under this Constitution, or the laws made in pursuance thereof."
9 418 S.W.2d 416 (Ky. 1967).
10 Ky. Const. § 237. See note 8 supra.
11 260 Ky. 261, 84 S.W.2d 75 (1935). In this case the defendant, a rural mail carrier, was judged ineligible to hold the office of school board member in Pulaski County. In following Groves v. Barden, 169 N.C. 8, 84 S.E. 1042 (1915), the Court of Appeals affirmed that "A mail carrier is a public officer within the meaning of the statute forbidding the holding of two offices at the same time." *Id.* at 263, 84 S.W.2d at 77.
could not be a member of a school board. In overruling Waddle, the Court of Appeals declared that it was a matter of common knowledge that a mail carrier has no decision-making powers concerning postal procedures or policy; he merely performs perfunctory duties assigned to him by his superiors. The purpose of Section 237 is to prohibit a separation of allegiance between one sovereign and another. The word "office" in Section 237 connotes a sense of power and does not apply to a rural mail carrier; otherwise, the term "regular, salaried position" could just as well have been used.

Although no other case in any jurisdiction can be found in point, the holding that no incompatibility exists between the two positions is not troublesome. Indeed, Waddle's holding that a conflict of interest exists between the two positions can not be justified. As early as 1809, the basic requirement for one to be in a position termed a "public office" was the possession of some authority to exercise a portion of the sovereign power.

If there is any difficulty with Lasher, it must concern the applicability of the holding. As stated in Haney v. City of Lexington, three courses are available to the Court in applying a new ruling: 1) merely announce the new rule without applying it and suggest that it be applied by the Court in the future; 2) give relief to the instant appellant while denying it to those injured before the date of the opinion; 3) apply the rule instantly and allow all others who are not barred by the statute of limitations to take advantage of the new decision. Lasher followed the first course of action, stating that the appellant should not be rewarded for his acts in defiance of

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12 418 S.W.2d at 418, where the Court adopted the reasoning of Baker v. Dixon, 205 Ky. 279, 174 S.W.2d 410 (1943). Here the plaintiff was the Commonwealth's attorney until he was drafted into the Army. Respondent, believing that the induction into the Army rendered the office vacant, filed as a candidate for the position. Plaintiff sought an injunction against respondent to prevent him from placing his name on the ballot. The Court of Appeals enjoined the respondent from seeking the office, declaring that no incompatibility existed between plaintiff's two positions.

14 Id. at 417, citing Commonwealth v. Bush, 113 Ky. 384, 115 S.W. 249 (1909). In Bush, the defendant was indicted for usurpation of the office of sheriff after one term of his office had expired. The Court affirmed a demurrer to the indictment adopting the definition of office found in Olmstead v. Mayor, 42 N.Y. Super. Ct. 481: "It implies an authority to exercise some portion of the sovereign power of the state, either in making, administering or executing the laws."


16 386 S.W.2d 738 (Ky. 1964).

10 Id. at 742.
a law which had previously been in effect. The decision signifies that an appellant's position can be viewed in different ways; the Court can reward him for his industry in obtaining a new rule of law, or it can chastise him for originally taking a position in defiance of the law.

Moreover, the Court interjected the concept of fundamental fairness in not applying the new rule to the appellant. Not only was the new rule rendered unavailable to the appellant, it will not apply to any other person presently holding office in defiance of the Waddle rule. While at first glance this result seems unfair, the Court's position is consistent with sound reason. The appellant entered office charged with the knowledge that he was ineligible to be a school board member. The decision in Waddle was very much in effect, whether publicly known or not. That the Court of Appeals refused to allow any other person presently holding office to benefit from this ruling indicates that the Court presumes everyone to know the law, statutory or common. Had the appellant requested an Attorney General's opinion on the matter, he undoubtedly would have been advised of his ineligibility.

The Legislature confers certain powers and duties to school districts which are exercised by the school's board of education. Members of the board perform a state function and are considered state officers. It is proper for the Court to indulge in the presumption that all state officers have knowledge of the law of the Commonwealth, both statutory and common, bearing on their eligibility to occupy public office.

C. Sunday Closing Law

In City of Ashland v. Heck's, the Court reached a decision which may have far-reaching significance for many Kentucky business establishments. Heck's, a large discount department store, opened a branch in Ashland, Kentucky, and began doing business seven days a week. The mayor of Ashland had previously advised Heck's that if it opened

17 418 S.W.2d at 419. Haney indicates that the first approach constitutes dictum. But Lasher cites as authority for its position, Great Northern Ry. v. Sunburst Oil & Refining Co. 287 U.S. 358 (1932). The Court's attitude toward prospective application of the new ruling presents the familiar problem of whether or not there was an existing law before the rule was changed by Lasher, i.e., do courts "find" or "make" law? In any event, the Court reiterates that it is acting within its inherent power in deciding to give the rule prospective application.

18 See generally KRS ch. 160 (1962).


20 407 S.W.2d 421 (Ky. 1966).
on Sunday, the Sunday closing law\(^21\) would be enforced. At the same time, the mayor stated publicly that the city did not intend to enforce the law against those establishments which had traditionally remained open on Sunday.\(^22\)

\(^21\) KRS § 496.160 (1962).
\(^22\) This statement was made public through an announcement in the newspaper, Ashland Daily Independent, Sept. 4, 1963, at 1, col. 1.

The laws concerning Sunday closing are state statutes. Every city is obligated to enforce these statutes even if there is no local ordinance on the subject.

In a recent decision, the Commonwealth vs. Arlans Department Store of Louisville, the Court of Appeals of Kentucky sustained the constitutionality of the law under which the store was ordered to remain closed on Sundays. Although Arlans sold food, their entire operation was classed as non-essential.

Certain enterprises, such as filling stations, movie picture establishments, bowling alleys, and some others are specifically exempted by the statutes. Grocery stores and drug stores are not mentioned, but they always have been considered as work of necessity. This has never been challenged in the courts.

In West Virginia, a Sunday closing law has been adopted. The department stores in Huntington that have been keeping open on Sunday immediately obeyed the law (grocery stores stay open). In Kentucky, we have a statute pertaining to Sunday operations which has been declared constitutional and became the law of the state.

A firm which complies with the law in West Virginia cannot expect to evade the law in Kentucky. City officials would be derelict to their duties to permit this to happen.

Sunday in Ashland has always been a day of peace and quiet—I hope it remains so. Essential work is necessary and essential business is necessary; but operations of a department store like Arlans has been declared non-essential for Sunday opening by our highest court.

The mayor said he was not issuing the statement "looking for a controversy" but added "I have had many phone calls, mostly agreeing with our stand."

The mayor also sent an open letter to the Businessmen of Ashland on October 29, 1963, which read in part:

1. The Appellate Court of the State of Kentucky has ruled that the operation of a department store on the Sabbath is not considered to be a necessity and as such is unlawful.
2. There has never been a test case argued before the Appellate Court in the matter of the operation of a drug store, a grocery store, a news stand, etc., to the best knowledge of this organization.

5. There has never been any desire to interfere with the operation of any business which, historically, has been in operation here on Sundays and which has not had its "operation of a necessity," or lack thereof, argued before the Appellate Court of the Commonwealth of Kentucky.

These statements may also be found in the Appellee's brief at 19-21, City of Ashland v. Heck's, 407 S.W.2d 421 (Ky. 1966).

Regarding the Mayor's assertion that grocery stores have always been considered works of necessity, see McAfee v. Commonwealth, 173 Ky. 83, 190 S.W. 671 (1917) which held that the Sunday operation of a grocery store was not a work of necessity.
Heck's agreed to remain closed on Sunday, provided the law would be enforced uniformly.\footnote{At this time, drug stores, newstands, car washes, and grocery stores were allowed to open on Sunday with impunity. In fact, the record showed that the Sunday closing law had not been enforced in Ashland for twenty-five years.} The discount house closed for six Sundays, during which time no arrests were made and no citations were issued to any persons engaged in Sunday business. On the seventh Sunday, Heck's opened and citations were issued to various employees of the store and also to several previously unmolested businesses. At trial, Heck's personnel were each fined fifty dollars and costs, but the other cases were either dismissed or continued indefinitely. One was continued even after the defendant, a grocery store clerk, had entered a guilty plea.

Heck's then filed a complaint in circuit court demanding injunctive relief against enforcement of the Sunday law by the city officials, including the police judge, on the ground that the discriminatory enforcement deprived Heck's of equal protection of the laws. The court delayed granting the injunction in order to ascertain whether the law would be enforced against other open violators. After determining that no further enforcement was intended, the injunction was granted, and on appeal, the Court of Appeals affirmed.

The Court's decision raised an interesting and timely issue: should the violator of a valid Sunday law\footnote{KRS § 436.160(1) (1962), provides: (1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense.} be given injunctive relief against prosecution because the judicial body involved knowingly refused to prosecute other violators of the law? Two distinct sub-issues must be resolved in seeking a solution: 1) should a judicial body be enjoined from enforcing a constitutional law which it has been given discretionary power to administer; and 2) should an injunction be granted to a violator of a constitutional statute, enjoining his criminal
prosecution under that statute on the ground that the law is being discriminatorily enforced.

The Supreme Court has resolved the first issue. In Chicago, Burlington and Quincy Railroad Co. v. Chicago, the Court declared that "prohibitions of the fourteenth amendment refer to all the instrumentalities of the state, to its legislature, executive, and judicial authorities. . . ." More recently, in Shelley v. Kraemer, the Court stated:

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this court that the actions of the states to which the Amendment has reference, includes action of state courts and state judicial officials.

The second issue has not been so easily resolved. Courts have been hesitant to enjoin criminal proceedings, and it is only the exceptional case where such a remedy is granted. This reluctance stems from the very core of our legal system. Historically, courts have refused to allow equity to interfere with judicial process on two grounds: 1) equity's dominant function is the protection of property in civil cases; and 2) practical considerations require such refusal,

25 166 U.S. 226 (1896). This case involved a dispute over the amount of compensation to be given the railroad company for the taking of a portion of its land for a street. The railroad contended that the payment of one dollar as compensation deprived it of property without due process of law. The Court, by way of dictum, stated that "due process of law" applied to the judgment of the highest state court.
26 Id. at 233-34. This quotation continues:
and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, "violates the constitutional inhibition; as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it."
27 334 U.S. 1 (1947). Here, a covenant restricting the use or occupancy of certain real property to persons of the Caucasian race was enforced in state court. The Supreme Court held that judicial action, even for the enforcement of private agreements, was state action, and within the scope of the fourteenth amendment.
28 Id. at 18. The Court continued:
Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.
29 Gee v. Pritchard, 2 Swans 402, 36 Eng. Rep. 670 (1818), illustrates the deep-rooted idea that only property will be protected in civil cases. This case involved a motion to dissolve an injunction enjoining the plaintiff from printing and publishing letters written by him. In answer to testimony offered that the basis for an injunction would have to be libel, Lord Chancellor Eldon stated by way of dictum, "The publication of libel is a crime; and I have no jurisdiction to (Continued on next page)
i.e., if law enforcement agencies operated under continual threat of contempt penalties, their needed freedom to exercise discretionary powers would be impaired. In spite of these reasons, courts of equity will permit an injunction to issue if the traditional criteria of equity are met. Included in these criteria are the following: 1) there must be a property interest involved; 2) the injury must be irreparable; 3) the person claiming injunctive relief must come into court with clean hands.

In regard to the first criterion, the Court of Appeals overruled Cohen v. Webb, which held that there must be a property right involved before a criminal prosecution would be enjoined. In recent years, the law's emphasis has shifted to the protection of individual freedoms, resulting in a trend toward issuing injunctions based solely on violation of personal rights. Thus, the overruling of Cohen came as no shock, but there is some doubt as to whether it was necessary to do so in order to reach a decision.

Certainly a property interest was involved in Heck's. Because they were required to close on Sunday, the discount house was placed at an economic disadvantage since other businesses, selling the same products, were allowed to remain open. Persons who

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prevent the commission of crimes. . . . The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property which it is bound to protect.” Id. at 413, 36 Eng. Rep. at 674.

32 For further thoughts on the reluctance of courts to enjoin criminal prosecutions, see Note, Equity: Enjoining Criminal Prosecutions, 37 Cal. L. Rev. 685 (1949); and 31 Micr. L. Rev. 128 (1932).

33 For a detailed discussion of the grounds advanced as a basis for determining whether an injunction should be granted, see Annot., 4 A.L.R.3d 404, 420 (1965).

34 175 Ky. 1, 192 S.W. 828 (1917). The plaintiff, a Jew, sought an injunction restraining the police judge of the town from repeatedly trying and convicting him of violating the Sunday closing law. The plaintiff alleged that, in accordance with his religion he closed his store on Saturday which he believed to be the true Sabbath, but opened on Sunday which he believed to be a working day. The Court refused to grant an injunction because no property right was involved.

35 Id. at 830.

36 See, e.g., Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946). There, the city had enacted an ordinance prohibiting distribution of handbills in the interest of keeping the streets clean. Jehovah's Witnesses circulating handbills advertising a religious meeting were arrested. In granting an injunction to prevent future arrests under the ordinance the court declared that equity would protect personal rights on the same terms as property rights—namely if a substantial right was being impaired to a material degree and no adequate remedy at law was available. See also 33 Cornell L. Q. 579 (1948); and 21 St. John's L. Rev. 225 (1947).

37 Brief for Appellee at 9, City of Ashland v. Heck's, 407 S.W.2d 421 (Ky. 1966). On a Sunday before the opening of Heck's, a witness who later appeared at the trial purchased the following articles from businesses in Ashland: doll clothing, hair shampoo, toy rifle, home permanent, toothpaste, model car, Kotex, clothespins, lawn table, bed tray, toilet tray and toilet tissue. All of these products were available for sale at Heck's.
would purchase goods at Heck's during the week, may well have purchased their goods on Sunday from the competitors who were allowed to conduct business with impunity. Thus, Heck's was denied a concrete property right in not being able to compete on the same basis with other stores.

The second criterion, the need for an irreparable injury, is met with the same analysis. The loss which Heck's suffered in not being allowed to open on Sunday could never be recovered. Those businesses allowed to open on Sunday gained an economic advantage which Heck's could not overcome so long as the Sunday closing law was unequally enforced.

The third criterion for an injunction is the so-called "clean hands" test. The familiar principle is that "he who comes into a court of equity must come with clean hands." Undeniably, Heck's was guilty of violating the Sunday closing law. The question then arises: In violating the law itself, did Heck's waive its right to injunctive relief? The Court in Heck's concisely disposed of this query:

With respect to the argument that as admitted violators of the law the plaintiffs [Heck's] do not have clean hands and thus are not entitled to equitable relief, we think the answer is that if a person singled out for prosecution under a law that is not being enforced against anyone else could be denied relief because he stands in violation of that law, in practical effect the equal protection clause of the Fourteenth Amendment could never be invoked against any arbitrary and willful discrimination in the enforcement of criminal laws.36

The foremost decision concerning discriminatory enforcement of a valid law was made by the Supreme Court in Yick Wo v. Hopkins.37 The Court held that discriminatory enforcement of a constitutional law was forbidden because it violated equal protection of the laws. This proceeding was initiated by a person who had "violated" the law. The Court further emphasized in Yick Wo that the law was valid on its face, and that it was only the unequal application of it by public authorities which rendered it discriminatory.38 A more

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36 407 S.W.2d 421, 424 (Ky. 1966).
37 118 U.S. 856 (1885). The City of San Francisco had passed an ordinance setting up certain requirements for laundry buildings on grounds that it was needed for fire protection. At trial, it was brought out that this ordinance was only being enforced against Chinese laundrymen, and laundrymen of other nationalities were unmolested although their establishments were not different in any manner. The Court held that such an ordinance was a violation of the fourteenth amendment.

38 Concerning the discriminatory enforcement, the Supreme Court held:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal dis-

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recent Supreme Court decision in the Sunday closing law controversy has also added support to Heck's position. In Two Guys From Harrison-Allentown v. McGinley, the Court indicated that if a continuing threat of discriminatory enforcement were shown, an injunction would have been granted.

The Court of Appeals cited Kentucky's version of Yick Wo as upholding the right of a violator of a constitutional law to contest its discriminatory enforcement. In City of Covington v. Gausepohl, the Court held that an injunction could issue to prohibit the city from enforcing a city ordinance against only one violator when several others were allowed immunity when performing the same acts.

However, before concluding that it is ridiculously easy for a violator of a Sunday closing law to obtain an injunction enjoining prosecution, one must consider the proof needed to show discriminatory enforcement. In People v. Utica Daw's Drug Co., the New

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York court succinctly stated the proof required before an injunction will issue: "A heavy burden rests on the defendant to establish conscious, intentional discrimination...."\(^{42}\) (Emphasis added.) In this very short statement the court raises an obstacle which is insurmountable in most cases. It is insufficient merely to prove other offenders have not been prosecuted.\(^3\) A laxity of enforcement.\(^4\) or a conscious exercise of selective enforcement.\(^4\) It is essential that sufficient evidence be presented to establish the existence of intentional or purposeful discrimination based deliberately upon an unjustifiable classification.\(^6\) In the instant case, the appellees were able to sustain this heavy burden of proof.\(^7\)

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decide any fact question involved by taking evidence in the jury's absence. The court expressed no opinion as to whether the prosecution in the case should be held to be discriminatory, but stated by way of dictum, that a heavy burden was on the defendant to establish conscious, intentional discrimination.

\(^{42}\) Id. at 135.

\(^{43}\) Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963). Evidence that only two persons in a particular area of the state had been prosecuted for violation of the Sunday closing law in one year was insufficient to show purposeful discrimination by the state prosecutors. Thus, appellant had not shown he was deprived of equal protection of the law.

\(^{44}\) People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962). The court, by way of dictum, stated that mere laxity of enforcement by itself would not be sufficient to prove intentional discrimination, but it should be admitted as relevant evidence bearing on that contention.

\(^{45}\) Id. at 136. Selective enforcement may be justified when a striking example is sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow, and that further prosecutions will be unnecessary. "It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation can be found." \(^{10}\) Id.

\(^{46}\) The Supreme Court has recognized that selective enforcement, in itself is not sufficient evidence of intentional and knowing discrimination. In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), the Court held:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ... The protection of the Equal Protection Clause goes no further than the invidious discrimination. \(^{46}\) Id. at 489.

\(^{47}\) The following points were offered by the appellees as evidence:

1. For twenty-five years prior to their prosecutions, groceries, drug stores, car washes and auto dealers were allowed to operate on Sunday with impunity.

2. The mayor of Ashland stated publicly, at least twice, that establishments traditionally open on Sunday would not be molested, but that Heck's would be cited if it should open in Ashland on Sunday. \(^{10}\) See note 3, supra.\(^3\)

3. Citations were issued to Heck's employees when it opened on Sunday and citations were also issued to several other business establishments. However, in police court, only Heck's employees were fined; all of the other businessmen's prosecutions were either dismissed or filed away. One suit was filed away even after the subject pleaded guilty.

4. Subsequently, the law was not enforced against any other business establishment in Ashland.

Brief for Appellee at 1-10, City of Ashland v. Heck's, 407 S.W.2d 421 (Ky. 1966).
Some courts have been reluctant to enjoin criminal prosecutions in spite of discriminatory enforcement, for it is feared that a guilty person will thereby escape prosecution and the law would fall into disrepute. This seems to be an unfounded apprehension, for Heck's, even though it has gained an injunction, will not be immune from a new prosecution if and when public authorities decide to enforce the Sunday closing law against all violators. Only when selective enforcement is designed to discriminate against the persons prosecuted, without any intention of ever enforcing it against all similar violators, will a constitutional violation be found.

An opportunity for a decision such as Heck's will not often appear since public officials will seldom be so blatantly discriminatory. It is to the Court's credit that when such a situation did arise, it recognized its duty and affirmed the injunction.
VII. CONTRACTS

To protect qualified and experienced teachers from socially or politically inspired dismissals and promote educational interests in general, most states have enacted tenure laws. The Kentucky Teachers’ Retirement and Tenure Act attaches specific rights to the positions of teacher and principal, including the right to continued employment without reduction in salary and freedom from dismissal except for specified reasons. However, these protections are not absolute; authority for personnel changes calculated to serve the best interests of the school system is vested in the board of education. It has the power to transfer an employee from one school or position to another, unless his contract specifies otherwise.

There is a clear distinction between statutes regulating the dismissal of teachers for personal reasons and those regulating dismissals or transfers because of economic necessity or lack of pupils. Several states, including Kentucky, have allowed school boards to remove or transfer teachers with tenure when their services are no longer required, e.g., in the consolidation of school districts or the abolition of an entire department in a school.

In Huff v. Harlan County Board of Education, the appellant was employed as an elementary school principal under a continuing service contract. See generally Annot., 127 A.L.R. 1298 (1940) and 47 Am. Jur. Schools § 129 (1943).

1 See generally Annot., 127 A.L.R. 1298 (1940) and 47 Am. Jur. Schools § 129 (1943).
2 KRS ch. 161 (1962).

3 "The term 'continuing service contract' shall mean a contract for the employment of a teacher which shall remain in full force and effect until the teacher resigns or retires or until it is terminated or suspended as provided in KRS 161.790 and 161.800." KRS § 161.720(4) (1962).

4 KRS § 161.760 (1962) prohibits a reduction in the amount of compensation received during the preceding year unless such reduction is part of a uniform plan affecting the entire school district. Conversely, some jurisdictions give permanency to the job but allow the school board to change the salary. See Annot., 127 A.L.R. 1298 (1940); 113 A.L.R. 1495 (1938).

5 KRS § 161.790 (1962) lists as grounds for dismissal: insubordination, immoral conduct, inefficiency, incompetency, mental or physical disability, or neglect of duty. The statute also sets forth specific procedures for termination of a contract of employment.

6 The superintendent has the authority to make recommendations for all appointments, promotions, and transfers. KRS § 160.380 (1962). Although the tenure law does not guarantee a teacher the right to continue his post in a particular school, his salary may not be reduced upon transfer to another post. Board of Educ. of Bath County v. Hogge, 239 S.W.2d 459 (Ky. 1951).


8 KRS § 161.800 (1962) provides in part: "When by reason of decreased enrollment of pupils, or by reason of suspension of schools or territorial changes affecting the district, a board of education decides that it will be necessary to reduce the number of teachers, it shall have full authority to make reasonable reductions."

9 See generally Annot., 100 A.L.R.2d 1159 (1965).
10 408 S.W.2d 457 (Ky. 1966).
contract which he had held for many years. A comprehensive merger of appellant's school and three others eliminated his position. The appellant was then offered the position of principal at a high school in the same system at no reduction in salary. He rejected this offer, giving the initial reason that he "thought" himself unqualified. He later refuted this, stating that he was legally qualified and held a masters degree. Appellant was subsequently offered, and he accepted at a reduced salary, a teaching position. The question before the Court was whether the appellant's compensation could lawfully be reduced.

The Court of Appeals strictly construed KRS 161.760, stating that a school principal with a continuing service contract could be transferred from one school or position to another, but his salary could not be reduced unless the reduction were part of a uniform plan affecting the entire district. Since there was no uniform plan, the Court held that the school board could not reduce the appellant's salary. This interpretation was consistent with that rendered in several earlier Kentucky cases.

The particular facts of this case fit squarely under KRS 161.800 which provides in part:

> When by reason of decreased enrollment of pupils, or by reason of suspension of schools or territorial changes affecting the district a board of education decides that it will be necessary to reduce the number of teachers, it shall have full authority to make reasonable reduction. But in making such reduction, the board shall proceed to suspend contracts in accordance with the recommendation of the superintendent of schools.

11 The reason for the merger was a decline in the coal industry, which caused many families to leave the area. Consequently, there was a loss of revenue available for the school and a corresponding reduction in the number of pupils. Brief for Appellees at 1-2, Huff v. Harlan County Bd. of Educ., 408 S.W.2d 457 (Ky. 1966).

12 Another reason suggested at trial was that appellant did not accept the first position because his wife did not want to move. Id. at 2.

13 In Board of Educ. of Nelson County v. Lawrence, 375 S.W.2d 880 (Ky. 1963), a teacher who had received additional pay for various responsibilities as principal was entitled to continue to receive that compensation when assigned to an ordinary teaching position.

The plain fact is that the tenure law states a clear policy that a teacher with a continuing service status, once promoted in salary, cannot be demoted in salary without such cause as would justify termination of her contract, and elimination of duties or responsibilities cannot be used as a device for demotion in salary. Id. at 813.

The appellees sought to distinguish this case, saying the action of the board had clearly been arbitrary in Lawrence since there, the teacher had not been offered a position at a commensurate salary. Brief for Appellees, supra note 12, at 4.

14 The Court had previously held that an employee's salary could not be reduced when he was transferred from one principal position to another, Board of Educ. of Bath County v. Hogge, 289 S.W.2d 459 (Ky. 1951), or from principal to teacher, Williamson v. Cassidy, 311 Ky. 666, 224 S.W.2d 934 (1949). However, it must be noted that in neither of these cases was there an offer of a commensurate salary as there was in Huff.
who shall, within each teaching field affected, give preference to teachers on continuing contracts and to teachers who have greater seniority.

This procedure was followed in Huff. Due to a sharp decrease in enrollment, a merger of several schools was necessary. When the consolidation was effected, appellant's particular position was abolished, and, in accordance with the above provision, a man with greater seniority than appellant was made principal of the new school. However, the superintendent, subject to the board's approval, had the authority to determine all appointments, promotions, and transfers. Pursuant to this authority rather than any statutory obligation, it was decided that appellant was qualified and would be offered the position of high school principal. Appellant refused this offer on the ground that he was not qualified. As was noted in the dissenting opinion, "it is not [the] law in this Commonwealth that a teacher may determine his educational qualification or his qualifications from experience." However, the Court's refusal to permit a reduction in salary, even though appellant had rejected a position for which he was fully qualified, was tantamount to holding that a teacher may refuse to accept a proper transfer to a position for which he is qualified without legal justification and at the same time demand an inferior job at a commensurate salary.

Although tenure laws are enacted to provide security for teachers by regulating the conduct of school boards, allowing salary reductions commensurate with alleviation of various duties and responsibilities does not impair this security. The Legislature must have been cognizant of the problems created by the former provision relating to non-reduction of salaries, for it adopted an amendment in 1964 which covers cases such as Huff. This amendment provides that there shall be no reduction in salary "unless there is a reduction or elimination of extra service, administrative and/or supervisory duties and responsibilities of the teacher or other certified personnel. . . ." If Huff had been decided under this amendment, it would seem reasonable to assume that appellant's salary could have been reduced since his justified change in position lessened his administrative duties and responsibilities.

Clearly the Legislature intended for individual teachers to be pro-

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15 Brief for Appellees, supra note 12, at 2.
16 KRS § 160.380 (1962).
17 408 S.W.2d at 459.
18 As stated in the dissent, "when appellant refused to accept a position . . . at the salary provided in his continuing service contract, he had no right to protest assignment to a position paying less than his contract provided." 408 S.W.2d at 459. See generally Annot., 145 A.L.R. 1090 (1943).
tected from the political whims of school boards. It seems equally clear that the Legislature intended to give school boards the necessary authority to manage their affairs intelligently and efficiently. Perhaps the statute as amended will attain this balance.
VIII. CRIMINAL LAW

A. CRIMINAL LIBEL

Libel is an injury to the reputation which may be redressed by an action in tort. However, if the libel has an injurious effect on the public it may also constitute a criminal offense either at common law or under statute. Libel is thought to have an injurious effect on the public if it tends to disgrace or degrade and is done with malice. The English common law crime of libel was invoked whenever a court found, in the defendant's publication, an incitement to breach the peace. American courts have been reluctant to consider this as adequate grounds for a criminal prosecution of libel, and in Cantwell v. Connecticut, the Supreme Court held that criminal libel prosecutions based upon incitement to breach the peace abridged first amendment rights because "incitement to breach the peace" furnished too vague a standard.

Ashton v. Commonwealth presented the Kentucky Court of Appeals with its first prosecution for criminal libel since the Supreme Court decided Cantwell. The defendant, while involved in a serious labor dispute, caused a publication to be printed and circulated which contained defamatory attacks upon certain local leaders. He was indicted for "the offense of criminal libel, by publishing a false and malicious publication which [tended] to degrade or injure [the complainants] against the peace and dignity of the Commonwealth of Kentucky."

At trial, the defendant admitted that certain of the statements were false and defamatory per se. The trial judge charged the jury that criminal libel is "any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable." He further charged that both malice and falsity were essential to conviction. The jury, presumably guided by these instructions, convicted the defendant.

On appeal, the defendant argued that to define the crime in terms of its tendency to incite a "disturbance of the peace" or to lead to an "indictable act" is too vague to serve as a constitutional basis for the imposition of criminal sanctions. However, the majority of the Court believed that since there was no issue as to the defamatory nature of the published material, the possible overreach of the breach of peace concept was immaterial. The Kentucky Court rejected the "breach of peace" criterion, recognizing that the Supreme Court had done like-

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1 310 U.S. 296 (1939); see also Garner v. Louisiana, 368 U.S. 157 (1961).
2 405 S.W.2d 562 (Ky. 1965).
3 Id. at 564.
4 Id. at 565.
wise. Thus, the Court of Appeals redefined the common law crime of libel as "the publication of a defamatory statement about another which is false, with malice," but upheld the verdict as reasonably based on those grounds.

The case was appealed to the United States Supreme Court and promptly reversed. The Supreme Court pointed out that the defendant was indicted, tried, and convicted under a charge which included the offensive element of incitement toward a breach of the peace. The Supreme Court cited Shuttlesworth v. Birmingham which held that where an accused is tried and convicted under an unconstitutional construction of a statute, the conviction cannot be sustained on appeal by construing the statute so as to eliminate the unconstitutional features.

A hasty reading of Ashton might lead one to think that the Supreme Court has denied Kentucky the right to any prosecution for criminal libel. However, Ashton was reversed because of the inconsistency of the trial and appellate definitions. A general distaste for the nature of the indictment was evident in the Supreme Court's opinion. It expressed agreement with the Kentucky dissent that "the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." The Supreme Court in Ashton warned that vague laws in any field suffer a constitutional infirmity and that when first amendment rights are involved statutes must be carefully and narrowly drawn. Some other states have prosecuted persons for criminal libel without using incitement to breach of peace as an element, but most states have utilized many of the same elements rejected in Ashton. Whatever the difficulties raised to the drafting of a constitutional statute and regardless of the actions taken in other states, the crime of criminal libel is, for the time being, a dead letter in Kentucky law.

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5 Id. at 568.
6 382 U.S. 87 (1965). This case was very similar on its facts to Ashton although it involved a breach of a local ordinance rather than a common law crime.
7 405 S.W.2d at 571.
8 Some statutes do not define criminal libel at all; e.g., FLA. STAT. § 836.01 (1965) provides: "Any person convicted of the publication of a libel shall be punished by imprisonment not exceeding one year, or by fine...." Obviously where the statute is so loosely drawn the courts must decide the elements of the crime and the common-law basis of incitement to breach of the peace is often included.
9 See, e.g., State v. Gardner, 112 Conn. 5, 151 A. 349 (1930), where it states: "the gist of the crime is not the injury to the reputation of the person libelled, but that the publication affects injuriously the peace and good order of society." See also Brooke v. State, 154 Ala. 53, 45 So. 622 (1907); People v. Spielman, 318 Ill. 492, 149 N.E. 466 (1925); Commonwealth v. Szleakys, 254 Mass. 424, 150 N.E. 190 (1926).
B. SEDUCTION

The Latin word from which "seduction" arises means "to lead aside." Seduction has been described as the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have and do have that effect, and result in her ultimately submitting her person to the sexual embraces of the person accused. In an 1894 case, Commonwealth v. Wright, the Kentucky Court wrote:

The statute was enacted for the protection of the pure, innocent and inexperienced woman, who may be led astray from the paths of rectitude and virtue by the acts and wiles of the seducer under promise of marriage by compelling him to marry her or suffer the penalty of the law. Its primary object is to compel the seducer to marry his victim.

Whether the Kentucky seduction statute protects divorcees was a novel issue before the Court in Amburgey v. Commonwealth. The defendant argued that the protection of the statute did not extend to divorcees. Having no Kentucky precedent directly in point, the Court cited foreign cases to support its ruling that divorcees are within the class of women protected by the seduction statute. The defendant's argument was based on a statement by the Virginia Court of Appeals in Jennings v. Commonwealth. That case held that a woman who has been married can no longer be considered chaste and has become so knowledgeable that she is immune to seduction. This theory was strongly criticized in State v. Eddy, a South Dakota case, and People v. Weinstock, a New York case. The Oregon Court in State v. Wallace expressed the opinion "the spirit of the law does not and cannot take into consideration the wisdom and experience of those whom it undertakes to protect from wrong." In interpreting the New York

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10 47 AM. JUR. Seduction § 2 (1943).
11 16 Ky. L. Repr. 251, 27 S.W. 815 (1894).
12 Id. at 252, 27 S.W. at 816.
13 KRS § 436.010(1) (1962) provides: "Any person who, under promise of marriage, seduces and has carnal knowledge of any female under twenty-one years of age, shall be confined in the penitentiary for not less than one nor more than five years."
14 415 S.W.2d 103 (Ky. 1967).
16 "We think no court should say as a matter of law that a woman who has been married is incapable of being the victim of seduction." State v. Eddy, 40 S.D. 390, 391, 167 N.W. 392, 393 (1918).
17 "Confidence and affection seem to play a great part in all cases of seduction. May not inducements lead even a previously married woman, not single, to consent?" People v. Weinstock, 140 N.Y.S. 453, 459 (1912).
18 79 Ore. 129, 154 P. 430 (1916).
19 Id. at 129, 154 P. at 430.
seduction statute (which is similar to Kentucky's), the New York Court noted that the statute "does not use the term 'maid' nor 'widow' . . . but the more comprehensive word 'female,' which is generic in its meaning, including therein all unmarried women, whether spinsters, widows or divorcees."\(^2\)

The policy and wisdom of any seduction statute is certainly open to question.\(^2\) However, given the existence of KRS 436.010, the Court of Appeals has logically applied the law to the facts. Early cases indicated that the Legislature, by passing the seduction statute, intended to protect a group consisting of women under twenty-one and presumed to suffer from sexual disability common to the young. The Court, in Hoskins v. Commonwealth,\(^2\) considered the question of the complainant's previous chastity and held that while it must appear that the seduced female was of chaste character at the time of the seduction, the fact that she was unchaste would not remove her from the class to be protected. Amburgey simply extends this protection to cover minor women who have once been married and are therefore presumed to have established a full sexual maturity. In Amburgey, the Court has underlined a presumption of the present chastity of women under age twenty-one. The inclusion of the divorcee in this category is reasonable. In effect, the statute protects the young woman from exploitation of her sexual weakness gained by an appeal to her mental and emotional immaturity. The practical consequences of early marriage and divorce may well be the heightening of sexual weakness because of the young divorcee's appreciation of sexual relationships. However, her youth is still a disability and her immaturity makes her a prime candidate for this legislative protection.

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\(^2\) People v. Weinstock, 140 N.Y.S. 453, 459 (1912).
\(^2\) 188 Ky. 80, 221 S.W. 230 (1920).
IX. CRIMINAL PROCEDURE

A. APPELLATE PROCEDURE

The Court of Appeals has declared that the same name given to a pleading shall not be decisive of the rights of the parties before the court and that the spirit of the Rules of Civil Procedure demands that trivial defects be ignored.¹ Thus, says the Court, a pleading labeled wrongly will be heard as if properly presented. However, as indicated by several cases which came before the Court last term, this informal attitude does not prevail in appellate procedure. In each of these the appeal was rejected solely because the Court found a failure to comply with technical details of appellate procedure.²

Particularly striking is Sherley v. Commonwealth.³ Mrs. Sherley was convicted in 1966 of violating local option laws. Her attorney filed a notice of appeal, stating that appeal was taken from an order of June 3, 1966, denying her motion for a new trial. In fact, however, the statement of appeal clearly showed that this was an appeal not from the order but from the judgment of June 3, 1966. Unfortunately for Mrs. Sherley, the Rules of Criminal Procedure⁴ state that the notice of appeal shall designate the judgment or order appealed from. The appeal was in fact “from the judgment,” but it read “from the order,” and this defect was fatal to Mrs. Sherley's appeal.

The Court has made frequent statements regarding strict compliance with the rules and practitioners are well warned.⁵ Undoubtedly, the pressure of an ever-mounting caseload has contributed to the Court's willingness to dismiss cases quickly on technicalities and without any inquiry into the merits. However, any policy which denies appellate review simply because an attorney used an improper word is questionable.

One case must be reviewed to reveal the reasoning behind the Court's ruling. In 1957, Kentucky held⁶ that an order overruling a motion for a new trial is not a final order and therefore can not be appealed. In that case, the Court declared that each rule prescribes a condition from which a party litigant may invoke appellate procedure. It states that the rules are not for the benefit of the parties but rather

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¹ Powell v. Hazen, 322 S.W.2d 483 (Ky. 1959).
² See, e.g., Marcum v. Commonwealth, 412 S.W.2d 241 (Ky. 1967); Sherley v. Commonwealth, 410 S.W.2d 612 (Ky. 1967); McGregor v. Commonwealth, 407 S.W.2d 705 (Ky. 1966).
³ 413 S.W.2d 627 (Ky. 1967).
⁴ RCr 12.52 (3).
⁵ See Rose Bowl Lanes, Inc. v. City of Louisville, 373 S.W.2d 157 (Ky. 1963).
⁶ UMW Dist. 23 v. Morris, 307 S.W.2d 763 (Ky. 1957).
to control the operation of judicial machinery. The Court cannot allow one litigant to disregard the rules while requiring others to rigidly adhere to them. Without rules there could be no order in the Court's judicial business. However, the early cases which establish this policy of judicial convenience are civil cases. Sherley is a criminal case, and the defendant faces prison. While the Court might be justified in regarding appellate rules as intended for the benefit of the Court in a civil proceeding, this is hard to rationalize in a criminal case. In short, where life or liberty are imperiled, technical considerations should not be invoked to deny a party his day in court.

In Oatts v. Hopkinsville,\(^7\) the defendant had been convicted in police court for driving while intoxicated and fined one hundred dollars. He paid the fine and appealed to the circuit court. The appeal was dismissed on the ground that by paying his fine the appellant had waived his right to review. The Court of Appeals reversed, reasoning that the defendant paid the fine to preserve his freedom and did not intend to relinquish his right to appeal.

The majority of jurisdictions consider the case moot when the judgment is satisfied.\(^8\) Some courts hold that after payment of the fine there is no controversy,\(^9\) and others deny appeal because the defendant would be unable to recover the fine paid.\(^10\) Many jurisdictions adopt the majority rule by statute. Until 1962, Kentucky had such a statute,\(^11\) but it was repealed and the Legislature did not enact anything comparable in its place.

The decision in this case is sound. It is absurd to hold that an individual, by paying his fine, voluntarily waives his right to review. As the Court stated, in most cases the person is merely trying to stay out of jail.\(^12\) A person's legal rights should not be jeopardized merely because he wants to protect his freedom and reputation.

Regardless of whether the defendant can recover his fine, the case is not moot. The results of the police court penalty may persist despite the payment of the fine. The defendant's insurance rates may be raised, his reputation impaired, and his employment lost. These factors seem sufficient to perpetuate the controversy.

\(^7\) 406 S.W.2d 842 (Ky. 1966).
\(^8\) See 24 C.J.S. Criminal Law § 1668 (1961); Annot., 18 A.L.R. 867 (1922); 74 A.L.R. 638 (1931).
\(^10\) See, e.g., State v. Cohen, 45 Nev. 266, 201 P. 1027 (1921).
\(^12\) Justice Holmes stated that "the payment of the fine in accordance with the sentence was not a consent to the sentence, but a payment under duress." Commonwealth v. Fleckner, 167 Mass. 13, 44 N.E. 1053 (1896).
B. EVIDENCE

1. Credibility of Defendant’s Testimony—In recent years it has become the practice of attorneys, when defending persons with a prior felony conviction, to minimize the impact of this conviction upon the jury. This is accomplished by conditioning the jury to the fact from the very beginning of the trial. During the voir dire examination, the jurors are asked such questions as “Would the fact that the defendant has been convicted of a felony influence you in deciding this case?” Moreover, in order to avoid an inference that the felony is being hidden, the accused admits the prior offense on direct examination.

In Shockley v. Commonwealth and Peyton v. Commonwealth the Court of Appeals, by four to three decisions, held that where the accused volunteers the fact that he has been convicted of an offense during the direct examination, it is not error for the trial judge to refuse to admonish the jury that the prior conviction should be considered only as it affects the accused’s credibility. In Shockley, the defendant testified that he had been in the penitentiary, and, on cross-examination, the Commonwealth elicited the nature of the offense. The accused in Peyton took the stand in his own defense and testified that he had been convicted of a felony. In both cases the trial court was requested to admonish the jury and refused. The Court of Appeals held that “under the circumstances . . . the appellant ‘opened the door’ on direct examination [and] . . . that the failure to give the usual admonition, even though it was requested, was not error.”

The dissenters inquired:

Why should the law be different when the defendant has made the disclosure voluntarily upon direct examination? . . . Are we in a game, in which by the introduction of competent evidence a party deprives himself of the right to have the jury properly instructed that its purpose is limited to impeachment of his credibility? . . . [We are] rather surprised that the majority of the court should be befuddled by such a red herring as, “Well, you brought it up first.” What does that have to do with whether an admonition should be given? After all, the purpose of an admonition is to help the jury decide the case according to law. It is not a trading stamp.

To support its holding, the majority examined the intent of CR 43.07 and its predecessor, section 597 of the Civil Code. It concluded

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13 415 S.W.2d 866 (Ky. 1967).
14 417 S.W.2d 252 (Ky. 1967).
15 415 S.W.2d at 872.
16 Williams, C.J. and Palmore and Hill, J.J.
17 415 S.W.2d at 872.
18 This rule provides that “a witness may be impeached by any party . . . [by the fact] that he has been convicted of a felony.” The Court of Appeals has interpreted the civil rule governing impeachment of witnesses to be applicable to criminal cases. See Cowan v. Commonwealth, 407 S.W.2d 695, 697 (Ky. 1966).
that the rule did not contemplate that the accused could show, for his own purposes, that he had been convicted of a felony and then require the court to admonish the jury that the conviction only affected his credibility. The cases cited in support of the Court's conclusion are not in point; they only re-affirm the proposition that an admonition should be given if the fact of a prior conviction is brought out on cross-examination. The only case that could even remotely support the decision is easily distinguished. The case, Turpin v. Commonwealth, involved a situation where the defendant attempted to use the confinement resulting from his prior conviction as an affirmative defense. The Turpin Court correctly held that where the accused offers, as an element of his defense, the information that he was in the penitentiary, the jury should not be admonished.

Moreover, the majority reasoned that since there apparently have been no cases dealing with the urged interpretation of the rule, such an interpretation does not exist. Perhaps this lack of precedent may be explained by observing that, up to now, no court has been "befuddled by such a red herring" as that urged by the Commonwealth in these cases. Usually, when one tries to determine the intent of a rule or statute, the policy and purpose of the rule or statute is investigated. Why should the jury be admonished that a prior conviction may only be considered as to the credibility of the defendant's testimony? As the dissenters pointed out, "A man ought not to be convicted by his previous record."

Shockley and Peyton allow the jury to "consider the prior conviction for any and all purposes, including the probability of guilt and the length of the sentence to be imposed." That this is not idle concern is well illustrated by the following passage from the closing argument of the Commonwealth's Attorney in Shockley: "'Now if you want to break this up . . . find him guilty and give him ten years in the pen. . . . He's been there once and didn't learn a lesson for the same

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19 415 S.W.2d at 872.
20 See, e.g., Buchanan v. Commonwealth, 304 Ky. 225, 200 S.W.2d 459 (1947); Shell v. Commonwealth, 245 Ky. 223, 53 S.W.2d 524 (1932); Atkins v. Commonwealth, 224 Ky. 126, 5 S.W.2d 889 (1928).
21 25 Ky. L. Rptr. 90, 74 S.W. 784 (1903).
22 The defendant was accused of stealing a horse in October, 1902, but he testified that since September 22, he had been in jail. The prosecution then produced evidence to show that the actual date of the theft was September 17. It is apparent that the defendant used his stay in the penitentiary in aid of his defense. This was not the situation in Shockley. There is no suggestion that the previous conviction was introduced by Shockley for any purpose other than to mitigate its impact on his credibility.
23 415 S.W.2d at 873.
24 Id.
crime, and now he tells us today that he didn’t do it." To allow this type of argument is not proper and is "bad" law. It is urged that the Court of Appeals re-evaluate its decisions in the Shockley and Peyton cases.

2. Local Option Violations: Offer of Proof—Effective use of the adversary system to develop the facts of a dispute looks toward stringent rules of evidence and procedure. In a criminal case these rules have traditionally been slanted toward protection of the defendant. One widely recognized exception to the stringent evidentiary standards placed on both parties in a criminal prosecution is the doctrine of judicial notice. The principal effect of the doctrine is to excuse the party from having to establish formal proof of a particular well-known fact. The doctrine is utilized when the fact in question is so well known by reasonably intelligent people of the community as to make presentation of proof unnecessary. It is universally true that courts will take judicial notice of the law of the forum.

Allen v. Commonwealth and Morris v. Commonwealth affirmed the fact that Kentucky courts will judicially notice the general statutes of the Commonwealth. However, Kentucky has had a longstanding problem regarding judicial notice of local option laws. In Patterson v. Commonwealth the Court reaffirmed the well-established rule in Kentucky that failure to prove a territory is dry in an action for illegal sale of alcoholic beverages is fatal to conviction. In many jurisdictions, courts will take judicial notice of the fact that a particular area is wet or dry, but there is a conflict of authority on the subject. In those jurisdictions which, like Kentucky, require that proof be given of the result of a local option election several reasons are given why

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25 Id.
27 272 Ky. 533, 114 S.W.2d 757 (1938).
28 231 Ky. 838, 22 S.W.2d 295 (1929).
29 411 S.W.2d 940 (Ky. 1967).
30 Click v. Commonwealth, 247 S.W.2d 371 (Ky. 1952); Ramsey v. Commonwealth, 314 Ky. 702, 236 S.W.2d 930 (1951); Musgrove v. Commonwealth, 301 Ky. 475, 211 S.W.2d 637 (1946); Sipple v. Commonwealth, 300 Ky. 725, 190 S.W.2d 354 (1945); Hensley v. Commonwealth, 171 Ky. 316, 188 S.W. 308 (1916).
33 People v. Mueller, 163 Cal. 521, 143 P. 748 (1899); State v. Kusick, 148 Minn. 1, 180 N.W. 1021 (1921); State v. Wright, 202 Mo. 241, 216 S.W. 545 (1919); Geisse v. State, 85 Ohio St. 457, 98 N.E. 1125 (1911); Rylee v. State, 135 Tex. Cr. 87, 117 S.W.2d 85 (1938).
judicial notice will not be taken. One explanation is that the condition of being a wet or dry territory is subject to change by another election.\textsuperscript{34}

In \textit{State v. O'Brien},\textsuperscript{35} the Montana Court stated that it will not take judicial notice of extrinsic facts, the establishment of which must depend on evidence given. In \textit{Craddock v. State},\textsuperscript{36} the Texas Court asserted that "the Court does not judicially know when these laws are put into operation. These are matters of fact to be proved."\textsuperscript{37} However, other courts would be quick to point out, as did the court in \textit{State v. Schmitz}\textsuperscript{38} that the judge of the court "could find out this fact just as he is required to find out numerous other facts."\textsuperscript{39}

The frequency with which a conviction is voided for failure of the prosecuting attorney to properly stipulate the prevailing local option law does not credit the profession's attention to detail. But there is little reason for the Kentucky Courts to refuse to take judicial notice of local option laws. In effect, the Court is saying that a moment of carelessness on the part of a prosecutor allows a violation of the laws to go unpunished. This result is untenable when one recognizes the practical simplicity of ascertaining the status of local option laws within a court's own jurisdiction.

C. INSTRUCTIONS

The purpose of instructing the jury is to guide their deliberations by explaining the law of the case, explaining the essential elements to be proved, and relating the evidence to the particular issues involved.\textsuperscript{40} It is universally accepted that instructions must be warranted by the evidence.\textsuperscript{41}

It is equally well established, with a few statutory exceptions,\textsuperscript{42} that where intentional homicide is involved, if there is any evidence

\begin{footnotesize}
\textsuperscript{34} People v. Mueller, 163 Cal. 521, 143 P. 748 (1859).
\textsuperscript{35} 35 Mont. 492, 90 P. 514 (1907).
\textsuperscript{36} 48 Tex. Cr. 385, 88 S.W. 347, 348 (1905).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} 19 Idaho 566, 114 P. 1 (1911).
\textsuperscript{40} Id. at --., 114 P. at 3.
\textsuperscript{42} For example, some state statutes which define all homicides committed by certain means, \textit{e.g.}, by poison, lying in wait, or under felony-murder, as murder in the first degree and specify that the court is not to instruct the jury on any grade of homicide less than murder in the first degree. \textit{See, e.g.}, Smith v. State, 222 Ark. 650, 262 S.W.2d 272 (1953); Taylor v. Commonwealth, 266 Va. 587, 43 S.E.2d 906 (1947). \textit{See generally} 26 Am. Jur. Homicide \S 564 (1940).
\end{footnotesize}
tending to show that the crime was of less magnitude than murder, it is the court's duty to give instructions on the lesser offenses.\textsuperscript{43} Conversely, if there is no evidence to support an instruction on a lesser degree of homicide, such instruction should not be given.\textsuperscript{44} In Kentucky the rule is well settled and has been clearly expressed that where the intention to kill is present, involuntary manslaughter cannot be found.\textsuperscript{45}

In \textit{Vinson v. Commonwealth},\textsuperscript{46} the issue was whether it was prejudicial error for the trial court to give an instruction on involuntary manslaughter in a case where the only possible theories were those based on intentional homicide. The appellant, while fighting with the deceased, shot and killed his fellow combatant. The trial court instructed the jury on the offenses of murder, voluntary manslaughter, involuntary manslaughter in both degrees, and on self-defense. The appellant was convicted of involuntary manslaughter in the first degree, and the Court of Appeals reversed, holding that . . .

\begin{quote}

in situations of mutual combat where one of the participants shoots, knives, bludgeons or mauls his adversary to death, his acts being intentional and his victim known, an involuntary manslaughter instruction should not be given. . . . Only when one acts wantonly and recklessly and death follows, not intentionally but incidentally, from the acts do we have the crime of involuntary manslaughter.\textsuperscript{47}

\end{quote}

\textit{Vinson} discusses the recent cases involving involuntary manslaughter instructions in mutual combat cases, and attempts to clarify the precise nature of involuntary manslaughter in Kentucky.\textsuperscript{48} Ulti-

\begin{footnotes}
\item[44] Davis v. Commonwealth, 198 Ky. 597, 237 S.W. 24 (1922).
\item[45] Maulding v. Commonwealth, 172 Ky. 370, 378, 189 S.W. 251, 254 (1916). The Court went on to say that [W]here the killing is done in such a manner and under such circumstances as to exclude the idea that it was not intended to kill, the crime falls under the definition of murder or of voluntary manslaughter, as the case may be, and no instruction on the subject of involuntary manslaughter should be given. The Court indicated that an instruction on involuntary manslaughter would be proper in a case where death resulted from "sudden simple fistfight." \textit{Id.} Maulding was used as authority in White v. Commonwealth, 360 S.W.2d 198 (Ky. 1962), where the Court, in overruling a line of cases sustaining voluntary manslaughter convictions in simple fistfight cases, held that an intent to kill cannot be inferred from a sudden simple fistfight. \textit{Id.} at 203.
\item[46] 412 S.W.2d 565 (Ky. 1967).
\item[47] \textit{Id.} at 568.
\item[48] Involuntary manslaughter was not a statutory offense in Kentucky until 1962, prior to which time the offense was a common law misdemeanor defined in Hunt v. Commonwealth, 289 Ky. 527, 530, 159 S.W.2d 23, 25 (1942) as: [T]he killing of another person in doing some unlawful act not amounting
\end{footnotes}
mately, the Court sets down a rule as to when involuntary manslaughter instructions should be given in mutual combat cases.

Several recent cases provide the foundation for the Court's decision. In Shanks v. Commonwealth the appellant was convicted of voluntary manslaughter in the slaying of his fellow combatant, and on appeal he contended that an involuntary manslaughter instruction should have been given. The Court rejected this contention, holding that where, in a mutual combat case, "a deadly weapon is used and the defendant admits he was trying to defend himself with such weapon there is no

(Footnote continued from preceding page)

to a felony and not likely to endanger life, and without an intention to kill, or where one kills another while doing a lawful act in an unlawful or negligent manner where the negligence is not such as to indicate a disregard for human life.

See also R. Moreland, The LAW OF HOMICIDE chs. 10, 11, 17 and 18 (1952); Moreland, Kentucky Homicide Law with Recommendations, 51 Ky. L.J. 59, 112 (1962). The offense as a common law misdemeanor was punishable under KRS § 431.075 (1950) which provided that all common law crimes, not provided for by statute, were punishable by imprisonment for up to twelve months in the county jail or a five thousand dollar fine, or both. Because of this rather lenient punishment for involuntary manslaughter, the Court was hesitant to overturn involuntary manslaughter convictions in intentional homicide cases. See, e.g., Spriggs v. Commonwealth, 113 Ky. 724, 63 S.W. 1087 (1902), where the Court recognized there had been opinions by the Court in which the distinction between voluntary and involuntary manslaughter was overlooked. Id. at 724, 68 S.W. at 1089. This hesitancy disappeared however with the passage of KRS § 435.022 (1962) which provides that:

(1) Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of a reasonable man under the circumstances shall be guilty of involuntary manslaughter in the first degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.

(2) Any person who causes the death of a human being by reckless conduct according to the standard of a reasonably [sic] man under the circumstances shall be guilty of involuntary manslaughter in the second degree and shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.

A wanton act as used in KRS § 435.022(1) has been defined as "[a] wrongful act done on purpose in complete disregard of the rights of others. The actor must have conscious knowledge of the probable consequences and complete disregard for them." Further, a reckless act as used in KRS § 435.022(2) "is that conduct which displays an indifference to the rights of others and an indifference as to whether wrong or injury will result from the act done." Lambert v. Commonwealth, 377 S.W.2d 76, 79 (Ky. 1964). The Court distinguished the two degrees by stating that "recklessness involves thoughtlessness while wanton conduct involves actual knowledge of the probable result and complete disregard for those results." Id. With the more severe punishment for conviction of involuntary manslaughter in the first-degree, the Court ceased to permit the offense to be used as "an appendage to the offenses of murder and voluntary manslaughter" and instead began to treat it as an "important offense in its own right." 412 S.W.2d 565 at 567.

49 390 S.W.2d 888 (Ky. 1965).
room for argument that he did not intend the result of [his] actions. . . \(^{27}\) In *Martin v. Commonwealth*,\(^{51}\) involving the same type of fact situation as *Shanks*, the converse issue was presented, i.e., whether it was error to give an instruction on involuntary manslaughter where the evidence justified a conviction only on theories of intentional homicide and appellant was convicted of involuntary manslaughter. The Court, relying on *Shanks*, held that the giving of such instruction was error and reversed appellant's conviction.\(^{62}\) Before *Vinson*, the most recent case applying the *Shanks* and *Martin* rule was *Cowan v. Commonwealth*\(^ {63}\) where the appellant was convicted of involuntary manslaughter for shooting his fellow combatant during a fistfight. Here, as in *Shanks* and *Martin*, the appellant made no claim of accidental or unintentional killing, relying on self-defense. The Court held that *Shanks* and *Martin* controlled, and therefore, where no attempt was made to suggest that appellant did not intend to kill his fellow combatant, "there was neither occasion nor justification for an instruction on involuntary manslaughter."\(^ {64}\) Thus, where the appellant uses a deadly weapon to defend himself and the death of his fellow combatant follows, and where there is no attempt to suggest that the act was either accidental or unintentional, the Court clearly holds that no involuntary manslaughter instruction should be given.

The one inconsistent decision in this line of cases was *Lambert v. Commonwealth*\(^ {65}\). There, the appellant, incarcerated in the same cell block with his fellow combatant, "stomped" the deceased to death. The circuit court instructed the jury on murder and voluntary manslaughter, but refused to instruct on involuntary manslaughter. The Court reversed, holding that under the circumstances of the case appellant was entitled to an involuntary manslaughter instruction. The facts were that Lambert did not use a deadly weapon, was under the influence of alcohol, was suffering from shock as a result of loss of blood from previous attacks by the deceased, and was aggravated by assaults by the deceased on three prior occasions.\(^ {66}\) In *Vinson*, the

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\(^{27}\) Id. at 890.

\(^{51}\) 406 S.W.2d 843 (Ky. 1966).

\(^{52}\) Id. at 845.

\(^{62}\) 407 S.W.2d 695 (Ky. 1967). The material facts and issue are undistinguishable from *Martin v. Commonwealth*, 406 S.W.2d 843 (Ky. 1966), or *Shanks v. Commonwealth*, 390 S.W.2d 888 (Ky. 1965).

\(^{64}\) Id. at 698. However *Cowan* was reversed on other grounds, the Court stating that "even though the giving of the involuntary manslaughter instruction was error, counsel's blanket objections to the instructions and failure to move for a new trial operated as a waiver." Id. at 698.

\(^{65}\) 377 S.W.2d 76 (Ky. 1964).

\(^{66}\) Id. at 78. This case was severely criticized as being identical on the facts with *Maulding v. Commonwealth*, 172 Ky. 370, 189 S.W. 251 (1916), and the (Continued on next page)
Court overruled Lambert to the extent that it was inconsistent with the Court's present holding, stating that: "where the intent to kill is the gravamen of the offense and where the person who is ultimately killed is the one toward whom the intent is directed, an involuntary manslaughter instruction should not be given."

Logic militates in favor of the Court's decision in Vinson. Where an act is admittedly intentional, there could be no justification for an instruction enabling the jury to find the defendant guilty of an unintentional act, i.e., involuntary manslaughter. In mutual combat cases where the defendant is asserting self-defense, there can be no finding that his acts are unintentional. For a trial court to instruct on involuntary manslaughter under these circumstances is to permit the jury to compromise on a lesser, more palatable offense when the only two answers which could be justified by the facts are that the act was done intentionally and without justification or that it was intentional but done in self-defense.

D. Probation and Parole

Probation is the process whereby one convicted of an offense, usually a misdemeanor, is released on a suspended sentence under supervision and upon specified conditions instead of being imprisoned. In Lovelace v. Commonwealth, the Court while upholding the constitutionality of Kentucky's probation statute, distinguished probation from parole by stating that: "Probation relates to the action taken before the prison door is closed—before final conviction, while parole relates to the action taken after the door has been closed." Parole is an adjunct of the pardoning power, and according to Section 77 of the Kentucky Constitution, only the Governor may pardon.

(Footnote continued from preceding page)

only case recorded "which has allowed drunkenness to reduce a crime from murder to involuntary manslaughter." Comment, 53 Ky. L.J. 201, 203 (1964). 67 412 S.W.2d at 568. The Court further underscores its holding by stating that:

In these cases of mutual combat where one of the participants shoots, knifes, bludgeons, or mauls his adversary to death, his acts being intentional and his victim known, an involuntary manslaughter instruction should not be given. Id.

68 WEBSTER'S NEW INTERNATIONAL DICTIONARY 1806 (1961).

69 285 Ky. 326, 147 S.W.2d 1029 (1941).

70 Id. at 1033. See also United States v. Murray, 275 U.S. 347 (1928); Diana, What is Probation, 51 J. CUM. L. C. & P.S. 189 (1960); Herlands, When and How Should a Sentencing Judge Use Probation, 35 F.R.D. 487 (1964).

61 Huggins v. Caldwell, 223 Ky. 468, 3 S.W.2d 1101 (1928). In Huggins, the Court struck down a 1926 statute which attempted to give circuit courts the power to parole prisoners. The Court held that this statute was a violation of the (Continued on next page)
Section 77 further provides that the Governor shall have the power to remit fines, except that part of a fine which is payable as a fee to enumerated state officers. Remission, defined as the "annulling of a fine or penalty," is an adjunct of the pardoning power, and where it is not expressly vested in the governor, some states have held that it is inherent in the power to pardon.

In Kentucky, probation can be effected either by withholding entry of judgment or by withholding a directive in the entered judgment to take the defendant to the penitentiary. During the past term, the Court of Appeals was faced with the novel question of whether or not a circuit court has the power to "probate a fine." In Commonwealth v. Ballinger, the appellee was found guilty of assault and battery, and the jury returned a verdict against him providing for a fine of twelve hundred dollars. The appellee moved for suspension and probation of the fine. The circuit court, in granting the motion, first entered judgment against appellee, then probated and suspended the fine in full. On appeal the Court reversed, holding that the circuit court lacked authority to remit a fine under the guise of probation. But the Court further held that a circuit court has the power to place a convicted party on probation even though his sentence would be the imposition of a fine.

Ballinger presents a novel situation in that its facts are unique. In most jurisdictions the power to remit fines is vested in the chief

(Footnote continued from preceding page)

separation of powers provisions of the Kentucky Constitution (Sections 27, 28, and 29) and also violated Section 77 because the Governor is given the exclusive power to parole, pardon, or remit fines under that section. Id. at 1103.

62 Ky. Const. § 77 provides, in part:

[The Governor] shall have the power to remit fines and forfeitures, commute sentences, grant reprieves and pardons . . . but he shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth's Attorney in penal or criminal cases.


64 In re Court of Pardons, 97 N.J. Eq. 555, 129 A. 624 (1925). One court has held that a pardon is a "remission of guilt." Warren v. State, 127 Tex. Cr. App. 71, 73, 74 S.W.2d 1006, 1008 (1935).


66 KRS § 439.260(2) (1962).

67 412 S.W.2d 576 (Ky. 1967).

68 The pertinent part of the judgment provides as follows:

It is adjudged that the defendant is guilty as charged and convicted and is hereby fined the sum of twelve hundred dollars ($1200.00); and it further appearing that the defendant having heretofore made motion for probation and suspension of the fine, it is hereby adjudged that said fine be and the same is hereby probated and suspended in full. 412 S.W.2d at 577.

69 Id.

70 Id. at 578.
executive;\textsuperscript{71} in a substantial minority the power is vested, with restrictions, in trial courts;\textsuperscript{72} in a few jurisdictions administrative boards exercise the power.\textsuperscript{73}

In \textit{Ballinger}, the circuit court made the error of \textit{first} entering judgment on the verdict and then probating and suspending the judgment. In \textit{Lovelace v. Commonwealth},\textsuperscript{74} it was noted that a trial court lost all power over a defendant once it entered judgment against him. Thus, in \textit{Ballinger}, the circuit court infringed upon executive authority because "probating" the fine was, in effect, a remission of the fine.\textsuperscript{75} The Court also pointed out that even if the power to probate fines was vested in the circuit court, there was a substantial noncompliance with the applicable probation statutes. Specifically, the Court noted that the circuit court had failed to postpone entry of judgment and imposition of sentence as required by statute,\textsuperscript{76} and further, it failed to place the defendant under the supervision of the Division of Probation and Parole.\textsuperscript{77}

Although the probation was improper in this case, the Court considered generally "[t]he power of a circuit court to invoke probationary procedure where the sentence to be imposed is a fine. . . ."\textsuperscript{78} Noting that KRS 439.260 does not define probation, and rejecting the argument that it means exclusively a substituted sentence "in lieu of imprisonment,"\textsuperscript{79} the Court held that \textit{sentence} as used in the statute may include either a fine or imprisonment, or both.\textsuperscript{80} It stipulated that "since the governing statutes do not limit probation to those cases where the punishment is imprisonment . . . the procedure may be invoked where the punishment is the imposition of a fine."\textsuperscript{81}

This rationale is based primarily on the fact that under KRS 431.140, KRS 441.180, and KRS 441.190, a convicted defendant, unable to pay his fine, may be subjected to imprisonment. From this fact there

\textsuperscript{74} 285 Ky. 326, 147 S.W.2d 1029 (1941).
\textsuperscript{75} 412 S.W.2d at 577.
\textsuperscript{76} Id.
\textsuperscript{77} Id. The Court cited Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029 (1941), where probation was defined as relating to "action taken before the prison door is closed." \textit{Id.} at 1033. (Emphasis added.)
\textsuperscript{78} 412 S.W.2d at 577.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
may arise an "anomalous situation" where an indigent might merit probation if he received a jail sentence, but if his sentence was a fine he could not pay, he would go to jail.\textsuperscript{82} The Court noted that "[i]nferior courts are authorized to place a defendant on probation, and since the normal sentence in many inferior courts is a fine, this statute apparently contemplates the possibility of probation where such a sentence could be imposed."\textsuperscript{83}

The Court's decision in \textit{Ballinger} is enlightened, just, and consistent with the nationwide concern for the rights of indigents in judicial proceedings.\textsuperscript{84} As the Court noted, it is repulsive to one's sense of justice that a situation might exist where an indigent could not escape imprisonment via probation if his punishment were a fine.\textsuperscript{85} The Court's decision is consistent with sound reason, and it speaks well of the Court that it interpreted a vague statute to provide protection for the indigent criminal defendant.

In \textit{Murphy v. Cranfill},\textsuperscript{86} the Court was called upon to decide the validity of KRS 439.175. This statute allowed the county judge to grant convicted misdemeanants parole "under the same terms and conditions as a parole may be granted for conviction in felony cases."\textsuperscript{87} Pursuant to this statute, the Jefferson County judge entered an order discharging the petitioner "by parole." When the sheriff refused to honor the order, the petitioner sought a writ of habeas corpus. The circuit court held the law invalid under Section 27 of the Kentucky Constitution\textsuperscript{88} as "an unconstitutional delegation of legislative power."\textsuperscript{89}
In affirming the invalidity of the law, the Court of Appeals rejected the reasoning of the lower court. Instead, the Court based its decision on the statute’s "lack of intelligibility." This vagueness was caused by "the difficulty in determining the scope of the power vested in the county judge. . . ." Without citing a specific constitutional provision, the Court held that "if the language of the law is so ambiguous as to defy rational meaning, it is simply in-operative as a law."

The problem was that after making a constitutionally permissible delegation of power to the county judge, the Legislature failed "to prescribe the manner of its exercise." The county judge was to grant a parole "under the same terms and conditions as parole may be granted for conviction in felony cases." However, because the county judge was not equipped to function as a parole board, the statute required "implementation." Therefore, the Court concluded the purpose of the law "cannot be effected under the language used." The net result of the case is that a misdemeanant serving in a Kentucky jail cannot be paroled.

The Legislature apparently attempted to legislate by analogizing the function of the county judge in paroling misdemeanants to the function of the parole board. However, they failed to provide machinery to enable the judge to exercise such power. To grant a parole to the misdemeanant "under the same terms and conditions" as a felon, the proper mechanism must be made available to determine the "terms" under which a parole will be granted and the "conditions" which may be placed on the parolee and, if broken, cause revocation of the parole. Otherwise, it appears that the analogy, and therefore the statute, must fail for ambiguity.

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90 Id.
91 Id. at 365.
92 Id. at 364. This general proposition normally applies to penal statutes because they must be sufficiently clear to enable a person of ordinary intelligence to understand them. See, e.g., Katzman v. Commonwealth, 140 Ky. 124, 130 S.W. 990 (1910). This proposition has also been applied to strike down a statute where there was an ambiguous delegation of power to an administrative body. Kerth v. Hopkins County Bd. of Educ., 346 S.W.2d 737 (Ky. 1961).
93 Id. at 365, the Court stated by way of dictum that "the legislature could properly delegate to him, the county judge, as it delegates to the Parole Board under KRS 493.330, the power of granting parole." To support this the Court cited Tincher v. Commonwealth, 208 Ky. 661, 271 S.W. 1066 (1925). That case held that the county judge "is really the chairman of the executive and legislative body of the county." As a result, he may, under statutory authorization, direct payments made by his county to the state auditor.
94 KRS § 435.175(1) (1962).
95 See KRS § 439.320-.520 (1962), which delegates power to the parole board.
96 KRS § 439.320-.520 (1962).
The Court admitted that the spirit of the statute was “laudable.”\textsuperscript{99} But the issue was not whether misdemeanants should be paroled, but whether the statute adequately provided for such parole. Although the Court must, when possible, resolve ambiguities in statutes,\textsuperscript{100} the Legislature must at least make the statute “intelligible.”\textsuperscript{101} Thus, the Court was correct to void the law at issue here.\textsuperscript{102}

In constructing a new misdemeanant parole law, the Legislature should follow the guideline established by the Court. The county judge may be delegated the “power of granting parole,” but not the power to pardon.\textsuperscript{103} A delegation of power to the county judge to parole (as contradistinguished from pardon) misdemeanants and a mechanism whereby the county judge does not have “absolute discretion” would satisfy the Court.

\textsuperscript{99} 416 S.W.2d at 366.
\textsuperscript{100} See Folks v. Barren Co., 232 S.W.2d 1010 (Ky. 1950) where the Court stated:
regard for legislative power, with the consequent reluctance of the judiciary to interfere requires that the Court draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act and expound it. It is competent for the Court to resolve to clearness and to deduce therefrom its constitutionality and freedom from the objection of indefiniteness urged against it. . . . It is especially right and proper for the Court to do this where the statute is but a general delegation of power, and prescribes only in general terms a rule of action for the officers charged with its execution. Id. at 1013.
\textsuperscript{101} Id., where the Court stated:
where the law making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared inoperative and void.
\textsuperscript{102} See 82 C.J.S. Statutes § 68 (1953), where it is stated that “a duty imposed by statute must be prescribed in terms definite enough to serve as a guide to those who have such a duty imposed on them.” Research revealed no exception to this general rule.
\textsuperscript{103} 416 S.W.2d at 366. For a distinction between parole and pardon, see text at notes 58-64 supra.
X. CRIMINAL PROCEDURE AND CONSTITUTIONAL INTERPRETATION

In recent years criminal law and procedure have become thoroughly entwined with constitutional interpretation. This was not true forty years ago when the Supreme Court was dominated by jurists whose view of the Constitution and society militated against federal intervention into areas traditionally reserved to the states. The Court was reluctant to interpret the Constitution in such a way as to allow that document to meet the problems of a nation undergoing the stress of transition to an industrial power. In the decades since 1925, however, the Supreme Court has approached the Constitution quite differently. In place of a constrictive interpretation of the fourteenth amendment, the modern Court has greatly expanded the substantive content of such vague terms as "due process" and "equal protection." Today the Supreme Court regards itself as obligated to guard the personal liberties of the citizen from state and local infringement. It has extended the scope of the fourteenth amendment to include rights of free speech and association, freedom from unreasonable searches and seizures, and right to counsel and fair trial. Thus, it is no longer realistic to regard criminal procedure and constitutional law as two separate areas.

A. DOUBLE JEOPARDY

The Fifth Amendment prohibition against double jeopardy has not yet been extended to the states through the fourteenth amendment. In 1958, the Kentucky Court of Appeals said, "The prohibition against double jeopardy in Amendment V to the Constitution of the United States is not a limitation upon state governments in reference to their own citizens, but is exclusively a restriction of federal power." However, most state constitutions contain a double jeopardy provision, most of which are interpreted the same as the federal provision. Section 13 of the Kentucky Constitution specifies that "No person shall, for the same offense, be twice put in jeopardy of his life or limb..." Clearly the prohibition is designed to protect an individual from being subjected to the harassment, expense, and anxiety resulting from repeated attempts by the state to get a conviction.

3 Blanton v. Commonwealth, 320 S.W.2d 620 (Ky. 1958).
This constitutional protection has rarely been invoked successfully in Kentucky. In *Huff v. Commonwealth*, however, the Court reasoned by analogy to double jeopardy and ruled that a motorist who drove his car from one county to another at a high rate of speed was guilty of only one act of reckless driving and could not be prosecuted separately in each county. This was a case of first impression.

Relying on *Commonwealth v. Devine*, the Court said that the double jeopardy provision of the Kentucky Constitution is inapplicable in a case not involving loss of life or liberty. Appellant's pleading of double jeopardy was, however, sufficient to raise the constitutional argument that a second prosecution for the same offense would amount to unconstitutional harassment and arbitrary treatment.

This holding was consistent with the rule in other states that where a state law is violated while passing through more than one county or division of the state, a conviction in one county bars prosecutions in other counties. The reasoning underlying the rule is that there is but one offense committed, a violation of state law. Crossing county boundaries does not create any new offense since counties are mere subdivisions of the state, units of venue in which prosecution for the offense against the state may be brought.

### B. Prejudicial Publicity

During the past term, the Court of Appeals considered a motion under Kentucky Rules of Criminal Procedure 11.42, urging excessive pre-trial publicity as a basis for reversal. In the case, *Baldwin v. Commonwealth*, the defendant attacked his conviction because "the publicity given his apprehension via the news media, . . . [made it] impossible for him to receive a fair trial." No facts were set forth by the petitioner to show the publicity involved. However, the Court held that the allegation did not lend itself to specificity of pleading and that this was enough to entitle him to a hearing, citing *Estes v. Texas*.

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4 406 S.W.2d 831 (Ky. 1966).
5 396 S.W.2d 60 (Ky. 1965).
6 Ky. Const. § 2 provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 17 requires that excessive bail or fines not be required, nor cruel punishment inflicted.
8 See cases cited supra note 7.
9 State v. Shimman, 122 Ohio St. 533, 172 N.E. 367 (1930).
10 406 S.W.2d 860 (Ky. 1966).
11 Id. at 862.
12 381 U.S. 532 (1965).
and *Sheppard v. Maxwell*. In both *Sheppard* and *Estes* it was held that when there was excessive publicity no actual prejudice need be shown in order to find a denial of due process. Cases following *Sheppard* have stressed that there must be *massive* publicity before a conviction will be overturned. The general idea is that each case must be decided on its facts. There is no set standard for determining excessive publicity.

The Court apparently realized that Baldwin would have difficulty showing enough publicity to overturn his conviction. Ordinarily, to get a hearing on an 11.42 motion the petitioner must state facts supporting allegations made in the motion. This was not done in *Baldwin*. Yet, the Court demonstrated a degree of leniency in recognizing that petitioner had been in prison and could not obtain facts to support his allegations. In fact, the Court seemed to base its decision partly on petitioner's inability to gather the facts.

On an 11.42 motion, the petitioner should be required to state some facts to show the type of publicity involved. Otherwise, any prisoner could assert that he was prejudiced by publicity and thereby obtain a hearing. With such ease of pleading, this decision could very well cause a sudden increase in the volume of motions to vacate judgment based on excessive publicity. As it is, the Court of Appeals is already flooded with 11.42 motions. It would appear that since facts are required in motions for reversal on other grounds, undue prejudice would not result if motions alleging excessive publicity were also required to state some facts.

C. RIGHTS OF JUVENILES

In *Smith v. Commonwealth*, the Court of Appeals rendered a decision which may prove to be a landmark in Kentucky juvenile procedure. The Court exhibited highly commendable judicial foresight. However, any enthusiasm is tempered somewhat by the Court's conspicuous failure to give any reasons for its decision. *Smith* involved a seventeen year old juvenile who had been charged with armed robbery in 1958 and brought before the juvenile court accompanied only by his parents. The juvenile court judge waived jurisdiction and ordered the case to the grand jury. Counsel was not appointed for the

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14 The rule was first enunciated in *Irvin v. Dowd*, 366 U.S. 717 (1961).
16 *Jennings v. Commonwealth*, 380 S.W.2d 284 (Ky. 1964); *Oakes v. Gentry*, 380 S.W.2d 237 (Ky. 1964).
17 406 S.W.2d at 861.
18 412 S.W.2d 256 (Ky. 1966).
youth until after an indictment had been returned. The boy pleaded guilty and was sentenced to life imprisonment. No appeal was taken at that time, but in 1966, Smith filed a motion under Kentucky Rules of Criminal Procedure 11.42 to vacate the judgment on the ground of ineffective assistance of counsel.19

Three significant questions were considered in Smith: 1) right to counsel in a juvenile proceeding, 2) the retroactivity of Kent v. United States,20 a recent Supreme Court decision, and 3) the allowance of an RCr 11.42 motion where no appeal was taken from the original decree. In a lengthy discussion of the right to counsel in juvenile proceedings, the Court relied heavily on Kent. In Kent, a juvenile court judge, by authority of a District of Columbia Statute,21 had waived exclusive jurisdiction without a hearing, stating tersely that the waiver order was based on “full investigation.”22 The juvenile had counsel, but the judge failed to rule on motions that a hearing be held and that the lawyer be given access to the juvenile’s social and probation records. Kent was subsequently tried in criminal court and sentenced to a lengthy prison term.

The Supreme Court recognized that juvenile courts have a “substantial degree of discretion as to factual considerations,”23 but stated:

The statute does not permit the Juvenile Court to determine in isolation and without the participation of and representation of the child the

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19 Ky. R. Crim. P. 11.42(1) [hereinafter cited as RCr] provides:
A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed sentence to vacate, set aside or correct it.

This rule was enacted as a procedural change in habeas corpus remedy cases. To prevent repeated motions to vacate, RCr 11.42(3) requires the petitioner to state all grounds for holding the sentence invalid of which he has knowledge. See 1965-66 Court of Appeals Review, 55 Ky. L. J. 273, 376 (1966).


21 The relevant part of the statute referred to is: D.C. Code § 11-1553 (1964), which provides:
When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court by this chapter and subchapter I of chapter 23 of Title 76 in conducting and disposing of such cases.

22 Kent v. United States, 383 U.S. 541, 546 (1966). “Full investigation” as used here means there must be “an inquiry not only into the facts of the alleged offense but also into the question whether the parens patriae plan of procedure is desirable and proper in the particular case.” Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959).

"critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. The Supreme Court deemed the waiver of jurisdiction a "critically important" action, the conviction was reversed. However, the Court ostensibly limited the application of its decision to the District of Columbia. There was no specific ruling that the right to counsel in juvenile proceedings was a Constitutional requirement applicable to states via the fourteenth amendment. Indeed, such a broad holding would have been improper since no state proceedings were involved. Despite the apparently limited application of Kent, Justice Fortas raised the implication that right to counsel in juvenile court was essential to a fair hearing:

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel.

The Supreme Court further required that the juvenile court conduct a hearing before issuing an order of waiver, that the juvenile's counsel be granted access to the youth's social and probation records, and that a statement of reasons for waiver be given. However, it must be emphasized that all of these requirements were gleaned from the Court's interpretation of the District of Columbia Juvenile Court Act.

Nevertheless, the Court of Appeals considered Kent to be dispositive of Smith. Moreover, it made no effort to explain how Kent

24 Id.
25 Id. at 556.
26 The Court limited its decision as follows:
This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further. Id.
27 See Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956). Juveniles being tried in the District of Columbia have the right to either retained or appointed counsel, which right can be waived. The Shioutakon decision was not restricted to waiver proceedings, but was extended to all juvenile court proceedings.
28 383 U.S. at 561. See also Comment, 52 Iowa L. Rev. 139 (1967); Paquette v. Langlois, 219 A.2d 569 (R.I. 1966); Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966); Dillenberg v. Maxwell, 413 P.2d 940 (Wash. 1966).
29 The Court intimated that in order for an appellate court to review, it must have before it a statement of the reasons motivating a waiver. Along with this a waiver hearing must be held due to the "critically important" action that the waiver involves. Id. at 561.
applied. Citing Kent, the Court merely stated: "In light of the foregoing language we think there is no room for debate on the question whether the present appellant was entitled to counsel in the juvenile court proceedings." This vague statement offers no clue as to exactly how Kent required the Court of Appeals to reach the decision it did. Since the Supreme Court expressly limited the scope of its decision, Kent could have been no more than persuasive authority to support a state court decision. However, in the absence of a definitive statement by the Court of Appeals, the assumption must be made that Smith somehow absorbed the entire holding of Kent, and future Kentucky juvenile court waiver proceedings must conform to the standards announced therein.

Whatever the views of the Court of Appeals concerning Kent, the Supreme Court subsequently ruled, in In re Gault, that the fourteenth amendment guarantees juveniles the right to counsel, either appointed or retained, in state juvenile adjudication proceedings. Factually, Kent and Gault differ slightly in that the youth, in Gault, was before the juvenile court for the purpose of determining whether he was a delinquent. Gault held that a juvenile needs the assistance of counsel to cope with the problems of fact and law and to insist upon regularity in the proceedings. Further, the Court said:

The child "requires the guiding hand of counsel at every step in the proceedings against him." Just as in Kent v. United States . . . we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit Court that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

Thus, there is truly "no room for debate" as to whether a juvenile defendant has the right to counsel in juvenile adjudication proceedings.

The problem arises in determining whether the right to counsel extends to waiver proceedings. By direct reference to Kent in Gault, did the Supreme Court intend to make Kent applicable to the states? Certainly the above reference makes such an assumption arguable. However, the Court was careful to limit its decision.

We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a

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31 387 U.S. 1 (1967).
32 Id. at 36.
33 Id.
34 See note 33 supra.
juvenile is a "delinquent" as a result of alleged misconduct on his part,
with the consequence that he may be committed to a state institution.35

In light of the foregoing language, it would appear somewhat tenuous
to argue that the constitutional rulings in Gault apply to waiver pro-
ceedings.

The full impact of Gault will not be known for some time, but the
ruling set forth will clearly engender considerable change in the
juvenile court systems. Henceforth, the fourteenth amendment guar-
antees to juveniles the right to counsel, either appointed or retained,
in delinquency adjudication proceedings.36 Furthermore, both the
child and his parents must be informed of this right since only the
child and parents together may waive the right.37 In addition, a notice
of charges stating with particularity the alleged misconduct must be
furnished to the child's attorney sufficiently in advance of the court
proceedings to permit preparation.38 The constitutional privilege
against self-incrimination was held to be applicable in the case of
juveniles.39 Finally, "absent a valid confession, a determination of
delinquency and an order of commitment to a state institution can-

35 In re Gault, 387 U.S. 1, 13 (1967). As a part of the same statement, the
Court said:
We do not in this opinion consider the impact of these constitutional
provisions upon the totality of the relationship of the juvenile and the
state. We do not even consider the entire process relating to juvenile
"delinquents." For example, we are not here concerned with the pro-
cedures or constitutional rights applicable to the pre-judicial stages of the
juvenile process, nor do we direct our attention to the post-adjudicative
or dispositional process.
36 387 U.S. 1 (1967).
37 Id. at 27.
38 Id. at 38.
39 Id. at 55. The Court intimates:
We appreciate that special problems may arise with respect to waiver of
the privilege by or on behalf of children, and that there may well be
some differences in technique—but not in principle—depending upon the
age of the child and the presence and competence of parents. . . . If
counsel was not present for some permissible reason when an admission
was obtained, the greatest care must be taken to assure that the ad-
mission was voluntary, in the sense not only that it has not been coerced
or suggested, but also that it is not the product of ignorance of rights or
of adolescent fantasy, fright or despair.

Miranda v. Arizona, 384 U.S. 436 (1966), announced some profound rules to
be followed to protect the individual privilege against self-incrimination. For a
discussion of these rulings, see 1965-66 Court of Appeals Review, 55 Ky. L.J.
346 (1966). It seems logical to infer from the language in Gault that since the
privilege against self-incrimination is the same for juveniles as for adults, then
the same standards must be met in order to protect this privilege. If this is the
case, changes in juvenile court proceedings will cut very deep. For a discussion,
see Comment, 7 SANTA CLARA LAW. 114 (1966).
not be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination. . . . 40

Since the Supreme Court restricted Gault to delinquency adjudication proceedings and Kent does not apply to the states, there are still no constitutional due process standards imposed upon state waiver proceedings. But there is little reason to doubt that Gault will eventually be extended to waiver proceedings. However, the need for such extension is not so great in Kentucky because of Smith. By adopting the standards in Kent, Smith has guaranteed Kentucky juveniles a right to counsel in waiver proceedings. But Kent (or Smith) did not involve the privilege against self-incrimination or the right to confrontation of witnesses, both of which were ruled on in Gault. Thus, neither of these rights will be imposed upon waiver proceedings by Smith. Aside from this deviation, juvenile waiver and delinquency adjudication proceedings must meet essentially the same standards of due process.

Heretofore, juvenile court proceedings have been regarded as primarily civil in nature, i.e., they were thought to serve a parens patriae function by supposedly caring for and aiding in the rehabilitation of the child.43 Thus, most courts previously ruled that application of specific constitutional safeguards was not necessary to protect the child since he was shielded from abuse by the "fundamental fairness" concept of due process.45 The vagueness of this concept has led to much criticism and dissatisfaction concerning its ineffectiveness in juvenile court proceedings.46 The Supreme Court in

40 387 U.S. at 57.
42 15A C.J.S. Common Law § 1 (1967). The parens patriae doctrine grew from the idea that the king, as father of his country, had the duty to look after and care for those of the kingdom who, due to youth or disability, could not take care of themselves.
44 Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959). An appendix at page 561 of the opinion lists the cases from 51 jurisdictions which have held juvenile proceedings to be civil in nature. Contra, United States v. Morales, 233 F. Supp. 160 (D. Mont. 1964) (held that the requirements of due process and fundamental fairness required the same safeguards for juveniles as for adults charged with the same offense); In re Poff, 135 F. Supp. 224 (D.D.C. 1955); In re W., 19 N.Y. 2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966) (attacked the juvenile proceeding as at least quasi-criminal in nature).
46 See Gardner, The Kent Case and the Juvenile Court: A Challenge to (Continued on next page)
Gault did not specifically label juvenile proceedings as either civil or criminal in nature, but carefully noted that granting juveniles specific constitutional rights would not compel the states to relinquish any substantive benefits of the juvenile process. However, while Gault does not specifically call for an end to the parens patriae rationale, one may at least ascertain the beginning of a movement away from this approach and toward an adversary proceeding.

Although the presence of attorneys will invoke a more formal atmosphere in juvenile court proceedings, it is doubtful that their role will be the same as in other courts. It is hoped that attorneys will be somewhat restrained and will try to aid the juvenile court judge by recognizing the social objectives and techniques of the juvenile court. Closely related to the right to counsel issue is the privilege against self-incrimination. It is significant to note that most juvenile cases involve confessions made at either the custody stage or at the

(Footnote continued from preceding page)


47 383 U.S. at 49. The Court did, however, declare that juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. . . . It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. . . . To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Id.

48 Id. at 30. The hearing need not "conform with all of the requirements of a criminal trial. . . ." Furthermore the processing and treatment of juveniles separately from adults and the classification of offenders as delinquents rather than criminals are to be retained. Id. at 22, 23.

49 Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 BUFFALO L. Rev. 501 (1963). The writer states: He should bring to this task the usual tools of the advocate—familiarity with the applicable law, the ability to make a thorough investigation and logical presentation of the pertinent facts and the faculty for forceful and persuasive exposition of his client's position. The suggestion found in some writings that "zealous advocacy" is incompatible with the objective of a Family Court is without merit unless zeal of advocacy is confused with purposeless obstructionism. Id. at 506.

Proper advocacy would therefore require "intelligent discrimination in the use of tactics learned in other courts since wholesale importation of techniques developed in the handling of criminal or civil cases before other tribunals . . . will rarely serve the interest of the minor client." Id.

50 KRS § 208.110 (1962) specifically states that the taking of a child into custody for a public offense will not be termed an arrest.
hearing itself. In spite of this, many courts have held that juveniles have no right to protection against self-incrimination in juvenile courts. Such decisions were thought justified by the use of the "civil nature" label on juvenile proceedings.

_Gault_ requires the juvenile court judge to advise both the juvenile and his parents of his right to remain silent. A waiver of the right is possible only if both the parent and the child agree to it. A problem arises, however, when the pre-adjudication stages are considered. Can it be assumed that the juvenile possesses the privilege against self-incrimination during pre-trial interrogation by police? The Supreme Court deemed it necessary to say that the "constitutional privilege against self-incrimination is [as] applicable in the case of juveniles as it is with respect to adults." However, since the decision was limited to juvenile adjudication proceedings, it would be presumptuous to assume that the privilege against self-incrimination has been extended to pre-judicial phases. Nevertheless, the general tenor of the decision indicates that perhaps the privilege may be extended at some future date. Suffice it to say that presently, in Kentucky, the juvenile must be informed by the juvenile court judge of his right to remain silent at a delinquency adjudication proceeding.

Notice of the charges against the juvenile is not provided for by Kentucky law. But _Gault_ emphasized that such notice must be adequately given to the juvenile. This is logical since the right to counsel at an adjudication proceeding would be worthless if the minor and his attorney did not know what the charges were. To insure proper notice, the Supreme Court required the judge to "set forth the alleged conduct with particularity." This requirement raises a problem. The Kentucky statutes define delinquency not only in terms of specific acts but also as a continuous mode of conduct. The juvenile court has jurisdiction over any child who is habitually disobedient to his

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51 Comment, 12 VILL. L. REV. 803, 816 (1967).
52 See, e.g., _In re Dargo_, 81 Cal. App. 2d 205, 183 P.2d 282 (1947); _In re Santillanes_, 47 N.M. 140, 188 P.2d 503 (1943); _People v. Lewis_, 260 N.Y. 171, 183 N.E. 353 (1932).
53 There is no law in Kentucky which requires advising the juvenile of his right to remain silent. The conclusion must be drawn that there was no right against self-incrimination for juveniles in Kentucky prior to _Gault_. In contrast the N.Y. Family Court Act § 741 (1962) provides for advising both the juvenile and the parents of the juvenile's right to remain silent.
54 387 U.S. at 55.
55 If the privilege against self-incrimination were extended to the police station, the question would remain whether all the rulings of _Miranda_ would be applicable. See Comment, 12 VILL. L. REV. 803, 818 (1967); cf. note 21 supra.
56 KRS § 208.080 (1962) provides for the summoning of the parent to appear in court with the child, but no notice of the charges is mentioned.
57 387 U.S. at 83.
parents, who is an habitual truant from home or school, or who is found by the court to be neglected, needy, or abandoned. Indeed, it has been suggested that such language would be unconstitutionally vague if used for a criminal prosecution, but since juvenile proceedings have heretofore been considered civil in nature, no challenge has been made of this or other similar statutes. However, the Supreme Court, in Gault, did classify juvenile proceedings as criminal for purposes of self-incrimination. As a result, the Court might extend the void-for-vagueness doctrine to such statutes as Kentucky's. It would be virtually impossible to allege with particularity such things as habitual disobedience or habitual truancy. Thus, before the notice requirement of Gault can be fully implemented in Kentucky either the Legislature or the Court of Appeals must define the generalized statutes with specificity.

Closely connected with insuring proper notice is the right, established in Kent and adopted by Smith, of the juvenile's attorney to inspect the youth's social and probation records. Such a right is necessary for proper preparation of a defense since without this opportunity, it would be difficult for an attorney to make a forceful argument against transferring the proceeding to a criminal court.

Kentucky juvenile proceedings will be substantially affected by the requirement of sworn testimony subject to cross-examination. Denial of this right has been based principally on the parens patriae rationale, the courts believing that such formalities hindered efficiency and that many witnesses in a juvenile proceeding have unique relationships to the child. Gault clearly made such justifications inadequate, ruling that a child has the constitutional right of confrontation and cross-examination where there is a possibility that the proceedings may end in his incarceration. This right is not applicable where the juvenile has made a valid confession since, in such a case, the hearing is held only to determine a proper disposition. In all other cases, the imposition of this safeguard for the juvenile is neces-

58 KRS § 208.020(b) (1962).
59 KRS § 208.020(c) (1962).
60 KRS § 208.020(d) (1962).
61 Paulsen, Fairness to the Juvenile Offender, 41 MINN. L. REV. 547, 556 (1957).
62 KRS § 208.170 (1962) provides for waiver at the discretion of the juvenile court judge if it appears that a felony has been committed.
63 There is no statutory provision in Kentucky for such testimony.
64 See note 38 supra.
65 Id.
66 387 U.S. at 56.
67 Id. at 56.
sary since without it the right to counsel would indeed be insigni-

The effect of giving Kentucky juveniles a right of confrontation and
cross-examination is difficult to assess. Certainly there will not be
testimony by witnesses who are not sworn. However, previous prob-
lems have centered on the inability of states to agree on specific
evidentiary rules, e.g., the admission of hearsay in juvenile courts.\textsuperscript{68} Gault remained silent on this point, but obviously, some restrictions
should be placed on the kind of evidence to be heard in juvenile
court, \textit{i.e.}, Kentucky should adopt tangible evidentiary standards for
juvenile proceedings.\textsuperscript{69} These standards should be constructed so as
not to hinder the juvenile in the exercise of his constitutional rights.

One major procedural point not involved in Gault, Kent, or Smith
involves appellate review of juvenile court decisions. Kentucky pro-
vides for direct appeal of all juvenile court decisions to the circuit
court of the county in which the juvenile was tried.\textsuperscript{70} However, further
appeal to the Court of Appeals is not ordinarily available.\textsuperscript{71} Neither
Gault nor Smith indicated any change in this procedure.\textsuperscript{72} While
Gault made no rulings on the desirability of a transcript in juvenile
proceedings, Kentucky does require a transcript for appeal purposes.\textsuperscript{73}
Kentucky’s provisions for a transcript and an appeal to circuit court
will probably remain unchanged. However, if a juvenile can appeal to

\textsuperscript{68} See Note, \textit{Rights and Rehabilitation in the Juvenile Courts}, \textit{67 Colum. L. Rev.} 281, 335-39 (1967). This is also of great importance in the waiver pro-
cedings. Throughout the discussion it has been assumed that the right to con-
ffrontation applies only to adjudication proceedings. However, Smith requires the
juvenile court to grant the child a hearing in a waiver proceeding. During this
hearing, counsel must be allowed to represent the child. Considering these factors,
it would seem that any attorney would be handicapped to the point of complete
ineffectiveness without the right to cross-examine any witness who might be sum-
moned to testify.

\textsuperscript{69} N.Y. Family Court Act § 744(a) (1962) provides for admission of
evidence which is “competent, material, and relevant.” The standard has been
This is not the only standard set up by a state. \textit{See also Calif. Welfare and
Institutions Code} § 701 (1966) which requires evidence to be “relevant and
material.”

\textsuperscript{70} KRS § 208.380 (1962).

\textsuperscript{71} See Tunget v. Commonwealth, 320 S.W.2d 798 (Ky. 1959) which held
that under KRS § 208.380, a defendant has no right of appeal from a circuit court
to the Court of Appeals, except where the circuit court erroneously dismissed an
appeal from juvenile session of county court on the ground of lack of jurisdiction.
Under these conditions the Court of Appeals will entertain an appeal because of
violation of fourteenth amendment.

\textsuperscript{72} Smith, by adopting Kent, requires a statement of the facts considered in a
waiver proceeding as well as a statement of the reasons for waiver. Although this
is for the purpose of appellate review, no assumption can be made that it was
intended to change appellate procedure.

\textsuperscript{73} KRS § 208.380 (1962).
the circuit court, it is difficult to understand why he cannot then proceed to the Court of Appeals. Perhaps the Legislature believes that the Court of Appeals is already overcrowded, or that juveniles do not need an appeal to the state's highest court. Obviously the remedy for an overcrowded docket is to change the court system; the rejection of worthy appeals is no answer. Moreover, little reason can be seen to ascribe infallibility to the lower courts. Whatever the justification for this anomaly, the procedure should be changed in order to further protect the rights of the juvenile.

Other tenuous questions have been left unanswered by Gault, e.g., the right to trial by jury in juvenile court, the application of constitutional safeguards to the dispositional process in juvenile proceedings, and the pre-judicial procedure to be followed. If cases involving these issues are later raised, it would seem logical to assume that the Supreme Court will extend further the rights of juveniles.

The second issue in Smith involved the retroactivity of the right to counsel ruling. The Court stated with finality that Kent would not be applied retroactively to Smith and cited as authority Johnson v. New Jersey. In addition, the Court, attempting to justify its decision, engaged in a lengthy analysis to show that Smith would not be adversely affected since he was over twenty-one years of age at the time of his appeal. The retroactivity of Kent would seem somewhat irrelevant, considering the limitations the Supreme Court put on that decision. The question should simply have involved the retroactivity of Smith in its own right. Were the question so limited the Court could have looked to various Supreme Court decisions in order to ascertain the factors that that Court has considered relevant in a retroactivity case. However, whether Smith should have been given retroactive application is not clear when one looks at what the Supreme Court has decided on the subject. In Gideon v. Wainwright, the Supreme Court held that an accused had the right to counsel at trial for a felony, and subsequent cases have shown that this right applied retroactively. But in Johnson v. New Jersey, retroactivity was denied Escobedo v. Illinois which guaranteed the right to counsel during police inter-

74 KRS § 208.060 (1962) provides for a separate hearing without a jury. Nearly all courts have held that a juvenile cannot demand a jury trial. See Annot., 100 A.L.R.2d 1048 (1965) for a listing of cases.
75 See note 28 supra for a discussion of this phase.
76 412 S.W.2d at 259.
78 412 S.W.2d at 260.
79 See note 26 supra.
rogation and *Miranda v. Arizona* which set forth several due process standards to be followed in implementing the right to counsel and the privilege against self-incrimination. One should question the apparent disparity in the application of these decisions. It has been suggested that the reason *Escobedo* was not applied retroactively is that *Escobedo* involved right to counsel before trial while *Gideon* required counsel at trial. The conclusion can be drawn that the presence of counsel at trial is essential to prevent a miscarriage of justice, but the presence of counsel during interrogation is not absolutely necessary to prevent such injustice since such presence might even lead to suppression of the truth. This may be a valid distinction between the two cases. In *Johnson* the Supreme Court announced that where retroactivity was involved, a balancing test should be employed. The Court stressed that whether the constitutional rule of criminal procedure affected the fact-finding process at trial was a matter of degree. The possibility of disrupting the administration of the law was also considered by the Court. Finally, the Court in *Johnson* concluded that the failure to apply *Escobedo* and *Miranda* retroactively would not prevent those previously convicted from invoking the safeguards announced in those cases as part of an involuntariness claim.

When considered in light of Supreme Court decisions, there is ample support for the retroactive application of *Smith*. *Smith*, like *Gideon*, is primarily a right to counsel at trial case. There is no other safeguard which can be invoked by juveniles as was the case in *Miranda* and *Escobedo*. However, any conclusion about retroactive application must be made in light of the consideration that if *Smith* were applied retroactively, a large number of adult and juvenile lawbreakers would be released upon society. This is certainly a strong consideration to ponder. Perhaps, in view of the apparent disrupting effects that retroactivity might engender, the Court chose the soundest course.

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87 384 U.S. at 728.
88 Id. at 731.
89 Id. at 730.
90 For further discussion, see *The Supreme Court, supra* note 86. Of course *Gault* also raises the question of retroactivity, and the same problems involved in *Smith* also apply to *Gault*. In addition *Gault* has five different holdings, only one of which concerns right to counsel. Thus, *Gault* involves elements common to *Gideon*, *Miranda*, and *Escobedo*. The retroactive application of *Gault* would, therefore, call for a true balancing test, or the case would have to be split into (Continued on next page)
A third issue in *Smith* concerned defendant's failure to appeal his 1958 conviction and his subsequent use of RCr 11.42. Ordinarily, an 11.42 motion cannot be entertained unless all appeals have been exhausted.91 However, at the time Smith could have appealed there existed no right to counsel at a waiver hearing.

Realizing Smith's predicament, the Court made an exception to the rule and allowed him to bring his 11.42 motion. This was a case of first impression, and although the holding is just, the Court cited no precedent. However, persuasive authority for its decision might have been found under cases concerning federal habeas corpus.92

In habeas corpus93 proceedings the general rule is that a writ will not issue if all appellate remedies have not been exhausted. However, in rare and exceptional cases, the writ of habeas corpus may be issued where an appeal has not been taken.94 The Supreme Court has ruled that procedural errors which were so flagrant as to result in an unfair hearing would render criminal proceedings vulnerable to collateral attack by habeas corpus.95 The denial of counsel to Smith should be considered such a flagrant error as to result in unfairness to him. Surely, the denial of a constitutional right justifies such writs even though appeal remedies were not exhausted.96

**D. Right to Counsel**

1. **Improper Preparation by Appointed Counsel**—A right to counsel question that frequently reaches the appellate level involves the petitioner's assertion that his counsel did not have time to properly prepare. The right to be represented by counsel in a felony case contemplates that the attorney have a reasonable time in which to become familiar with and prepare the case.97 On the other hand, the court's

(Footnote continued from preceding page)

91 Thornberry v. Commonwealth, 400 S.W.2d 226 (Ky. 1966), cert. denied, 385 U.S. 868 (1966); King v. Commonwealth, 387 S.W.2d 532 (Ky. 1965).
92 Federal habeas corpus and RCr 11.42 are very similar in operation. See 1965-66 Court of Appeals Review, 55 Ky. L.J. 376 (1966).
93 In Kentucky, habeas corpus has been almost completely displaced by RCr 11.42. See Ayers v. Davis, 377 S.W.2d 154 (Ky. 1964).
94 25 AM. JUR. Habeas Corpus § 22 (1940).
95 In Eagle v. United States, 329 U.S. 304 (1946), a writ of habeas corpus issued where the petitioner had failed to bring writ of error in the proceeding against him.
97 Davis v. Commonwealth, 310 Ky. 360, 220 S.W.2d 844 (1949); Chenault v. Commonwealth, 282 Ky. 455, 138 S.W.2d 969 (1940); Shelton v. Commonwealth, 280 Ky. 733, 134 S.W.2d 653 (1939).
ruling on a motion for continuance is discretionary and except for a
showing of abuse will not be reversed. This conflict was well high-
lighted in two cases where the convicted defendant appealed because
of the trial judge’s refusal to grant defense counsel more time for
trial preparation. While the grounds of appeal in both cases were
identical, the Court’s analysis of the fact patterns resulted in one re-
versal and one affirmation.

Defendant in the first case, Stumph v. Commonwealth, was in-
dicted for murder. He retained an attorney, but a dispute over fees
resulted in the attorney’s dismissal shortly before the trial. Less than
two days prior to the scheduled trial the judge appointed two at-
torneys to the defense, and they immediately moved for a continuance
of one week. This was refused despite the fact that the local docket was
not crowded. The Court of Appeals held that there was no valid reason
for denial. It placed particular emphasis on the fact that the appointed
attorneys were inexperienced, had never tried a jury case before, and
were faced with a capital punishment case.

Moreover, citing Davis v. Commonwealth, the Court said:

While each must stand upon its own facts there runs throughout the line
of decisions an appreciation of the fact that lawyers appointed to defend
accused persons are often entitled to greater consideration with respect
to time and opportunity for preparation for trial than otherwise. They
ought not, in addition to assuming the grave responsibility without com-
pensation, be compelled to sacrifice the interests of other clients in order
to get ready in an unreasonable time to defend the accused.

The Court reversed with directions to grant a new trial.

Gibson v. Commonwealth involved appointed attorneys who
were experienced lawyers and had six days to prepare the defense in
a rape case. Although the attorneys were required to appear in court
frequently on other business during the six days, the Court of Appeals
upheld the lower court’s refusal to grant a continuance. The Court
believed that the inconvenience of the attorney is not a valid reason
for granting a continuance, particularly where, as here, the prosecuting
witness had been brought from another state to testify. Throughout,
the opinion is a subtle lecture on the responsibility of the experienced
lawyer who finds himself appointed to a criminal case. The briefs for
defendant note that at no time during the six day period did the

98 Lusk v. Commonwealth, 291 Ky. 339, 164 S.W.2d 389 (1942); Rose v.
Commonwealth, 286 Ky. 53, 149 S.W.2d 772 (1941).
99 408 S.W.2d 618 (Ky. 1966).
100 310 Ky. 360, 220 S.W.2d 844 (1949).
101 408 S.W.2d 618, 620 (Ky. 1966).
102 417 S.W.2d 237 (Ky. 1967).
defense attorneys either consult with their client or even ask for permission to do so. The Court stated firmly: "It... was the duty of these lawyers to bestir themselves to prepare for a trial of which they had adequate notice." While the Court tacitly admits that the attorneys did not properly "bestir themselves," it affirmed the conviction on the basis of the nature of the case and the simplicity of the defense. The Court believed that an allegation of rape supported solely by the evidence of the prosecutrix and without assertion by the defendant of any defense other than consent requires a minimum of preparation. The Court concluded that there had been no showing that delay would have helped the defendant or his counsel.

An indigent defendant should have no less an opportunity for an adequate defense than a defendant with retained counsel. This means that appointed counsel must "bestir themselves" and conduct a vigorous defense, raising every point the indigent accused is legally entitled to. Moreover, the pretrial duties and responsibilities of appointed counsel play such an important role in the effective defense of a case that they are just as crucial as representation during the trial. Appointed counsel who are disinterested or unprepared place the indigent in a precarious position, and he might just as well represent himself. Such ineffective representation is highly prejudicial and clearly results in a denial of due process. However, to enforce the requirement of effective counsel the Court must closely scrutinize the details of the trial. If the Court is not able or does not in fact weight the factual considerations carefully there will be no due process. Because judging the adequacy of counsel depends on the close attention of the Court to the particular facts, there is great risk that unequal standards will be applied. While the facts of these two cases lead to the conclusion that the decisions are correct, it seems that the Kentucky Court of Appeals should make some effort to spell out the degree of effectiveness and participation, so essential to a fair trial, now to be expected from appointed counsel.

2. Waiver of Right to Counsel—The appellant in Copeland v. Commonwealth was serving a life sentence as a habitual criminal. This sentence was imposed in 1946 as a result of Copeland's third felony conviction. He filed a motion to set aside the habitual criminal conviction, alleging that in his first two felony convictions he had not been represented by counsel. The Court, relying on Gayes v. New

103 Id. at 239.
104 415 S.W.2d 842 (Ky. 1967).
105 On this appeal the prisoner was making a preliminary move toward setting aside the habitual criminal conviction. See Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966).
York,106 ruled that by failing to question the validity of the two prior convictions at the 1946 trial, the appellant had waived his right to later challenge them.

The appellant contended that he did not know of his right to counsel until Gideon v. Wainwright107 was decided. The Court, however, held that Copeland could have challenged his lack of counsel at the two prior convictions in 1946 through the remedy of coram nobis,108 and his court-appointed attorney was "chargeable with knowledge" of the remedy at that time.

In a previous appeal,109 Copeland had charged that in 1946 he had insufficient time to prepare his case, and that his attorney was appointed only five minutes before trial. The Court rejected the contention that this amounted to ineffective counsel since there is a presumption that a court-appointed attorney is diligent and competent.

A proper means of obtaining relief from an invalid conviction should be available to an appellant until the penalties from such a conviction have ended. The inconvenience that the Court endures from reviewing a case long past decided seems trivial when compared to the burden the appellant suffers because of that decision.110

In Gayes v. New York111 the Supreme Court announced the waiver rule followed by Copeland. The appellant in Gayes was sixteen years of age at the time of his first conviction. The youth expressly waived his right to counsel and pleaded guilty to the offense. When he was later convicted for a second offense, he was sentenced as a habitual criminal. In a later appeal, the Supreme Court held that Gayes had waived his right to challenge lack of counsel in his first conviction since he had the opportunity to contest that conviction at his second trial.

The scope of Gayes has been narrowly defined in subsequent decisions.112 In a state case,113 almost factually identical to Gayes, the waiver rule was not applied. The state court attempted to distinguish the cases on the ground that the decision in Gayes referred only to the waiver of a federal remedy and not necessarily to state remedies.

107 372 U.S. 335 (1963). Gideon held that under the fourteenth amendment, indigents were entitled to appointed counsel in felony prosecutions.
108 Coram nobis was used to vacate judgments obtained without due process of law. This remedy was replaced by RCn II.42 in 1962.
109 Copeland v. Commonwealth, 397 S.W.2d 59 (Ky. 1965).
112 See United States v. Jackson, 250 F.2d 350 (2d Cir. 1957); United States v. Jackson, 234 F.2d 742 (2d Cir. 1956) and cases cited therein.
Other courts have refused to waive a person's right to challenge a conviction when the previous opportunity to make such a challenge occurred in another jurisdiction. Still other decisions have suggested that the waiver rule does not apply in federal courts.

In *Burgett v. Texas* the Supreme Court has recently stated that the right to counsel under the fourteenth amendment as established by *Gideon v. Wainwright* is not limited to "prospective application." The Supreme Court further stated that using a conviction obtained when the appellant was not represented by counsel to enhance punishment for a subsequent offense would erode the principle of *Gideon*. Thus, regardless of the efficacy of *Gayes* concerning the waiver of state rights, the federal rights as defined by *Gideon* are not affected. Assuming Copeland waived his state right to challenge lack of counsel, he did not waive his fourteenth amendment right to make such a challenge.

A strong dissent in *Gayes* stated an unwillingness "to subscribe to such a doctrine of forfeitures concerning constitutional rights. . . ." The *Gideon* and *Burgett* decisions raise the suggestion that the present Supreme Court would join the dissent in *Gayes* and find the "waiver doctrine" offensive to the common and fundamental ideas of fairness.

### E. Search and Seizure

The principle that "a man's home is his castle" found constitutional support in the fourth amendment. However, today the protection against illegal search and seizure extends far beyond the home. In 1965, the Kentucky Court of Appeals held that search of a vehicle incident to arrest for a minor traffic violation was illegal. Moreover, evidence gained in such illegal search is inadmissible in a trial based on a charge arising from the search. The Court found that in order to meet modern problems of the highway it was necessary for police to

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114 See, e.g., cases cited *supra* note 9.
116 386 U.S. 931 (1967). Previous convictions against the defendant were being used to establish "repetition of offense." The defendant was not represented by counsel at the time of one of these convictions.
119 *Lane v. Commonwealth*, 386 S.W.2d 743 (Ky. 1965). Appellant was stopped by a state trooper for improper passing. He had no driver's license and the car was registered in his wife's name. The trooper arrested him, searched his person and then searched the car. In the trunk he found several cases of whiskey which were used to convict defendant of illegal possession of whiskey in dry territory.
be able to stop motorists on the road. However, the Court warned that this extension of police power required a corresponding restriction upon the authority to search without a warrant.\textsuperscript{121} It specifically stated that police may not stop a car on the pretext of a traffic violation and then search the person or the vehicle without good cause to suspect a crime. But during the past two years the Court has narrowed the apparent sweep of this rule by demanding a strict interpretation of the "search."

In \textit{Noble v. Commonwealth},\textsuperscript{122} a trooper in dry territory stopped to investigate an incident of public drunkenness. The driver was standing beside his truck which was stopped beside the road. The defendant, in response to a reasonable request that he show his driver's license, opened the door and the trooper saw liquor bottles on the floor of the truck. The prosecutor introduced this evidence at the defendant's trial for illegal possession of alcoholic beverages, and the defendant was convicted. The Court of Appeals, in affirming, reiterated its earlier view that no unauthorized search has been made where the evidence is clearly visible to the investigating officer.\textsuperscript{123}

A closely related issue was presented in an unusual fact pattern in \textit{Nichols v. Commonwealth}.\textsuperscript{124} Two local police officers and a federal narcotics agent had a combination rooming house and beer tavern under surveillance. The officers stopped one man leaving the building and asked him for identification. The man volunteered to return to the building with the officers, saying that the defendant, Nichols, would "vouch" for his identity. When the police knocked on the door, they were invited in by the defendant who knew and recognized them. While inside one of the policemen noticed an open sack on the table, looked inside it, then reached into the bag and felt the contents. The contents were subsequently identified as marijuana and admitted in evidence at the defendant's trial.

The defendant was convicted, but the Court of Appeals reversed, holding that the defendant was entitled to a new trial at which the marijuana and any evidence relating to its discovery and seizure must be withheld.

This would appear to be a close case, perhaps relying entirely on such detail as how far the bag was open, how much the officer could see before reaching into the bag, and how dependent he was upon the manual exploration for his identification. \textit{Noble} seems consistent with Kentucky law as to the admissibility of evidence obtained without a

\textsuperscript{121} Love v. Commonwealth, 386 S.W.2d 743, 745 (Ky. 1965).
\textsuperscript{122} 408 S.W.2d 185 (Ky. 1966).
\textsuperscript{123} Ferrell v. Commonwealth, 204 Ky. 548, 264 S.W. 1078 (1924).
\textsuperscript{124} 408 S.W.2d 189 (Ky. 1966).
warrant where the object sought is obvious to anyone within reasonable viewing distance.\textsuperscript{125} The word "search" implies a prying for that which has been concealed or intentionally removed from common view.\textsuperscript{126} Thus, the results in \textit{Noble} and \textit{Nichols} were sound and consistent with past law. In \textit{Nichols}, it was impossible for the officer, casually observing the room, to see and identify the marijuana. By peering into the bag, feeling it, and finally asking the federal agent for assistance, the character of his observation took on the intrusive character of a search. Moreover, the facts here were similar to those in \textit{Adkins v. Commonwealth}\textsuperscript{127} where the police officer saw the neck of a bottle protruding from a paper sack and had to pull it out of the bag in order to identify its contents as moonshine whisky. This too was held as an illegal search.

Complex and varied fact patterns often present close questions as to the admissibility of evidence taken without a warrant. These two cases should help to clarify for the Kentucky practitioner the point at which the Court will find a search has taken place.

\section*{F. Privilege Against Self-Incrimination}

When the United States Supreme Court held, in \textit{Escobedo v. Illinois}\textsuperscript{128}, that statements elicited from an accused after his request to consult with retained counsel was denied were inadmissible, two heretofore separate and distinct Constitutional protections were joined, \textit{i.e.}, coerced confessions under the fifth amendment and right to counsel under the sixth amendment. However, the "judicial interpretation and spirited legal debate"\textsuperscript{129} that \textit{Escobedo} initiated made it predictable that a clarifying decision would be forthcoming. The delay was not prolonged. On June 13, 1966, the Supreme Court handed down the landmark decision of \textit{Miranda v. Arizona}\textsuperscript{130} which held that a suspect, who is taken into custody or otherwise significantly deprived of his freedom, must be advised prior to any questioning, unless other fully effective means are adopted, that: 1) he has a right to remain silent; 2) anything he says may be used against him in a court of law;

\begin{thebibliography}{99}
\bibitem{125} Id.
\bibitem{126} 79 C.J.S. \textit{ Searches \& Seizures} § 1 (1952).
\bibitem{127} 202 Ky. 86, 259 S.W. 32 (1923).
\bibitem{128} 378 U.S. 478 (1963).
\bibitem{129} 384 U.S. 436 (1966). Although the decision is usually referred to as \textit{Miranda v. Arizona}, the case was actually a consolidation of the appeals of four separate defendants, Miranda, Virgnera, Westover, and Stewart. Each case involved a confession that was introduced at trial over the defendant's objection. In the \textit{Miranda} cases there were no charges of mental or physical coercion, only that each defendant had not been adequately advised of his constitutional rights.
\bibitem{130} Id. at 440.
\end{thebibliography}
3) he has the right to the presence of an attorney; and 4) if he cannot afford an attorney, one will be appointed prior to any questioning if he so desires.\textsuperscript{131}

An opportunity to exercise these rights must be afforded the accused throughout the interrogation.\textsuperscript{132} By including a right to counsel and self-incrimination warning among a suspect's rights during interrogation, the Court in \textit{Miranda} further entwined the fifth and sixth amendment protections:

> After such warnings have been given, and such opportunity [to exercise these rights] afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or to make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. (Emphasis added.)\textsuperscript{133}

The implications are clear, both in holding and dictum. The Supreme Court specifically held that before the prosecution may introduce a confession or statement of the defendant into evidence, they must demonstrate that at the time of his interrogation the accused was given the four part warning\textsuperscript{134} and that he knowingly and intelligently waived his rights. However, the dictum is far more inclusive; it is not merely limited to statements and confessions. The Court said that "no evidence obtained as a result of the [unlawful\textsuperscript{135}] interrogation can be used."\textsuperscript{136} The import of these words is clear—the "fruit of this poisonous tree" will be inadmissible.\textsuperscript{137}

Self-incrimination is the keystone of \textit{Miranda}.\textsuperscript{138} If the police are


\textsuperscript{132} 384 U.S. at 479.

\textsuperscript{133} \textit{Id.} Thus, the Court has clearly put the burden of proof upon the prosecution to show that the accused voluntarily divulged any information obtained during any phase of the interrogation. While such a burden does lessen the possibility of direct evidence being obtained against the person being questioned, the usefulness of interrogation as an aid to criminal investigation is not totally eliminated.

\textsuperscript{134} \textit{See} note 5 \textit{supra}.

\textsuperscript{135} An "unlawful interrogation" is one that is conducted by the authorities without giving such a person an opportunity to exercise the rights of the warning as required by \textit{Miranda}.


\textsuperscript{137} \textit{Arthur, Questioning by the Police Since Miranda}, 4 \textit{WILLIAMETTE L. J.} 105, 141 (1966).

\textsuperscript{138} While two constitutional rights are involved in \textit{Miranda}, \textit{i.e.}, the privilege against self-incrimination and the right to counsel, the Court makes it clear that it is using the right to counsel as a means of insuring the protection of the privilege against self-incrimination. Certiorari was granted in \textit{Miranda} in order further to explore some facets of the problems, thus exposed [by \textit{Escobedo}], of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete Constitutional guidelines for law enforcement agencies and courts to follow. 384 U.S. at 441.
allowed to do indirectly what is forbidden directly, the safeguards of *Miranda* protect against nothing. Evidence gained because of information obtained by an illegal arrest,\textsuperscript{39} an illegal detention,\textsuperscript{40} or an unlawful search and seizure\textsuperscript{41} has been held inadmissible as the "fruit of the poisonous tree." It is highly unrealistic to believe that the Court will allow facts and leads, uncovered by an unlawful interrogation, to be used in a court of law.

The Kentucky Court of Appeals was faced squarely with this problem in *Shockley v. Commonwealth*.\textsuperscript{142} The defendant had been convicted of dwelling house breaking, and it was argued on appeal that he had not been "informed of his constitutional rights to remain silent, to confer with an attorney and to have an attorney present with him at any interrogation."\textsuperscript{143} Ignoring the patent implications of *Miranda*, the Court of Appeals held that "Miranda stands for the principle that warnings are required in connection with the use by the prosecution of statements or confessions. No statement or confession was used at the trial";\textsuperscript{144} therefore, no inquiry should be made into whether or not the four part warning was given to the accused prior to his interrogation.

Realizing its possible error, the Court of Appeals held that even if the defendant's Constitutional rights had been violated, he was not prejudiced.\textsuperscript{145} To support this latter contention, a 1935 case, *Matthews v. Commonwealth*, was cited.\textsuperscript{146} *Matthews* held that the accused was not entitled to a new trial where the police had allegedly obtained his confession "by quizzing him while arrested and in their custody and by threats of violence,"\textsuperscript{147} and such confession was not introduced into evidence. However, it should be noted that the facts and the date\textsuperscript{148} of the case limit its applicability. The accused pleaded self-defense and readily admitted killing the decedent. The fact that while under alleged duress he had admitted the killing may be overlooked since he admitted the same on the witness stand.

In *Shockley* there existed a different situation. The trial court had

\textsuperscript{140} Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1959).
\textsuperscript{141} Fahy v. Connecticut, 375 U.S. 85 (1963); see generally L. HALL & Y. KAMISAR, MODERN CRIMINAL PROCEDURE 108-10 (2d ed. 1966).
\textsuperscript{142} 415 S.W.2d 866 (Ky. 1967).
\textsuperscript{143} Id. at 866.
\textsuperscript{144} Id. at 869.
\textsuperscript{145} Id.
\textsuperscript{146} 261 Ky. 484, 88 S.W.2d 8 (1935).
\textsuperscript{147} Id. at 487, 88 S.W.2d at 10.
\textsuperscript{148} A state court, before perfunctorily relying on a criminal procedure case which was decided before 1962, ought to compare that decision with the recent criminal procedure cases of the United States Supreme Court.
no way of knowing what information the defendant had given to the
police during his unlawful interrogation—it may have been negligible
or substantial. Our system, in such a case, normally resolves the un-
certainty in favor of the accused. Where the police violate Constitu-
tional procedures, it should be incumbent upon the Commonwealth
to show that the defendant’s rights were, in fact, not violated.140

The Kentucky Court of Appeals, like other state courts which have
passed on this question since Miranda,150 had an opportunity to make
the safeguards of that decision meaningful, i.e., to place upon the
police the “burden of establishing that ‘[the] evidence is not tainted
by establishing that they [the police] had an independent, legitimate
source for the disputed evidence.’”151 The Court of Appeals elected,
as have the other state courts,152 to ignore the inevitable and let the
Supreme Court of the United States remain the primary protector of
the criminal defendant. This is unfortunate.

The Supreme Court held in Johnson v. New Jersey153 that Miranda
would apply only to those cases in which the trial began after the date
of Miranda, i.e., June 13, 1966. In a pre-Miranda decision with
Miranda overtones, McDowell v. Commonwealth,154 the Court of Ap-
peals held that the “State is not, and should not be, charged with any
undue influence, pressure, sweating, or inducement exercised by a
private citizen, acting on his own, not in concert with the officers of
the State.”155 While this is the generally accepted rule,156 the facts of
the McDowell case and the subsequent rendering of Miranda require
a re-evaluation of the case.

McDowell, at the time of his confession, was confined in a cell
awaiting bond. He signed the prepared confession only after a bonds-
man insisted that bond would not be issued until the defendant told
the truth. The Commonwealth, in a situation where “private” citizens
are permitted to coerce a confession from a defendant in its presence,

140 “A heavy burden rests on the government to demonstrate that the de-
fendant knowingly and intelligently waived his privilege against self-incrimination
and his right to retained or appointed counsel.” 384 U.S. at 475.
150 Oughton v. State, 420 P.2d 452 (Alaska 1966); Nebraska v. Silvaarvalho,
145 N.W.2d 447 (Neb. 1966); People v. Duhard, 52 Misc. 2d 244, 275 N.Y.S.2d
151 Rothblatt & Fiter, Police Interrogation: Warnings and Waiver-Where Do
We Go from Here?, 42 notre dame law. 479, 489 (1967).
152 Cases cited note 22 supra.
154 415 S.W.2d 854 (Ky. 1967).
155 Id. at 856.
156 People v. Cradtree, 239 Cal. App. 2d 789, 49 Cal. Rptr. 295 (1966);
People v. Frank, 52 Misc. 2d 266, 275 N.Y.S.2d 570 (1966). See generally Note,
Confessions Obtained through Interrogations Conducted by Private Persons, In-
should be required to show that the *Miranda* warning was given and effectively waived if it intends to use the confession.\(^{157}\) Otherwise, this practice could be used as an indirect method of circumventing the *Miranda* safeguards.

In *Wilson v. Commonwealth*,\(^{158}\) the defendant had been convicted of knowingly receiving stolen property. The facts indicated that he had been questioned at the scene of the alleged crime,\(^{159}\) but he was not informed of his constitutional rights at any time during the questioning. His answers were introduced at the trial over the defense attorney's objections. Of particular importance to the prosecution was the officer's allegation that defendant admitted to a belief that he paid a low price because the goods were stolen.

In affirming the conviction, the Court held that appellant had made the statement voluntarily to the police before being taken into custody. The Court summarily dismissed the implications of *Escobedo* and *Miranda*, asserting that neither was applicable in this case.

The Court's interpretation of the facts in *Wilson* is less than realistic. More importantly, the Court fails to take an honest view of *Miranda*. *Miranda* clearly says:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences. . . .\(^{160}\)

\(^{157}\) Even without *Miranda*, the admissibility of a confession obtained under the circumstances existing in *McDowell* is subject to question under existing Kentucky law. KRS § 422.110 states that:

1. No peace officer, or other person having lawful custody of any person charged with a crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions or extort information . . . by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

2. A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court. (Emphasis added.)

This is a partial abrogation of the general rule enunciated by the Court that a State will not be responsible for the coercive acts of a private citizen. The statute clearly requires that if such acts occur while the accused is in custody, as was the case in *McDowell*, the confession should not be admitted into evidence. *Miranda* simply supplies Constitutional grounds for denying the Commonwealth the use of this type of confession.

\(^{158}\) 411 S.W.2d 33 (Ky. 1967).

\(^{159}\) The defendant was working in a Louisville restaurant when an officer arrived to investigate a report that some boys were carrying property into the building. There was disputed testimony that defendant himself had alerted the police. The patrolman observed the items in the storeroom at the restaurant and then questioned the defendant, also in the storeroom, as to the source of the items and the price paid for them.

\(^{160}\) 384 U.S. at 477.
The fundamental issue in Wilson is whether a suspect not yet formally arrested but being questioned by police is "deprived of his freedom in any significant way." Under Escobedo, the crucial stage was reached when the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect. Miranda specifically explained the Escobedo doctrine in terms of this loss of freedom. The Supreme Court has not yet specifically ruled whether Miranda will be applied where the police question a suspect in his home or place of business and arrest him only after he has made damaging admissions. However, it can be speculated that the Supreme Court would agree that questioning a suspect in his home before a relative or friend may be coercive even though there had been no actual arrest. Likewise, questioning a person at his place of business may also be coercive.

The Supreme Court seems to be moving closer to an assertion that an accused may not be convicted from his own mouth, regardless of how the admission is obtained. This observation is reinforced by the Court's description of the Miranda warnings as protection of the privilege against self-incrimination. Over the years the Supreme Court has constantly re-examined the multiplicity of interests—individual, social and governmental—visible in the process of in-custody interrogation. Its persistent use of the twin terms "voluntary" and "involuntary" however, tended to obscure much of the evolution in this area. Originally, the Court excluded only inculpatory statements made under circumstances where an innocent man of reasonable firmness might have given a false confession; all other statements are acceptable. Then the list of acceptable statements was narrowed to give the courts more effective control over police procedure. The focus centered upon the accused, seen not as an innocent man forced into an untrue confession but as an individual who was also a citizen and, as such, entitled to certain basic rights without regard to guilt or innocence. Primarily in an effort to discover why the accused chose not to exercise these rights, the Court asked whether he even knew that they existed. The age, experience and intelligence of the accused became the dominant considerations. With the decision in Miranda, however, the Court has again shifted its perspective. The focus is now not on the man alone, but on the man in his environment...

\[161\] Id. at 440.

\[162\] Id. at 478 n.46:

The distinction [between in-custody interrogation and on-the-scene questioning] and its significance has been aptly described in the opinion of a Scottish court:

In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavorable to the suspect.

whether there was an intelligent waiver in an environment that would permit and honor nonwaiver. There is less concern with the fact of waiver and more concern with the accused's awareness and understanding of the other alternatives available to him.104

The problem in Wilson arises because police investigation allegedly produced "admissions" which were introduced in the courtroom as evidence. This would seem to fall squarely within the Miranda protection and the Kentucky Court should have reversed the conviction.

104 Warden, supra note 131, at 47.
XI. DOMESTIC RELATIONS

A. Age of Majority

In 1965, when Kentucky changed the statutory age of majority from twenty-one to eighteen, the problems which could arise from the modification seemed few. The language of KRS 2.015 is a deceptively lucid expression of legislative intent: “for all purposes” eighteen years of age shall be the age of majority. Even the enumerated exceptions to the statute involved no complexities.1 Yet, since its inception this statute, due to its apparent ambiguity in the minds of judges and its interference with other statutory language, has failed to stand the test of consistent interpretation or understanding. “It is readily apparent that there is a broad and fertile area of future litigation arising out of the vague and sweeping terminology of this statutory effort to simplify something that is not simple.”2

The Court faced two domestic relation’s cases this term involving the age of majority statute. Wilcox v. Wilcox3 concerned an attempt by a divorced father to terminate child maintenance payments when his daughter reached eighteen. When the divorce was granted in 1951, the appellee was ordered by the court to tender a certain amount until his child reached the age of majority or became self-supporting. The change in the statutory age of majority, he argued, should end his payments when his daughter reached eighteen and the trial court so held. The Court of Appeals reversed, holding that since the age of majority was twenty-one when the parties entered into the contract, the father was obligated to support the child until she reached twenty-one or became self-supporting.

In reaching its decision, the Court summarily dismissed the new age of majority statute. It reasoned that the real question presented was one of contract, and as such, the intention of the parties had to be discovered in order to “ascertain how they meant the agreement to operate at the time they entered into it.”4 Since they meant, in 1951, for the word “majority” to represent age twenty-one, that intention governed the settlement contract despite the lowering of the statutory age after the date of the contract.

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1 KRS § 2.015 (1964) reads as follows:
Persons of the age of eighteen years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of handicapped children, for which twenty-one is the age of majority.

2 Commonwealth v. Hallahan, 391 S.W.2d 378, 380 (Ky. 1965).

3 406 S.W.2d 152 (Ky. 1966).

4 Id. at 153.
“It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract.” This is a widely accepted view, and a decision based on such grounds seems reasonable. It also seems to be a continuation of the policy argument alluded to in Commonwealth v. Hallahan that there are certain situations in which an eighteen year old is simply not capable of assuming adult status. Hallahan concerned the consent needed by an eighteen year old to marry. Perhaps, as in Hallahan, the Court in Wilcox was of the opinion that eighteen is too young an age to set an individual out on his own without any aid from his natural parents.

In Young v. Young, the Court met the statutory age issue squarely and, unlike Wilcox, seemed to refute the Hallahan policy. In this case, as in Wilcox, a divorced father sought to discontinue support payments when his children reached eighteen. However, this litigation did not involve a contract, court order which dictated payments, or an "intended" termination date. Rather, the father had made support payments on his own accord, and he simply quit paying them. His ex-wife brought suit to have him continue the payments until the children reached twenty-one, and the trial court so ordered. The Court reversed, holding that in the absence of a contract, the legal obligation of a father to support his children terminated when they reached eighteen, the age of majority.

By statute, fathers in Kentucky are "primarily liable for the nurture and education of [their] minor children." In Young the Court interpreted this statute to mean that "a parent [has] no legal obligation to support his child after it [reaches] its majority." Therefore, since the contract did not specify when the payments would end, KRS 2.015 would require that they end when the child reached eighteen.

The Court seemed quite reluctant to decide the case as it did, almost as if it were backed into a corner where neither a separate field of law such as contract, nor a policy argument would allow avoidance of the statute. Thus, the "for all purposes" language of the statute prevailed. Even the policy argument of "unripe an age" was not serviceable be-

5 Whitaker v. Louisville Transit Co., 274 S.W.2d 391, 394 (Ky. 1954).
6 391 S.W.2d 378 (Ky. 1965).
8 413 S.W.2d 887 (Ky. 1967).
9 KRS § 405.020(1) (1962).
10 413 S.W.2d at 888. See Central Kentucky Asylum for Insane v. Knighton, 113 Ky. 156, 67 S.W. 866 (1902). This ruling has been relaxed only when the adult child is so mentally or physically weak as to be incapable of caring for itself. Brewer v. Dowden, 207 Ky. 12, 268 S.W. 541 (1925).
cause it was precisely in such a situation as this that the Legislature deemed the age of eighteen an advantageous dividing line.\textsuperscript{12}

The Court has been caught up in the dilemma caused by the ambiguity of the statute, and its decisions reflect the confusion. Literally interpreted, \textit{Young} is inconsistent with \textit{Hallahan} since in \textit{Young} the statute was read according to its plain meaning; in \textit{Hallahan} it was not. There is no conflict between the cases, however, if the Court's reasoning in \textit{Hallahan} is to be taken at face value. In that case, the Court stated that the age of majority statute applied only to "lower the age to eighteen whenever the statute in question refers to the age of majority or infancy without a specific age."\textsuperscript{13} Therefore the \textit{Hallahan} decision should be considered affirmed by \textit{Young} since in the former the age "twenty-one" was stated in the applicable statute, but in the latter only the term "minor" was used.

It is questionable, however, whether the Court actually placed much faith in the \textit{Hallahan} rationale. That rationale seemed to be a temporary test to use until the General Assembly defined or further amended the statute. However, the 1966 General Assembly failed to aid the Court. An amendment was proposed and passed in the Senate which added to the end of KRS 2.015 the words "all other statutes notwithstanding."\textsuperscript{14} The Bill also specifically amended several statutes in which the age twenty-one was used.\textsuperscript{15} Unfortunately, the proposal was tabled in the House,\textsuperscript{16} allowing perplexity to remain the order of the day. The Legislature would do well to settle this confusion once and for all.

After almost three years and two Court terms, KRS 2.015 still presents an unsolved issue. As evidenced by the abortive legislative attempt, it is certainly not incapable of solution. The Attorney General's Office has assumed a consistent position in its opinions and adheres to a strict interpretation of the statute.\textsuperscript{17}

\textsuperscript{12}The Court is powerless to act contrary to a valid act of the Legislature. See Owens v. Clemens, 408 S.W.2d 642, 644 (Ky. 1966), where the Court said: It is beyond the province of a court to vitiate an act of the legislature on the ground that public policy therein promulgated is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare what acts constitute a violation of public policy and the consequences of such violation.


\textsuperscript{14}S.B. 297, 1966 \textit{FINAL LEGISLATIVE RECORD} 14.

\textsuperscript{15}It is interesting to note that one of the amended statutes has been KRS § 402.210, the effect being to overrule \textit{Hallahan}.

\textsuperscript{16}1966 \textit{FINAL LEGISLATIVE RECORD} 28, 30.

\textsuperscript{17}Op. Att'y Gen. 52 (1966) (Maintenance of a child by a divorced father ends when the child reaches eighteen unless a divorce decree specifically states (Continued on next page)
It is submitted that although KRS 2.015 is an imperfect statement of legislative intent, the General Assembly in fact intended to make eighteen the age of majority “for all purposes.” Thus, regardless of whether the Court thinks this sound, it is the law, and as such, should be applied uniformly.

B. Custody

One of the most perplexing problems of divorce is the inability of society to effectuate complete severance of a marriage when there is a child. The child is an indivisible part of the marriage, seldom a contributing factor in the divorce, and loved by both parties. Courts, primarily concerned with the interest and welfare of the child, are forced to award it to one parent. However, this does not completely eliminate the other parent’s access to the child. In Kentucky the other parent has an absolute right to see the child at reasonable times and convenient places. This is equitable since the purpose of divorce is to separate husband and wife, not parent and child. However, because of visitation rights, the custodian parent’s freedom of movement is restricted.

In *Brumleve v. Brumleve*, the wife, who had been awarded custody of three minor children in a prior action, requested permission to leave Kentucky for a job in Texas. Her former husband, protesting the move, was able to show that his ex-wife did not have a job in Texas; she had been interviewed but not hired. The commissioner terminated the hearing and would not permit the father to present evidence that the proposed trip would be detrimental to the children’s best interests. The Court of Appeals reversed the commissioner, holding that the appellant should be permitted to show that the trip proposed by his ex-wife was not necessary to her welfare and was not in the best interest of the children.

(Footnote continued from preceding page)

an ending age; at which point, modification would be at the court’s discretion.); Op. Att’y Gen. 505 (1965) (An eighteen year old unwed mother can bring an action for termination of parental rights.); Op. Att’y Gen. 67 (1965) (An eighteen year old can give consent for surgery without the necessity of parental collaboration.); Op. Att’y Gen. 41 (1965) (A guardian may settle accounts with his ward when the ward reaches eighteen.). Cf. Op. Att’y Gen. 176 (1965) (A nonresident over eighteen but less than twenty-one can give his consent to surgery only if the surgeon or hospital assumes the risk of legal action elsewhere.).

18 The standard policy argument favoring majority for eighteen year olds is: Since they can vote, be drafted, and hold a job, they should have the other privileges of adult status.

19 KRS § 403.070 (1962).

20 Tackett v. Tackett, 302 Ky. 611, 194 S.W.2d 832 (1946). *Tackett* held that reasonable times and places were “such times and places as may be convenient to the parties concerned.” Id. at 615, 194 S.W.2d at 834.

21 416 S.W.2d 345 (Ky. 1967).
The decision is sound, and cannot be disputed on its facts. As with so many aspects of domestic relations law, judgment is at the discretion of the trial court.\textsuperscript{22} However, the Court of Appeals stated that since this was a judicial proceeding and the husband was asserting a legal right, he should have been heard on the issues and given an opportunity to present proof.\textsuperscript{23} Mere custody or prior record should not preclude reexamination of the status quo since the trial court may reverse any part of the original custody order.\textsuperscript{24} Although the case offered no decision by which to judge "sufficient reason" for moving, the Court again indicated that the fundamental problems to be considered are freedom of movement from state to state, rights of custody and visitation, and rights of the child to develop with the normal advantages of life.

In cases of this nature, permission will normally be granted to remove the child from the jurisdiction if sufficient reason can be shown. Thus, if the divorce proceeding scandalized the mother and resulted in too much friction in which to raise the child, the mother would be allowed to leave.\textsuperscript{25} In most jurisdictions, if the mother has remarried and seeks permission to take the children to the new husband's residence, permission will be granted.\textsuperscript{26} However, unless there is a "force compelling" the mother to leave the state, and the interests of the child will be served as well within the state as without, permission will be denied.\textsuperscript{27}

\textit{Brumlee} is clearly consistent with these principles. The mother may have had no valid reason to move to Texas, and such a move might not have been in the children's best interests. The husband should have been permitted to offer proof to this effect.

Depriving children of a normal home life is perhaps the greatest tragedy of divorce. This is vividly revealed in the \textit{Eilers} cases.\textsuperscript{28} These cases are a testimonial of the failure of divorced parents to recognize their parental responsibility. However, the cases are an even greater monument to the inability of the judicial system to provide for the welfare of the children of broken homes. Since 1968, when

\textsuperscript{22} Spencer v. Spencer, 312 S.W.2d 360 (Ky. 1958).

\textsuperscript{23} Cupp v. Cupp, 302 S.W.2d 371 (Ky. 1957). There, the Court stated: "Appellant is asserting a legal right, and as in any other judicial proceeding, he should be given the opportunity to present proof, to cross-examine witnesses of opposing parties, and otherwise to be heard on his claim." \textit{Id.} at 372.

\textsuperscript{24} KRS § 403.070 (1962).

\textsuperscript{25} Duncan v. Duncan, 293 Ky. 762, 170 S.W.2d 22 (1943).

\textsuperscript{26} Alcorn v. Alcorn, 388 S.W.2d 578 (Ky. 1965); Byers v. Byers, 370 S.W.2d 193 (Ky. 1963); Bowman v. Bowman, 313 Ky. 806, 233 S.W.2d 1020 (1950).

\textsuperscript{27} See \textit{generally} 24 Am. Jur. 2d \textit{Divorce and Separation} § 798 (1966).

\textsuperscript{28} Eilers v. Eilers, 412 S.W.2d 871 (Ky. 1967); Eilers v. Carpenter, 406 S.W.2d 830 (Ky. 1966).
The divorce was granted in January, 1963, on the grounds of cruel and inhuman treatment by the father. At that time the mother had custody of the children, but no formal award of custody had been made. In January, 1964, Mrs. Eilers, a Caucasian, married a Negro in Illinois. Thereafter, Mr. Eilers filed a supplemental pleading to the divorce action seeking custody. In September, 1964, the Jefferson County Circuit Court responded by removing custody from the mother, stating that “rearing these children in a racially mixed atmosphere will per se indoctrinate them with a psychology of inferiority. . . . Subjecting these children to such a hazard would be in negation of their ‘best interests.’” However, the trial court found the father unfit for custody, and the children, often separated, were placed in one children’s home after another. The juvenile court later gave each parent custody of some of the children, but again the Chancellor ordered custody removed from the parents and given to the Jefferson County Children’s Home. Mrs. Eilers’ appeal from this order was denied as untimely.

Mrs. Eilers then filed a habeas corpus action against the Children’s Home alleging that the September, 1964, court action was premised solely on the grounds of racial discrimination and void under the fourteenth amendment. The appeal was dismissed because the home had transferred the children, making the issue moot. In July, 1966, in a supplemental action on the grounds of changed circumstances, custody was awarded to the father. The present appeal, the third in this drama, ensued from this judgment. In reversing, the Court of Appeals reasoned that certain evidence of the parents’ fitness had been erroneously excluded. The Court said, “we are not able to adjudicate the case upon the merits in the present appeal,” because “absent the proffered testimony . . . a reviewing court has no means by which it may adjudicate the propriety of the ruling.” Custody remained with the father pending final outcome. It was the dissent’s opinion that the Court should disregard technical considerations, and rule in favor of Mrs. Eilers, asserting that she “has been deprived of her lawful right to her children solely on the fallacious argument that she has married a member of the Negro race.”

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29 Eilers v. Eilers, 412 S.W.2d 871, 873 (Ky. 1967).
30 Dismissed without opinion January 14, 1966.
31 Eilers v. Carpenter, 406 S.W.2d 830 (Ky. 1966). During the pendency of the appeal, the Jefferson Circuit Court awarded the custody of the children to their father, who presently has custody.
32 Eilers v. Eilers, 412 S.W.2d 871 (Ky. 1967).
33 Id. at 873.
The Court was on solid judicial ground in ruling that there was error in the admission of evidence, but as the dissent points out, omission is the Court’s sin. The record contains no evidence of unfitness of the mother nor her Negro husband. Mrs. Eilers was deprived custody in 1964 solely because of the “racially mixed atmosphere” of her home. This atmosphere is still present and it appears that any subsequent determination of her rights will also be predicated largely upon this factor. The Court, therefore, should have ruled that the racial atmosphere and its effect upon the development of the children is but one factor in determining their best interest. Other jurisdictions have held that race alone should not be allowed to defeat a custody award that would otherwise benefit the children.

Denial of custody to the mother on a racial basis is a denial of equal protection of the laws and an interference with the sanctity of the home and marriage relationship. In a recent United States Supreme Court decision, which made laws prohibiting interracial marriages unconstitutional, the Court said that “distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality.” This policy would likewise seem to prevent custody of children from being determined on a racial basis. As parens patriae of minor children, the State has a duty to provide for their welfare. These children have been shifted from pillar to post, home to home, and parent to parent for over three years. The judiciary has been remiss in failing to expeditiously place the children in a permanent home based on the fitness of the parent and the home. The Court of Appeals should have decided the case on its merits or, at the very least, strongly indicated that fit-

34 Id. There is some indication that Mrs. Eilers’ Negro husband left marks on some of the children in attempting to correct them.

35 Id. at 873.

36 See In re Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955); Fontaine v. Fontaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956); Portnor v. Strasser, 303 N.Y. 539, 104 N.E.2d 87 (1952). But see Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), where the court refused custody to a “Bohemian father. See also Annot., 66 A.L.R.2d 675 (1959) (religion as a factor in custody); Annot., 57 A.L.R.2d 675 (1958) (race as a factor in child custody); Annot., 54 A.L.R.2d 909 (1957) (race as a factor in adoption).


39 Loving v. Virginia, 388 U.S. 1 (1967). “Marriage is a social relation subject to the State’s police power, but such a power is limited by the commands of the Fourteenth Amendment. ... The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states.” Id. at 7. Loving has made unconstitutional KRS §§ 402.020-.990 (1962). The legality of the racial marriage in Eilers is not an issue since it was legally performed in Illinois.

ness of the parents cannot be determined by racial considerations repugnant to the Constitution.

C. Adoption

In Williams v. Neuman, the Court was confronted with a situation in which a child's natural mother, four days after that child's birth, had placed the infant in another's care, stating that she “never wanted to see [the child] again.” The mother signed consent to adoption papers and did not see the child again for about a year. Appellants raised the child in their home and provided for all her needs. Appellant-husband was seventy-three, and his wife was fifty-one when they filed adoption proceedings. The child's mother and alleged natural father, married after the child’s birth and both about twenty-five years of age, contested the adoption. The trial court awarded custody to the natural mother on the basis of the recommendation of a social worker that appellants were too old to adopt a child. The Court of Appeals reversed, holding that it was error to refuse the adoption since the appellants were qualified despite their ages.

The Court was primarily concerned with the advanced ages of the appellants as compared to the relative youth of the appellees. However, the Court indicated that where investigation reveals that an adoption is clearly justified, the age of those proposing the adoption should not “influence the court in the determination of the case.” Appellant-husband was retired, but his wife earned enough to provide them comfortable living. Furthermore, appellants had raised the child since birth, and to place her with the appellees, whom she had never seen, would impair her welfare. “She cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment.” Thus, even the desire of the natural

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41 405 S.W.2d 556 (Ky. 1966).
42 Id. at 557.
43 Shortly after Williams, another case was decided involving an adoption dispute between an aged couple and the natural mother. In that case, however, the elderly couple were the natural grandparents, and the mother had neglected and not properly fed the children. The Court affirmed the circuit court in granting adoption by the grandparents. Roark v. Yarbrough, 411 S.W.2d 916 (1967). An interesting issue in that case was the constitutional question of whether the natural mother, who signed the consent for custody, was denied due process of law because she was not represented by counsel. The Court held that she was not.
44 Williams v. Neuman, 405 S.W.2d 556, 558 (Ky. 1966). The Court was quoting Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457 (1944). In Lee the Court was confronted with a factual situation similar to that in Williams with regard to the age of the adopting parties, but there the natural mother was “not as well suited for custody as the mother in [Williams].” 405 S.W.2d at 558.
45 405 S.W.2d at 557.
mother to "bring the 'brood' together under one roof" would not compel the Court to take her from the appellants.

Another issue to which the Court alluded in the statement of the facts concerned a claim that the natural mother had not realized the full import of the consent to adoption papers. The Court either gave no weight to this point, or chose to ignore it. Prior Kentucky decisions indicate that only if the natural mother shows "sufficient reason," such as a lack of understanding of what she was doing, can she invalidate consent to adoption papers.

Although Williams does not represent a landmark decision in domestic relations, it does point out once again that the "welfare of the child is the paramount question." The Court was not bound by the natural mother's desire to bring her disassembled family together when such a measure could jeopardize the child's security. The Court soundly recognizes that psychological values such as love and stability, found in most family relationships, have important effects on

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46 Id.
47 This was mentioned only in the facts, when the Court stated: Wanda stated that she was "not sure" what she said about adoption at the signing of consent for adoption on May 16, 1963; but she stated, "The only thing that I do know is that I said that I did want this child back if anything happened to them [sic]." Further along in her testimony Wanda stated "she couldn't have her to keep." Id.
49 Wsh v. Young, 240 S.W.2d 584 (Ky. 1951).
50 A similar issue was presented in Commonwealth v. Helton, 411 S.W.2d 932 (Ky. 1967), in which the Court upheld a decision terminating the natural mother's parental rights, stating:
Occasions do arise when parents realize the unhappy necessity of their surrendering parental rights, sometimes involuntarily... and sometimes voluntarily... The entire adoption program would be utterly frustrated if judgments terminating parental rights were to be lightly regarded. The prospective adoptive parents, the Department [of Child Welfare], and indeed the parents whose rights have been terminated would have no assurance of when or if an adoption could be effected if the termination were regarded as revocable. That this condition would militate against the best interests of the child and the public at large hardly needs elaboration. Id. at 934.
51 405 S.W.2d at 557.
52 See R. White, THE ABNORMAL PERSONALITY 223 (3d ed. 1964), where it states:
The infant experiences need satisfaction chiefly from his mother... The presence of the mother or nurse is soon learned to be the best guarantee of security. Separation from the mother can thus easily become a serious danger signal. At the outbreak of the Second World War, with the threat of large-scale bombing of cities, much fear was felt concerning the shattering effects of air raids on children's feeling of security. Experience showed that for small children, at any rate, the danger of separation from the family circle had a far more devastating effect than the bombings.
a child’s development. Other jurisdictions have chosen to follow a like path when confronted with similar situations, and it is a course that must always be kept uppermost in mind if adoption proceedings are to share in the twentieth-century enlightenment process.

53 See In re Duke, 95 So. 2d 909 (Fla. 1957); In re Brown, 85 So. 2d 617 (Fla. 1956); McGowen v. McGowen, 364 S.W.2d 477 (Tex. Civ. App. 1963).
XII. INSURANCE

A. Automobile Insurance

"By far the greatest amount of liability insurance today . . . covers the risks arising from automobile accidents."¹ This is a fact best explained by Lewis Mumford's view that "the current American way of life is founded . . . on the religion of the motor car."² In 1964, insurance companies collected more than seven and one half billion dollars in premiums on automobile insurance policies, and paid losses that totaled almost five billion dollars.³

Motorists are so heavily insured that many losses are covered by more than one policy. Court battles are often fought between two insurers, either of which might be found liable, depending on the fancy of the court and the facts of the case. Often, the law in these situations is undefined, perhaps undefinable, and characterized by intricate judicial jargon which often conceals the actual issue. Last term, the Kentucky Court of Appeals decided cases in two of these areas—the “other insurance dilemma” and the “loading and unloading problem.”

1. Other Insurance—Most automobile insurance policies cover the insured vehicle when driven by the owner and when driven by others with the owner's consent. By the same token, most policies cover the insured driver when driving the insured vehicle and when driving another vehicle not owned by him. Thus, when an insured driver is driving an insured car not owned by him, he is covered by his own policy and the owner's policy. This situation arises quite frequently when a car is borrowed or rented. When an accident occurs, the question becomes: which insurer should pay?

Insurers have long anticipated such situations and have recognized that by skillfully drafting their policies, they can reduce liability or escape it altogether. Such policy provisions are known as “other insurance” clauses, and four types are commonly used:⁴ 1) the “pro rata” clause provides that the insurers will share the loss up to the limits of their policies; 2) the “standard escape” clause provides that the policy affords no coverage at all when there is other valid and col-

¹ W. Prosser, TORTS 563 (3d ed. 1964).
³ Premiums paid for automobile liability insurance against personal injury totaled $3,612,000,000, and losses amounted to $2,268,000,000. Premiums paid for automobile liability insurance against damage to other persons' property were $1,418,000,000, and losses totaled $940,000,000. Premiums paid for policies covering the insured's automobile (collision insurance) were $2,552,000,000 and losses were $1,581,000,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 474 (87th. ed. 1966).
lectible insurance; 3) the “excess” clause provides that the insurer shall only be liable for the amount by which the loss exceeds the coverage of all other valid and collectible insurance, up to the policy limit; and 4) the “excess-escape” clause provides that the policy affords no coverage at all when there is other valid and collectible insurance, either primary or excess.

To resolve conflicts between these clauses, most courts have established a “pecking order” much like the child’s game of rock, paper, and scissors: “rock breaks scissors, scissors cut paper, paper covers rock.” The rules of the game are:

1) Where only one policy has an other insurance clause, that clause will be given effect according to its provisions.

2) Where the two policies contain identical other insurance clauses, the loss is shared by the two insurers. In no case shall the two clauses serve to allow both insurers to escape liability.

3) Where the two policies have different other insurance clauses, the following hierarchy controls liability:

   Excess-escape (Strongest)
   Excess
   Escape
   Pro rata (Weakest)

The rationale for this hierarchy is that the insurer anticipated the possibility of other insurance and expressly stated the conditions under which it would be liable. Since the general rule is that insurance policies, like all contracts, should be construed according to the meaning of their terms and the intention of the parties, the courts give effect to these clauses. For example an “escape” clause affords no coverage against a “pro rata” clause since the “escape” policy is not “other valid and collectible insurance” under the terms of the “pro rata” policy. When matched with an “excess” policy, however, an

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6 See, e.g., St. Paul Mercury Indem. Co. v. Martin, 190 F.2d 455 (10th Cir. 1951); Penn v. National Union Indem. Co., 65 F.2d 567 (5th Cir. 1934).


10 Washington Nat'l Ins. Co. v. Burke, 258 S.W.2d 709 (Ky. 1953).
"escape" policy covers the loss since it is "other valid and collectible insurance" under the terms of the "excess" clause.

To Oregon and other courts comprising a small minority, this word-magic has seemed to be "circular reasoning." These courts have adopted the minority rule that all "other insurance" clauses are mutually repugnant and therefore void. Thus, whenever two policies are available, the two insurers share the loss automatically without regard to their policy provisions.

Last term, the "other insurance dilemma" was presented to the Court of Appeals in Government Employees Insurance Co. v. Globe Indemnity Co. There, the driver's policy contained an "excess" clause, and the owner's policy contained an "excess-escape" clause. The Court applied the majority rule and held the driver's insurer liable, stating: "[T]he owner's insurer anticipated the possibility of the existence of an 'excess insurance' clause in the driver's insurance policy, and expressly contracted against liability in that situation. . . . [T]he clause was a valid, express condition against liability."

This approach to the "other insurance" problem is satisfactory in that it provides a definite, predictable test that may be relied upon by insurers. It is in accordance with the general principle that parties should be free to include or exclude any provisions they desire, so long as these provisions are consistent with public policy. As long as insurers continue to use only the four types of other insurance provisions discussed supra, conflicts can be easily resolved, perhaps without resort to the courts. However, it may be expected that most insurers will ultimately adopt the strongest (excess-escape) clause, and more policies will contain identical terms. Thus, proration will result automatically, as under the minority rule.

On the other hand, it may also be expected that insurance companies will continue their efforts to escape liability in "other insurance" cases. As adroit policy drafters shrewdly devise new provisions, courts

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12 415 S.W.2d 581 (Ky. 1967).
13 Id.
14 Id. at 582. The Court relied primarily on Continental Cas. Co. v. Weekes, 74 So. 2d 367 (Fla. 1954) for a statement of the majority rule in the excess-escape v. excess situation.
will be called upon to determine their places in the pecking order. For this reason, the minority rule may be more desirable insofar as its automatic proration formula prevents litigation and discourages new schemes for limiting liability. However, even if proration is the better rule, it will no doubt require a legislative enactment since the majority rule is firmly entrenched.

2. Loading and Unloading—Legal writers have long considered liability insurance a means of spreading the cost of accidents to society as a whole.15 This view has gradually been adopted by the courts,16 causing development of a judicial doctrine which favors finding an insurer liable whenever possible. This theory is never expressly verbalized, but it is the rationale behind such declarations as "insurance policies should be construed against the insurer who drafts them."17

The "loading and unloading" clause of the standard automobile liability policy is one device courts use to implement this theory. Most policies cover losses arising from automobile "use" which is defined as including "loading and unloading."18 Courts originally adopted a limited interpretation of loading and unloading, termed the "coming to rest doctrine."19 Under this rule, loading began at the time the material was physically placed in the vehicle and unloading ended when the material came to rest at its destination. But as the courts began to adopt the more liberal view of the function of insurance, they expanded their construction of "loading and unloading" clauses to include the "complete operation" of loading and unloading.20 Just what is included in a "complete operation" is, of course, impossible to predict and depends entirely on the particular facts in a case and the court's own inclinations.21

15 See, e.g., L. Green, TRAFFIC VICTIMS: TORT LAW & INSURANCE 103 (1952).
16 W. Prosser, supra note 1, at 562. One indication of this trend is a comparison between losses paid and premiums received. In 1950, insurance companies paid back only 40.7% of the premiums collected; in 1964 this figure was 63.1%. Thus, insurers are paying back almost two-thirds of premiums collected. U.S. BUREAU OF THE CENSUS, supra note 3, at 474.
19 See Risjord, supra note 18, at 904.
21 In Wagman v. American Fidelity & Cas. Co., a consignor was watching a shipment being loaded onto a truck by the trucker's employees. As the consignor turned to enter his store, a passer-by tripped over the consignor's feet and was injured. The court held that the consignor was engaged in the complete operation of loading the truck even though he was not carrying anything, and therefore the trucker's insurance covered the loss. 201 Misc. 325, 108 N.Y.S.2d 854 (Sup. (Continued on next page)
In defining "loading and unloading" courts did not consider the status of the negligent actor. The standard policy defines "insured" as the named insured and "any other person using the automobile, provided the actual use thereof is with the permission of the named insured." Thus, courts found liability under "loading and unloading" clauses regardless of whether the accident was caused by the owner, his employee, or a third person with no legal relationship to the insured.

However, recent years have witnessed a trend away from the liberal rule. Ohio was the first jurisdiction to depart and it seized upon the actor's status as its basis. In *Travelers Insurance Co. v. Buckeye Union Casualty Co.*, the driver of a truck was injured when an employee of Gulf Oil negligently loaded diesel fuel into the truck. Gulf argued that the trucker's policy covered the loss since their employee was "using" the truck at the time of the accident. The court rejected this argument, reasoning:

[Where as here the injury is caused by a third party who is not connected with the truck, who has no legal relationship to the named insured, and who under normal circumstances would not be using the truck: it must first appear that such third party was in the actual use of the truck. The equipment used by Gulf's employee was exclusively owned by Gulf and the acts performed by him related...]

(Footnote continued from preceding page)


In *Lamberti v. Anaco Equip. Corp.*, 16 App. Div. 2d 121, 226 N.Y.S.2d 70 (1962), a truck emptied its load of concrete into the bucket of a crane, and the crane operator negligently let the concrete spill, injuring some workers on the ground. The trucker's insurer was held liable. In two similar cases, the entire crane collapsed after the concrete truck had unloaded, causing several deaths and injuries. Despite proof that the crane owner had negligently maintained the equipment, the court found the truck insurer liable under the "loading and unloading" clause. *Travelers Ins. Co. v. W. F. Saunders & Sons*, 18 App. Div. 2d 126, 288 N.Y.S.2d 495 (1963); *Travelers Ins. Co. v. Employees Cas. Co.*, 380 S.W.2d 610 (Tex. 1964).

See also, *Sputlock v. Boyce-Harvey Mach. Co.*, 90 So. 2d 417 (La. 1958) (consignor's employee negligently injured trucker while tagging grader blades preparatory to placing them on loading ramp); *State Auto. & Cas. Underwriters v. Casualty Underwriters, Inc.*, 266 Minn. 536, 124 N.W.2d 185 (1963) (consignee's employees opened sidewalk trapdoor injuring passerby before truck began to unload); *London Guar. & Accident Co. v. C. B. White & Bros.*, 188 Va. 195, 49 S.E.2d 254 (1948) (pedestrian tripped on piece of coal from pile being shoveled into bin from street after truck unloaded and left).

For a case that found no "loading or unloading" see *Pavlik v. St. Paul Mercury Ins. Co.*, 291 F.2d 124 (7th Cir. 1961) (construction employee hurt when washing dragline bucket with hose from concrete truck, after concrete was unloaded and deposited in forms).

22 See Risjord, supra note 18.

23 7 AM Jur. 2d Automobile Insurance 89 (1963); Annot., 95 A.L.R.2d 1122, 1125 (1964).

The court further stated that the trucker did not pay premiums with the intention that the insurer protect third parties against his claims. Three recent cases from other jurisdictions indicate that this approach is gaining favor.

The Sixth Circuit Court of Appeals, however, applying Michigan law, criticized this rule in *St. Paul Mercury Insurance Co. v. Huitt*:

To the extent that it would impose special restrictions upon persons not bearing a legal relationship to the named insured . . . [the Ohio court] appears to have read conditions into the definition of the insured not contained in the policy. The policy in defining "the insured" makes no distinction between employees of the named insured and strangers.

The Kentucky Court of Appeals faced this problem last term in *Kentucky Water Service Co. v. Selective Insurance Co.* In that case, the insured trucker was getting a load of water at the Water Service, helped by an employee of the Service. The overhead water pipe became unfastened and fell, knocking the trucker to the ground and injuring him. The trucker sued the water company and its employee. The defendants then attempted to get the truck insurer to defend the action on the grounds that the employee was "using" the truck at the time of the accident and that it was immaterial whether the negligence was that of the trucker or the employee. The lower court rejected this argument, and the Court of Appeals affirmed. Following the Ohio rule, the Court reasoned:

"The truck was clearly operated by . . . the named insured. It was exclusively under his control. . . . There is no suggestion that . . . [the employee of the water service] had any other function than to turn, as he did, the water valve. . . . It would seem evident that . . . [his act] in turning the valve did not constitute using the truck within the meaning of the policy and that it was not such coverage as was within the con-

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26 Id. at ........., 178 N.E.2d at 798. See also Buckeye Union Cas. Co. v. Illinois Nat'l Ins. Co., 2 Ohio St. 2d 59, 206 N.E.2d 209 (1965), where the Ohio court affirmed its rule in *Travelers*: "We can never arrive at a finding that an insured may be a claimant against a company which has computed a risk to protect the insured only against the claims of others." 2 Ohio St. 2d at ........., 206 N.E.2d at 211.
28 336 F.2d 37 (6th Cir. 1964).
29 Id. at 43.
30 406 S.W.2d 385 (Ky. 1966).
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templation of the . . . [parties] when the policy was issued. We cannot escape the view that . . . [the insured] did not pay premiums to Selective so that it would insure third parties against his claim for damages.\textsuperscript{32}

Whether the Court's decision in this case is wise depends on one's vantage point. Insurers will no doubt welcome it as a sound limitation on their liability, but those who frequently load and unload vehicles belonging to others will criticize it as too severe. Where a negligent third party is covered by his own liability policy, it seems reasonable to require his insurer to suffer the loss rather than the insurer of the innocent truck or automobile owner. Where, however, the injured party is faced with an uninsured, judgment proof defendant, he may be delighted for his own insurer to indemnify him. However, the rule in \textit{Kentucky Water} makes no such distinction. Thus, the case seems to strike a blow at the more liberal view of insurance as a loss-spreading device.

It remains to be seen whether the Court will follow this rule absolutely and hold that third parties are never covered under the loading and unloading clause if they have no legal relationship to the insured. Such an absolute rule would be too severe since the nature of the third party's acts may vary considerably, and at least some third party use of the insured vehicle is no doubt contemplated by the parties at the time the insurance policy is issued.

3. \textit{Financial Responsibility Law}—Although the Kentucky Financial Responsibility Law\textsuperscript{33} was enacted almost two decades ago, until last term the Court of Appeals had never made a definitive statement of its purpose. In cases arising under the statute, the Court would merely state that the law provided "added protection to the public and better [assured] the safety of our highways."\textsuperscript{34}

In \textit{Tharp v. Security Insurance Co.}\textsuperscript{35} the Court provided a clear statement of the legislative intent and policy underlying the statute. There, the appellant was injured in an automobile accident caused by a driver insured by the appellee insurance company. The driver had been convicted in 1958 of driving while intoxicated, and consequently, his driver's license was revoked. In 1959, after his license was reissued, he applied for an operator's policy which, under the Kentucky Automobile Assigned Risk Plan,\textsuperscript{36} covers the insured driver only while

\begin{thebibliography}{9}
\bibitem{32} 406 S.W.2d at 387.
\bibitem{33} KRS § 187.290-390 (1962).
\bibitem{34} See, e.g., \textit{Ballow v. Reeves}, 238 S.W.2d 141, 142 (Ky. 1951).
\bibitem{35} 405 S.W.2d 760 (Ky. 1966).
\bibitem{36} KRS § 187.490(3) (1962) provides that an operator's policy "shall insure the . . . insured . . . for damages arising out of the use by him of any motor vehicle not owned by him."
\end{thebibliography}
driving a vehicle not owned by him. Pursuant to the Financial Responsibility Law, the liability risk was assigned to the appellee insurance company. The policy did not cover "any automobile owned by the named insured or a member of the same household," and it was valid from July, 1959, to July, 1962.

In 1961, the insured purchased an automobile but had title and registration placed in his mother's name. Appellant was injured in September, 1961, and brought suit against the driver and appellee. The insurance company refused to defend the action, asserting that the driver owned the automobile. The appellant received judgment against the driver, but when it appeared that the driver had no property, the appellant sued the insurance company. The lower court ruled that the insured "owned" the car even though legal title and registration were in his mother's name. Thus, the car was excluded from coverage. On appeal, the Court reversed and ordered appellee to pay the judgment.

The insurer first argued that automobiles owned by the insured and members of his household were expressly excluded from the policy, and that, therefore, even if the car were owned by the insured's mother, it would not be covered. The Court rejected this contention on the grounds that the Financial Responsibility Law is read into and becomes a part of every policy issued under the assigned risk plan. Any policy provisions contrary to the law are null and void. Because the statute does not allow exclusion of automobiles owned by a member of the insured's household, any policy provision providing otherwise would be inoperative.

The insurer also attempted to establish that the insured was the "owner" of the car even though title and registration were in his mother's name. The statute, however, defines "owner" as "a person

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37 405 S.W.2d at 762.
39 Id.
40 405 S.W.2d at 763.
41 Appellee relied upon two Kentucky cases holding that "paper title" is not essential to have "legal title." Crawley v. Mackey, 283 Ky. 717, 143 S.W.2d 171 (1940); Turner v. Bowens, 180 Ky. 755, 203 S.W. 749 (1918). The Court answered with this statement:

Words such as owner and ownership are consistently used with reliance upon their assumed concreteness and ability to express in all situations the same concepts. Unfortunately, their apparent synonymity often is illusory. . . . In Campbell County Bd. of Education v. Boulevard Enterprises, Inc., 360 S.W.2d 744, 746 (Ky. 1962) we said "[t]he word owner invokes many images. It is elastic and its color changes to match the context. . . ." Counsel have cited decisions of this court defining the word "owner" with regard to its technical meaning within the law of real and personal property. . . . The concern of the court in this case is to de-

(Continued on next page)
who holds the legal title of a motor vehicle,”42 and the Court, applying
the plain-meaning rule, refused to accept this argument:

For the purposes of the Kentucky Financial Responsibility Law, the
owner of a motor vehicle, having legal title to it, is the person in whose
name the vehicle is registered. . . . The objective of the Financial
Responsibility Law . . . would be defeated by permitting an insurer
under the law to deny coverage on the basis of interests of ownership not
of public record. There would be no certainty in fixing legal responsibility
and the law would be incapable of administration. . . .43 (Emphasis
added.)

The Court went further and defined the “objective” of the law and
provided a clear statement of its policy:

The Financial Responsibility Law is remedial in nature and should be
broadly construed. The purpose of the law is fundamentally to provide
compensation for persons injured through faulty operation of motor
vehicles. The Commonwealth has a valid interest in promoting safety
on the highways. . . . As between the insurer and an innocent mem-
ber of the general public, the risk is on the insurer.44 (Emphasis added.)

This decision will no doubt meet with great disapproval from in-
surance companies, but it seems consistent with the policy of the
Legislature.45 In any event, the Court has provided a clear statement
of “legislative intent” which should be helpful to counsel in cases
arising under the statute.

B. Property Insurance

In order to recover on a fire insurance policy, the insured must
have an “insurable interest” in the property. Insurable interest is

42 KRS § 187.290(9) (1962).
43 Id. at 764-66.
44 The Court relied on the statute itself as authority for its decision: “The
liability of the insurance carrier with respect to the insurance required by the
. . . [Financial Responsibility Law] shall become absolute whenever injury or
damage covered by said motor vehicle liability policy occurs . . . .” (Emphasis
added.) KRS § 187.490(6)(a) (1962). This decision follows those in other
jurisdictions with similar Financial Responsibility Laws. See Annot., 88 A.L.R.2d
995 (1963); Annot., 83 A.L.R.2d 1104 (1962).
"that interest in the property by virtue of which the person insured will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction or injury by the happening of the event insured against." There is a disagreement among American jurisdictions regarding insurable interest where property has been sold but legal title has not passed. The majority, including Kentucky, hold that when "equitable title" passes to the vendee, the vendor no longer has an insurable interest, even though the vendor still holds "legal title" and may be in possession. The minority rule is that the vendor retains an insurable interest until title passes.

Where the vendee is the government, taking under the right of eminent domain, the rule is somewhat complicated because of the government's right to abandon condemnation proceedings. The Kentucky rule is that the condemnor may abandon a proceeding at any time, even after judgment, so long as possession has not been taken or the award paid.

Last term, the Court faced this problem in Patrick v. Kentucky Farm Bureau Mutual Insurance Co. The appellant had an insurance policy with the appellee, covering loss from fire up to four thousand dollars. In May, 1962, the Commonwealth instituted condemnation proceedings against the property, and on July 3, the county court entered an order allowing the Commonwealth to take possession of the land upon paying the reported value of $7,500. The Commonwealth paid the money into court, and on July 7, the clerk paid it to the appellant. On July 22, after both parties had appealed the amount of the award to the circuit court, the property was destroyed by fire. The appellant sued on the policy, but the lower court found that he had no insurable interest and denied recovery.

On appeal, the appellant argued that he had an insurable interest since he had legal title and the Commonwealth could abandon the proceedings any time before the final judgment of the circuit court.

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46 Crabb v. Calvert Fire Ins. Co., 225 S.W.2d 990 (Ky. 1953).
47 Cook's Adm'r v. Franklin Fire Ins. Co., 224 Ky. 360, 6 S.W.2d 477 (1928). The basis for the rule is that the vendor suffers no loss from the destruction of the property since the vendee is obligated to pay the purchase price. To permit an insured to keep the proceeds of both the sale and the insurance policy offends public policy since that policy frowns upon placing an insured in a position to profit by a loss which he may be tempted to cause himself or be careless in failing to prevent.
49 See Annot., 29 A.L.R.2d 888 (1953).
50 See, e.g., Commonwealth, Dept of Highways v. Fultz, 360 S.W.2d 216 (Ky. 1962).
51 413 S.W.2d 340 (Ky. 1967).
The Commonwealth was not named a party to the action but filed an amicus curiae brief asserting its right to abandon the proceeding. The Court of Appeals affirmed the lower court, holding that appellant had no insurable interest. Although it acknowledged that under the condemnation statutes the appellant still held legal title, the Court reaffirmed its rule that legal title is not conclusive of insurable interest.

Turning to the appellant's contention that the Commonwealth could abandon the proceeding, the Court reaffirmed its rule that the condemnor may abandon at any time before possession is taken or the award paid:

[T]he pending appeal to the circuit court was confined only to the issue of the amount of compensation to be paid for the taking, and the right of the condemnor to pay the . . . award and take possession of the property was unaffected by this appeal. . . . Appellant was assured by operation of law that she would receive a judicially determined amount of money representing the fair market value of the property insured. . . . Once the condemnor pays, its right to abandon the condemnation proceeding ceases . . . and the risk of the destruction of . . . [the property is] on the condemnor. The Commonwealth was not named a party to the action but filed an amicus curiae brief asserting its right to abandon the proceeding. The Court of Appeals affirmed the lower court, holding that appellant had no insurable interest. Although it acknowledged that under the condemnation statutes the appellant still held legal title, the Court reaffirmed its rule that legal title is not conclusive of insurable interest.

In its amicus brief, the Commonwealth argued that if it had no right to abandon the proceedings, it was entitled to the proceeds of the policy and it should be joined in this action as an indispensable party. The Court sidestepped this issue, holding that the Commonwealth was not an indispensable party to the action since it was not a named party to the insurance contract. In a cryptic parting word, however, the opinion hinted that in a suit against the insurer, the Commonwealth might prevail: "[A]s the Commonwealth was not a party to this action, it is not bound by the judgment herein nor are its rights prejudiced." (Emphasis added.) The Court seems to indicate by this phrase that in a suit between the Commonwealth and the insurance company, perhaps the Commonwealth could successfully assert a right to the policy proceeds.

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62 KRS § 177.087(6) (1963) authorizes conveyance of the title by action of the circuit court after the appeal.
63 413 S.W.2d at 342.
64 Id. at 343.
65 Id. at 343-44.
66 Brief for Kentucky Department of Highways as Amicus Curiae at 8, Patrick v. Kentucky Farm Bureau Ins. Co., 413 S.W.2d 340 (Ky. 1967).
67 413 S.W.2d at 344.
68 Id.
69 This problem is beyond the scope of this comment and it was not an issue in the case. However, there is some authority to the effect that a condemnor acquires the rights of the owner to the proceeds of the policy. See Heidisch v. Globe Republic Ins. Co. of America, 388 Pa. 602, 84 A.2d 566 (1951). The (Continued on next page)
This decision serves to clarify the Commonwealth's right to abandon condemnation proceedings, and it serves to further establish the point at which the condemnee's insurable interest ceases. By this holding, insurers will be protected from the "moral hazard" that owners of condemned property will destroy the property to collect the insurance and be entitled to condemnation damages also.  

This decision should provide guidelines for future condemnation-insurable interest problems, and such problems may be expected to increase as the number of state and federal highway and urban renewal projects expand.

C. LIFE INSURANCE

In 1965, life insurance in force in the United States totaled over nine hundred billion dollars or more than $4,500 for every American citizen. The combined assets of the two largest life insurance companies exceeded the combined assets of the two largest industrial corporations. With this vast amount of insurance in force, a myriad of legal problems arise and life insurance cases account for a substantial portion of litigated insurance disputes. Last term, the Kentucky Court of Appeals decided two significant life insurance cases dealing in turn with the mental capacity of a person killing an insured, and the proof of loss requirement.

1. "Intentional" Killing—Most life insurance policies expressly exclude from coverage, deaths resulting from an intentional act, and courts generally consider this exclusion a valid limitation of liability. Where, however, the death of the insured is caused by an "insane person," the death is not considered intentional, and the beneficiary is entitled to the proceeds of the policy. South Carolina has been the only jurisdiction in the United States to hold that the mental capacity of the killer has no bearing on the question of intent. In all other jurisdictions, the mental capacity of the actor is a question of fact, and upon a jury finding of insanity, the insurer is held liable.

Until last term, Kentucky appeared to follow the majority rule,

(Footnote continued from preceding page)

Kentucky Court has never ruled on this point but has generally favored the Commonwealth in similar situations. Cf. Commonwealth v. Fultz, 360 S.W.2d 216 (Ky. 1962).

See note supra.


INFORMATION PLEASE ALMANAC 594 (1965).

See generally 29A AM. JUR. INSURANCE § 1199 (1960); 1A J. APPLEMAN, INSURANCE LAW & PRACTICE 482 (2d ed. 1962); 45 C.J.S. INSURANCE 772 (1946); G. COUCH, INSURANCE 41:667 (2d ed. 1962); Annot., 55 A.L.R. 688 (1928).

though the Court had never actually decided a case in which the insured was killed by an alleged insane person. The Court had, however, followed the majority in suicide cases, holding that “if the insured did not realize the consequences of his act” the insurer was liable. In two suicide cases, the insurance policy excluded coverage where the insured committed suicide, and expressly stated that whether he was sane or insane was of no consequence. Ignoring these provisions, the Court held the insurer liable, stating “the insured . . . [was] so insane that he did not know he was taking his own life or that his act would probably result in death.” Apparently interpreting these cases to mean that Kentucky subscribed to the majority rule, a federal court, in a case where the insured was killed by an insane person, held that “an intentional injury policy does not preclude recovery where the insured is killed by an insane person incapable of forming a rational intent.”

The Court of Appeals considered this problem last term in Wagner v. Colonial Life & Accident Insurance Co. The insured was killed in 1960, and his killer was convicted of voluntary manslaughter over an insanity defense. The appellee insurer refused to pay on the decedent’s policy, standing on the exclusion for intentional injury or death. The decedent’s wife, who was his beneficiary, sued for the proceeds, contending that the man who killed her husband was insane at the time of the killing. The jury found for the beneficiary and the insurer appealed.

Initially, the Court reversed, holding:

A person may be excused from penalty if he is insane at the time he commits a criminal act . . . [even though] he may do the act with every intention of consummating it. The absence of punishment, however, does

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68 408 S.W.2d 612 (Ky. 1966).

69 The policy contained the standard provision excluding coverage when death is caused by “injuries intentionally inflicted upon the insured by another person.” Id.

70 There was testimony that Shockley, the killer, had “spells where he did not know what he was doing.” Shockley himself testified that he “just had not control” of his actions, though he also testified that he had “intentionally” killed Wagner. Appellant relied primarily on the testimony of a psychologist who had examined Shockley. The expert testified that Shockley was “not capable of having a rational intention to do what he did” although he was not “insane” by legal standards. Colonial Life & Accident Ins. Co. v. Wagner, 380 S.W.2d 224, 225-26 (Ky. 1964).

not retrospectively expunge the original intention. . . . Under the terms of the policy, the act was intentional and therefore specifically excluded from coverage.72

In that appeal the Court cited none of the relevant Kentucky cases or any "majority" cases, but instead followed the South Carolina, minority-of-one rule.73 The case was remanded to circuit court for a new trial with an instruction that if the evidence were substantially the same, a directed verdict for the appellee insurer should be given. On remand, the insurance company moved for summary judgment. In response to this motion, the appellant filed a psychologist's affidavit stating that the man who had killed the insured was "temporarily insane" at the time of the act and therefore not mentally capable of distinguishing between "right and wrong."74 The lower court sustained the insurer's motion for summary judgment and the beneficiary appealed.

On this second appeal, appellant argued that an injury inflicted upon another by an insane person cannot be held as a matter of law to be intentional but should be a jury question. The Court summarily dismissed this argument, holding: "Irrespective of whether . . . [the killer] was insane, the gunshot wounds which caused the death of the assured were 'intentionally inflicted' as the term is used in the policy."75

It is difficult to understand why the Court would reject the majority rule and follow a rule adhered to by only South Carolina.76 It is also difficult to understand why the Court would do so without expressly stating that there were Kentucky cases suggesting a contrary result and either distinguishing these cases or overruling them. The Court did not, in either opinion, cite or mention any cases other than those of South Carolina.

The majority rule, i.e., the test for mental responsibility under the intentional death clause of insurance policies is the same as the test for

72 Id. at 226.
73 See note 66 supra, and accompanying text.
74 408 S.W.2d at 612.
75 Id.
76 Colonial Life is a South Carolina corporation, and it is safe to assume that the policy was drawn up by South Carolina lawyers accustomed to the law in that state. Perhaps the Kentucky Court felt somewhat bound by South Carolina law, though there were no policy provisions to that effect. At any rate, the Court did not indicate in either opinion that they were bound by South Carolina law. See Brief for Appellee at 11, Colonial Life & Accident Ins. Co. v. Wagner, 380 S.W.2d 224 (Ky. 1964). Another possible explanation for the decision is that the Court felt Shockley's conviction for voluntary manslaughter in spite of his insanity defense had settled the question. In that case, however, it would not have been necessary to rule, that killing by an insane person was "intentional" as a matter of law.
mental responsibility in the criminal law,77 is clearly the better rule. In 1968, Kentucky joined the small group of progressive states that have adopted a more enlightened test of criminal responsibility. Under Terry v. Commonwealth,78 the M'Naghten "right or wrong" test was discarded in favor of a test allowing courts to take full advantage of advances in the psychological and psychiatric sciences so as to more effectively detect and deal with the mentally irresponsible.79 To follow Terry four years later with a decision ignoring mental responsibility in life insurance cases seems, at best, inconsistent.80

This is not to suggest that "insanity" should always render the intentional injury clause inoperative since an insurer should be free to include in his policies any specific exclusions consistent with public policy.81 If the insurer expressly excludes "intentional injuries by any person, sane or insane," a result such as that in Wagner might be justified. But if such a clause is not included, the capacity of the actor should be a relevant question of fact for the jury. At the very minimum, the Court, if it wishes to rule as a matter of law that insanity is no defense, should expressly state its reasons and justify its departure from the vast majority of other jurisdictions and similar Kentucky cases.

2. Proof of Loss—Most life insurance policies state that, in order to receive the proceeds, the beneficiary must provide the insurer with "proof of loss" within a specified time. "The purpose of a provision for notice and proof of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, and to prevent fraud and imposition upon it."82 Courts have generally recognized these interests as valid and have given effect to proof of loss requirements. Courts have also recognized, however, that the requirement often serves as an escape clause for insurers

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78 371 S.W.2d 862 (Ky. 1968).
79 The Terry test finds the accused insane if "at the time he committed the act, he did not have substantial capacity either to appreciate the criminality of his conduct, or, if he did understand it, to resist the impulse to violate the law, but in either case, the conduct must be the result of a mental disease or defect not including abnormality manifested only by repeated criminal or otherwise anti-social conduct." Terry v. Commonwealth, 371 S.W.2d 862, 865 (Ky. 1968).
80 "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has nothing to do. . ." (Ralph Waldo Emerson). Perhaps courts, as well as "great souls," need not be consistent, but courts, in the business of providing guides for the solution of future controversies, should never fail to explain their inconsistencies.
81 See Borneman v. John Hancock Mut. Ins. Co., 289 N.Y. 295, 45 N.E.2d 452 (1942), where the policy excluded "injuries intentionally inflicted by any person while sane or insane." But cf. note 57 supra, for Kentucky cases in which such express policy provisions were not given effect. Such clauses still pose the problem of defining "intentional" and determining whether the actor is capable of forming an intent.
when beneficiaries neglect to comply. Thus, most courts have been quick to find that the insurer has “waived” the requirement or that it has been “estopped” by some action or inaction. The Kentucky Court of Appeals has joined the majority in showing reluctance to require compliance with proof of loss provisions whenever some basis for “waiver” or “estoppel” can be found.

The Court of Appeals construed such a provision in Commercial Travelers Mutual Accident Association v. Witte. The appellant issued a life insurance policy to James Witte in 1953, with appellee named as beneficiary. The policy required that proof of loss be filed with the company within ninety days after the loss. Witte died on November 18, 1958, as a result of injuries inflicted by his wife during a domestic altercation. Mrs. Witte was subsequently indicted for voluntary manslaughter. In December, Witte’s brother gave the policy to his attorney, who notified the company of Witte’s death and requested proof of loss forms. In their response, the company pointed out that the named beneficiary was Mrs. Witte, not the estate. Nevertheless, they enclosed the requested forms. At this point, Mrs. Witte was unaware of the policy’s existence. However, neither the attorney nor the company sent Mrs. Witte the forms, and the attorney did not notify her that he had them.

In the latter part of December, the insurer hired a detective to investigate the death. He spent some time in the investigation, but he did not interview Mrs. Witte. She did not become aware of the policy until mid-January, 1959, when the attorney informed her that she was the beneficiary. She apparently did not read the policy or note the

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83 See G. Couch, supra note 63, at 49:872. Perhaps this tendency to find for the insured can be explained, in part at least, by the rule of construction that insurance policies are construed against the insurer.

84 See Fidelity & Guar. Ins. Underwriters, Inc. v. Gregory, 387 S.W.2d 287 (Ky. 1965).

85 406 S.W.2d 145 (Ky. 1966).

86 The policy contained the following provisions with regard to proof of loss:

The Association upon receipt of such notice will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this certificate as to proof of loss upon submitting within the time fixed in the certificate for filing proof of loss written proof covering the occurrence, character and extent of the loss for which claim is made. Affirmative proof of loss must be furnished to the Association at its said office...within ninety days after the date of such loss. Id. at 146.

87 One of the partners of the attorney was representing Mrs. Witte in the criminal trial. She was informed of the policy at a meeting attended by the three of them. This caused counsel for the insurer to remark: “It seems that a complete mockery is made of the law when partners in the same law firm have a proof of loss within their file and one partner represents the insured and the insured (Continued on next page)
proof of loss requirement because she left the policy with the attorney but did not then employ him to handle her claim.

In late April, Mrs. Witte was found guilty of involuntary manslaughter, an offense classified as an unintentional killing. Shortly thereafter, she employed the attorney to claim the proceeds of the policy, and he submitted proof of loss late in May. The company rejected the claim and suit followed. The lower court ruled in favor of Mrs. Witte, and the insurer appealed, arguing that her claim was defeated by failure to file proof of loss within ninety days.

By a policy provision and stipulation of the parties, the Court was bound by New York law. The New York cases, somewhat contrary to the general rule, hold that the proof of loss requirement is to be strictly construed. Mrs. Witte, however, relied on a New York statute which provides that policies must contain a clause extending the ninety day period where compliance is not "reasonably possible." She argued that since she was in poor health from the time of her husband's death until after the criminal trial and was unaware of the policy requirements, it had not been "reasonably possible" for her to file proof of loss within the required period. In response, the insurer

(Footnote continued from preceding page)

is aware of the fact that she is beneficiary of the policy within the time prescribed for the filing of that proof of loss... but... we must believe that no one in this same firm of lawyers advised her that they had a proof of loss." Appellant's Petition for Rehearing at 7, Commercial Travelers Mut. Accident Ass'n v. Witte, 406 S.W.2d 145 (Ky. 1966).

The insurer also argued that Mrs. Witte was not entitled to the policy proceeds since she "intentionally" killed her husband. The Court dismissed this argument, however, stating: "We do not find any authority... suggesting that the policy of law forbidding one who had intentionally killed another to collect the insurance on his life applies to an unintentional homicide..." 406 S.W.2d at 149.

MacKay v. Metropolitan Life Ins. Co., 281 N.Y. 42, 22 N.E.2d 154 (1939). Relying on this case, the Court originally decided in favor of the insurer. The decision has not been reported but may be found in the Appendix to the Appellee's Petition for Rehearing, filed January 3, 1966 with the Clerk of the Court of Appeals. Rehearing was granted and the Court reversed their original decision with Chief Justice Palmore writing for the majority. The Court was split 5 to 2, Montgomery and Hill, J.J., dissenting.

N.Y. INSURANCE LAW § 164(3)(A)(7) (McKinney 1951) provides: Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as is reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

The "Findings of Fact" in the lower court stated: "That in any event proof of loss was furnished by the plaintiff as soon as was reasonably possible and that all conditions precedent required of said contract were fully performed." Appellee's Petition for Rehearing at 7. This finding was based on evidence introduced at the trial which showed that Mrs. Witte suffered severe emotional shock, required hospitalization, was unable to care for herself, and required continuous medical attention. Appellee's Petition for Rehearing at 6-7.
cited another section of the same statute which provides a five year period in which policies not containing the "reasonably possible" clause could still be used. Since the policy issued to Witte came within this period, the company argued that the "reasonably possible" clause did not apply.

The Court sidestepped this issue entirely, however, and, applying Kentucky law, found a waiver:

It is not necessary . . . that we decide the question of whether Mrs. Witte's proof of loss was timely submitted, because it is our conclusion that under the circumstances of the case, the requirement should be considered as having been waived by the company . . . It is our view that the company's deliberate failure to send the necessary forms to Mrs. Witte coupled with its promptly causing an independent investigation to be made on its behalf, did amount to an implied waiver of the requirement, or if not technically a waiver, an estoppel.

One's view of this case depends largely on his view of the proper role of insurance in society and of the Court in insurance disputes. Those who are "result" oriented will find the decision in Commercial Travelers consistent with the principle that policies should be con-

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92 Ch. 630, § 7 [1951] New York Acts (expired 1956) provided:
This act shall take effect July 1, 1951. A policy . . . which could have been lawfully used . . . immediately before the effective date of this act may be used . . . during five years after the effective date of this act without being subject to the (reasonably possible) provisions of subsections two or three of section 164.

93 In his first opinion in this case, Judge Palmore stated: "We cannot believe that the legislature of New York intended to permit new policies not in conformity with the requirements of the 1951 Act to be issued for a period of five years thereafter." This statement was deleted from the final opinion but may be found in the opinion printed in the Appendix to Appellant's Petition for Rehearing, Red July 29, 1966 with the Clerk of the Kentucky Court of Appeals. The reason for the deletion may also lie in this Appendix i.e., Commercial Travelers produced two documents, certified by the New York Superintendent of Insurance, which demonstrated conclusively that the New York Legislature did in fact intend to permit new policies not in conformity with the statute to be issued for a period of five years. Appellant's Petition for Rehearing, Appendix at 23-28.

94 The proof of loss provisions make it clear that the claimant is required to provide proof regardless of whether the insurer provides the necessary forms; thus, it is difficult to see how such failure could constitute a waiver of the requirement. See note 86 supra.

95 406 S.W.2d at 148-49. As authority for this holding, the Court cited Fidelity & Guar. Ins. Underwriters, Inc. v. Gregory, 387 S.W.2d 287 (Ky. 1965). That case held that the actions of an adjuster could estop the insurer from denying coverage because of failure to file proof of loss, even though the adjuster was not authorized to waive the requirement. The Court went on to suggest in Commercial Travelers that "an investigation alone, quite apart from a failure to furnish proof of loss forms, may be sufficient to constitute a waiver," citing 14 G. Couch, supra note 63, at 49:872. It is interesting to note that although the Court was bound by New York law, it cites no New York cases to support this "waiver" theory. Couch cites no New York cases to support his statement, though some states have apparently held that an investigation will estop the insurer from denying coverage.
strued against the insurer. This allows insurance to function as an effective loss-spreading device. Those whose sympathies lie with the insurance companies may agree with the appellant that this decision is a “complete mockery of the law . . . a complete travesty of justice.”

Beyond these individual biases, however, there is one criticism which must be made: the Court failed to provide a clear justification for its result and thereby failed to provide guidelines for future litigation. The Court acknowledged that it was bound by New York law. Yet in deciding the case on the waiver/estoppel theory, it cited no New York cases and relied entirely on one Kentucky case and “some authority” from a treatise on insurance. As is noted in the dissent and the appellant's petition for rehearing,97 such secondary authority is not controlling since the New York courts have ruled on this point. In Bland v. Trevett,98 the beneficiary cooperated fully with an agent of the insurer during an investigation of the claim. The company had complete knowledge of the accident, but the beneficiary did not comply with the proof of loss requirement; the court rejected her argument that the company was estopped to deny that proof of loss was timely furnished: “Neither the doctrine of estoppel nor the public policy of liberal construction can be invoked in support . . . [of this] position.”99 One is inclined to agree with the appellant: “It is a complete travesty of justice to rewrite the law of New York without any New York authority or case law. . . .”100

The refusal to apply New York law might be explained by the “public policy” of liberal construction in favor of the beneficiary. Yet when Commercial Travelers is contrasted with Colonial Life & Accident Insurance v. Wagner,101 the inconsistency is apparent. On the one hand the Court stretched the law to find for the beneficiary, on the other it stretched the law to find against the beneficiary. From a policy standpoint, the innocent beneficiary in Wagner would seem to deserve more protection than the beneficiary in Commercial Travelers. Again turning to the appellant's petition, “[C]ertainly neither equity nor justice compel this Court to protect a woman who killed her husband.”102

The dissent suggests the underlying reason for the Court’s decision:

96 Appellant’s Petition for Rehearing at 7-8.
97 406 S.W.2d at 149-51; Appellant’s Petition for Rehearing at 6.
99 Id. at 536, 256 N.Y.S.2d at 646.
100 Appellant’s Petition for Rehearing at 7-8.
101 380 S.W.2d 224 (Ky. 1964). This case is discussed in depth, see text at notes 70-81 supra.
102 Id.
Evidence that ... [Mrs. Witte] was the beneficiary of a $10,000 insurance policy on the life of the man whom she was charged with killing would have been evidence of a motive and would have been condemning. ... The further significance of this is that there was a serious question whether ... [Mrs. Witte] could have collected as beneficiary under the policy if she had been convicted of the felony [voluntary manslaughter]. ... This accounts for the delay for which [the insurer] should not be charged and which is not justified under the New York law.¹⁰³

Thus, the decision in this case may be interpreted as indicating the Court thinks it was reasonable to delay filing proof of loss until the outcome of the criminal trial was known. This is a debatable point, on which the minds of reasonable men may, and obviously do, differ. The point is, however, that the Court should explain its reasons for decisions such as Commercial Travelers and Wagner. The debate should be set out in the opinion and should not be left to conjecture. The legal profession needs to know not only what was decided, but how and why. Only through a straight-forward presentation of issues, answers, and reasons can a realistic, effective legal structure for resolving conflicts and contributing to the progress of society be established.

¹⁰³ 406 S.W.2d at 150.
XIII. LABOR LAW

The major labor cases decided last year by the Kentucky Court of Appeals fell into a discernable pattern. Though the specific fact situations differed, the common theme was that individuals were attempting to secure legal protection of job status against "economic invasions of personality." Individual job status is crucial to an employee's economic, social, and personal standing in the community, and the broad statutory framework of our labor laws places upon the courts a duty to define in concrete cases how that job status will be protected. This is accomplished by expanding or narrowing the duties of employers and labor unions to the individual worker.

Some of our labor laws, such as the minimum wage acts, deal directly with the employer-employee relationship. These place duties on the employer which he cannot contract away. Other labor laws, such as the Labor Management Relations Act [hereinafter referred to as Taft-Hartley Act], introduce a third party, the labor union, into the employment relationship. The employer and the union largely define by contract the duties of the employer and the rights of the individual. While the union represents a large group of workers, the courts have placed a broad general duty of fair representation on the union to protect the individual. Since the individual is not a party to the collective bargaining contract, courts have a theoretical difficulty justifying the protection of individual rights, especially when these rights have been bargained away. In struggling with the employer-employee-union relationship, the Kentucky Court of Appeals has been unable to add any protection to individual status. However, the Court has had little difficulty expanding such protection when only the employer-employee relationship exists.

A brief survey of the labor movement will place the struggle for individual rights recently appearing before the Court of Appeals in its proper perspective. Nineteenth century America was characterized by individual action. People carved out their own rights and duties through contract, with courts generally limited to interpreting and enforcing this private law-making. When it became apparent that the equal bargaining power between employers and employees had dis-

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1 Affeltdt, The Right of Associations and Labor Law, 7 VILL. L. REV. 27 (1961). "Status" describes a body of rights, disciplines, and immunities governing individual workers by virtue of their membership in or representation by labor unions (or other collective groups). F. TANNENBAUM, A PHILOSOPHY OF LABOR 140 (1951).


3 Statutory limitations were sometimes placed on one party. See, e.g., Sherman Anti-Trust Act, 15 U.S.C. §§ 1-2 (1890).
applied, Congress, to promote industrial peace and stability, adopted the group balance of power concept as a method of protecting individuals.\(^4\) Status was given by law to a group spokesman, the labor union,\(^5\) and this power unit was given the right to assert its own group interest. Although the individual has a strong personal and vested interest in his job,\(^6\) necessity caused individual rights to become subservient to the group interest represented exclusively by the union.\(^7\) The majority interest was found superior to the individual's job status, even though a basic purpose of the new labor legislation was to protect individual job status.

Thus, the union movement helped create a Twentieth century based upon status protected by law, while destroying a society based on individual contract. One authority has compared this "relationally organized society" to the feudal system of the middle ages, where everyone was "economically interdependent" and all had reciprocal duties.\(^8\) However, this collective society is imperfect. Imperfection exists in the conflict of rights within the employer-employee-union relationship. One outgrowth of this conflict is to propagate poverty status and its accompanying government subsidy.\(^9\) There are certain legally defined duties and rights, e.g., welfare, attached to poverty status. When a person relinquishes this status he necessarily gives up the accompanying rights. When he assumes a job status, however, he gains duties and rights which are poorly defined, and on which he cannot depend. Therefore, many people would prefer to remain in poverty status where there is greater security. To eliminate this condition, collective job status must be defined by the courts to provide concrete, dependable duties and rights.

In spite of the predominant position the group interest occupies, there are some individual rights still available to union members.\(^10\) The individual employee has a statutorily vested right to present his grievances to his employer for determination when the union declines

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\(^8\) Pound, *supra* note 7.


\(^10\) It has been suggested that the combined power of unions and employers, cooperating to pass on the cost of agreement to consumers, is so great that future legislation limiting that power may be politically impracticable. Wirtz, *Government by Private Groups*, 13 *La. L. Rev.* 440 (1953).
to pursue his complaint. However, the employee must first attempt to process his grievance through the procedure established by the collective bargaining contract. The complainant, if he alleges a breach of the contract and not a mere grievance, may also sue the union pursuant to the Taft-Hartley Act. Before the individual has a cause of action against the union, however, it must have breached a representative duty. Since the union is the exclusive bargaining representative, it has a duty to exercise the power conferred on it fairly and without discrimination. Thus, the union is not barred from making a contract which might have unfavorable effects on some members, but the variation in treatment must be based on such relevant factors as group welfare, the merits of the claim, and the future implications of the settlement. It is believed that this duty of fair representation is the most workable standard of control over union action toward its members because it allows flexibility and self-determination.

Kentucky examined the duty of fair representation in Ball v. Eastern Coal Corp., to decide whether the union acted in good faith when it made an agreement with management affecting employee's seniority rights. Eastern operated two adjacent mines independently of each other, and the employees of each mine had their own United Mine Workers local [hereinafter referred to as UMW]. Eastern subsequently connected the two mines by underground haulway and operated them as one. Since the union constitution prohibited two locals in one mine, one of the locals was incorporated into the other. The UMW determined that seniority of the men of both locals would depend on their hiring date, and that the men of the dissolved local would not be treated as "new men." The men of the old, surviving local protested and appealed to higher authority in the union, but they received no relief.

When Eastern was forced to lay off workers, some of the employees from the original local were layed off before some of the employees of the dissolved local. These employees requested the UMW to file a grievance for violation of their seniority rights, but the UMW refused

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16 Cox, The Duty of Fair Representation, 2 VILL. L. REV. 151 (1957); Cox, Rights Under a Labor Agreement, supra note 6, at 601.
17 415 S.W.2d 620 (Ky. 1967).
to recognize the grievance. Suit was brought against Eastern for breach of contract regarding seniority rights. The UMW was also sued for breach of its fiduciary duty to present grievances. The Court held that dovetailing the seniority rights was neither a violation of the union's fiduciary duty nor the contract:

There being neither fraud nor bad faith, as bargaining representatives for its members, the union had the right and power to resolve this purely intra-union problem and in the course of so doing, to effect an agreement with Eastern either interpreting or amending the contract accordingly.\(^1\)

Since the employer agreed, no grievance proceeding was required. Moreover, the Court found, "it is quite clear that the union did not in any sense fail in its duty of fair representation."\(^2\)

This decision adds little substantive content to the union's general duty, and it leaves the employee less secure and certain of the nature and extent of his rights. The Court relied heavily on Ford Motor Co. v. Huffman,\(^2\) where provisions of a contract were altered by the union so as to give seniority greater than the plaintiff's to certain employees, even though they were employed at Ford after he was. The newer employees were credited with seniority based on their prior military service. The United States Supreme Court held that

the complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.\(^2\)

The Supreme Court did not define what specific conduct constituted "good faith" and "honesty of purpose." As to the issue of fair representation, Humphrey v. Moore\(^2\) was cited as controlling. In that case two employee groups were merged as a result of the merger of two employers, and the Supreme Court said:

\(^1\) Id. at 626. A bargaining representative may alter or amend seniority rights secured both by contract and statute. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

\(^2\) 415 S.W.2d at 626.

\(^3\) 345 U.S. 330 (1953).

\(^4\) Id. at 338. See also Note, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L.J. 1215 (1964), where it was stated:

Yet it may be questioned whether the group representative is suited by temperament or design to strike the balance between individual or group interests, for the bargaining representative has a concern for solutions most beneficial to the majority of the union members, and beyond that a concern for the institutional interests of the union.

\(^5\) 375 U.S. 345 (1964). Before it was reversed by the Supreme Court, the Kentucky Court decided Humphrey by placing a duty on the group. Moore v. Local Union No. 89, 356 S.W.2d 241 (Ky. 1962). The Kentucky Moore decision was contrary to this case and in line with policy in the minimum wage cases. See notes 30, 36, and 39 infra.
We are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process.23

The real argument in *Ball* as to preferred seniority rights is between the union and its members. The Court of Appeals refused protection of individual job "rights" and supported the group's right to alter the status of minority group members—thus, denying seniority "rights" of some while advancing the seniority "rights" of others. Therefore, the job "rights" of the individual depend on the amount of political pressure or status he can generate within the union.24 His rights are protected only if he belongs to the most powerful group within the union. Hence, within the union, the member's status is gained by the old freedom of contract method, and the protections afforded by collective bargaining are not available. Nor is there adequate statutory protection placed upon the union by the vague general duty of fair representation.

In *Ball* the Court made no attempt to define more concretely the reciprocal duties and rights of the parties. It can be argued that, because mobility of labor, no less than mobility of capital, is a necessary condition of an expanding economy,25 this was not the proper case to place content in the duty of fair representation. However, seniority is a socio-economic problem to be determined by the employer, union, and employee, each having a protectable status. It is up to the Court to define the status and protect the individual without weakening the collective power. This could have been accomplished by the Court holding that dovetailing seniority is the only acceptable method of protection of vested job rights when there is merger. The union should

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23 375 U.S. 345, 349 (1964). Seniority rights acquire a legal status of their own, and may be enforced even after expiration of the agreements which created them. Zdonok v. Glidden, 370 U.S. 530 (1962); see Note, Seniority Rights in Mergers, 52 Iowa L. Rev. 95 (1966).
25 Pound, supra note 7. It has been said "the very concept of seniority is doomed to extinction, because the economic system upon which it is based is even now in the process of fundamental and irrevocable change. . . . The rapidity of technological change strongly suggests that the average employee in the immediate future will have to change jobs at least several times during his working life." Aron, Reflections On The Legal Nature And Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962).
never be allowed the opportunity of capriciously and arbitrarily "horse trading" vested job rights under the guise of fairly adjusting the interests of competing groups within the union.

In Armco Corp. v. Perkins\textsuperscript{26} a minority group of individuals, dissatisfied with union protection of their interests, attempted self-help by picketing the employer. This was in violation of a no-strike clause in the collective bargaining agreement, and the Court enjoined the picketing. The right of concerted action given employees by the Taft-Hartley Act\textsuperscript{27} was taken from the minority by contract. The Court found a duty to submit to the group interest, but once again no corresponding duty of the group to the individual was defined.

Wheeler v. P. Sorensen Manufacturing Co.\textsuperscript{28} provides a novel reaction by an individual caught in the power struggle between the collective powers. The case was a suit for invasion of privacy against the employer who published the plaintiff's pay check in an effort to show other workers that they did not need the union to earn high wages. The Court held this was not such a disclosure of private facts as to be unwarranted and unreasonable to the ordinarily sensitive person since the matter was of interest to the group in selecting a group representative.\textsuperscript{29} This case might indicate that most individual rights must succumb to the efficiency of our modern collective society.

In three cases certain statutory duties were attached to the status of the employer in order to protect the employee's job status. They involved no third party collective representative to establish duties by contract. Hence, there was no conflict between individual status rights and group status rights. Status was directly given and protected by statute. In Owens v. Clemons\textsuperscript{30} a waitress sued her employer for wages under a mandatory wage order issued by the Commissioner of Labor.\textsuperscript{31} There was an arrangement by which the employer had agreed to furnish the employee free meals, but it was not in writing as required by the wage order. The Court refused to allow the employer to add the value of the meals to the compensation paid in determining the extent of underpayment even though the meals were considered a form of compensation. Such an unwritten agreement is "exactly what . . .

\textsuperscript{26} 411 S.W.2d 935 (Ky. 1967).
\textsuperscript{27} 9 U.S.C. § 157 (1947).
\textsuperscript{28} 415 S.W.2d 582 (Ky. 1967).
\textsuperscript{29} This case is also discussed \textit{infra} section XVII, at notes 76-88.
\textsuperscript{30} 408 S.W.2d 642 (Ky. 1966).
\textsuperscript{31} 3 Ky. ADMN. RE., Labor 41 (1966). KRS § 337.270 (1962): "Persistent nonobservance . . . is a threat to the maintenance of fair minimum wage standards in any occupation . . . the commissioner may make . . . the order or any part of it mandatory."
the Minimum Wage Order expressly prohibited.”\textsuperscript{32} This decision is consistent with the policy of the statute and prevents the employer from contracting out his statutory duties.

A secondary issue in \textit{Owens} was the constitutionality of a statute allowing the plaintiff a reasonable attorney’s fee.\textsuperscript{33} This statute was upheld because “the general assembly was justified in prescribing special working conditions and protective provisions for this class of workers.”\textsuperscript{34} Ordinarily, economic regulations are voided only if they are “so lacking in justification as to constitute an arbitrary exercise of legislative power or to deprive the employer of his property without due process of law.”\textsuperscript{35} However, the Court found that social purposes were served by allowing the successful claimant to recover an attorney’s fee in this type of case. In this case the Court expanded the scope of the employer’s duties by specific definition and protected job rights, thus, giving specific content to a general statutory duty.

In \textit{Cabe v. Kitchen}\textsuperscript{36} the issue was whether the Commissioner of Labor could require production of existing payroll records for inspection when, by statute, employment records for women or minors need only “be kept on file at least one year after entry.”\textsuperscript{37} The Court held that the “at least one year” limitation was a “minimum standard,” which did not limit voluntary retention beyond the period, and, “therefore, could not be a limitation upon [the Commissioner’s] right of inspection.”\textsuperscript{38} Therefore, if the records are in existence they will have to be produced. There is no statute of limitations on the right to sue for violations, so why limit to one year the principal means of proving a violation, \textit{i.e.}, inspection of records. The Court expanded the scope of the employer’s duty when it might have strictly construed the statute just as easily.

\textit{Cabe v. Eubanks}\textsuperscript{39} held that when an audit by the labor department to ascertain compliance with the minimum wage order reflects indebtedness to past and present employees, the department may not be enjoined from holding a hearing and subpoenaing employees as witnesses, even though it causes the employer some inconvenience. The Commissioner has “the statutory right to hold the hearings, and

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\textsuperscript{32} Owens v. Clemons, 408 S.W.2d 642, 644 (Ky. 1966).
\textsuperscript{33} KRS § 337.360 (1962).
\textsuperscript{34} W. W. Mac Co. v. Teague, 180 S.W.2d 387, 389 (Ky. 1944). KRS § 337.360 was amended in 1966 to cover “all employees.”
\textsuperscript{35} 408 S.W.2d at 646. See Burns v. Shepherd, 264 S.W.2d 685 (Ky. 1954) for violation of the constitution.
\textsuperscript{36} 415 S.W.2d 96 (Ky. 1967).
\textsuperscript{37} KRS § 337.320 (1962).
\textsuperscript{38} Cabe v. Kitchen, 415 S.W.2d 96 (Ky. 1967).
\textsuperscript{39} 411 S.W.2d 334 (Ky. 1967).}
the completion of the audit did not constitute an exhaustion of his statutory prerogatives. In any event, the extraordinary remedy of injunction was not warranted. No irreparable damage would have resulted from the employees missing work for the hearing, and the right of appeal furnished an adequate remedy at law. The Court found the employment duty superseded the property rights of the employer.

The Court protected the individual in the minimum wage cases against arbitrary economic power by restricting that power through legally imposed duties. However, when faced with the collective representation status, the Court allowed the economic power to contractually establish its own rights and duties, and then, refused to protect the individual against abuse of the contractual power. Only by placing more concrete duties on the collective representative will job status be appealing to potential workers and protective to present workers.

\textsuperscript{40} Id. at 335.
XIV. MUNICIPAL CORPORATIONS

A. ANNEXATION

 Included among the statutory requirements for annexation\(^1\) is a remedy whereby residents and freeholders of territory to be annexed can protest the proposed action. This remedy is a remonstrance proceeding,\(^2\) and it culminates in a jury trial affording an aggrieved party the usual avenues of appeal. Briefly, the format for perfecting a remonstrance proceeding is as follows: Within thirty days after a city has enacted an ordinance proposing to annex certain territory,\(^3\) one or more residents of that territory may file a protest petition with the county’s circuit court setting forth the reasons why the land should not be annexed. Once the petition has been filed and the city has been given an opportunity to answer, a jury trial will be held to determine whether the proposed annexation should be approved. Should it be proven that seventy-five per cent of the area’s residents protest,\(^4\) annexation will be denied unless the evidence indicates that a failure to annex will materially retard the city’s prosperity.\(^5\)

 Last term’s decision in *City of St. Matthews v. Arterburn*\(^6\) involved a unique fact situation. Most appeals by aggrieved remonstrants contain an allegation that the annexing city failed to adhere to a statutory requirement. However, in *City of St. Matthews*, the alleged violation by the City involved circumstances not touched upon by legislation.

 St. Matthews is located in a county containing a first class city, and because of this, it must give notice to the county’s fiscal court of any ordinance proposing the annexation of property.\(^7\) By the terms of the statute, failure to give the required notice renders the ordinance void.\(^8\) St. Matthews mailed a letter to the Jefferson Fiscal Court giving notice

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\(^1\) Provisions for annexations are found in KRS §§ 81.100–290 (1962).

\(^2\) A remonstrance proceeding is defined as “a representation made to a court or legislative body wherein certain persons unite in urging that a contemplated measure be not adopted or passed.” Black’s Law Dictionary 1459 (4th ed. 1951). The word “remonstrate” is also specifically mentioned in KRS § 81.110 (1962).

\(^3\) KRS § 81.100 (1962) specifically declares that a city must first enact a proposing ordinance before the annexation ordinance is passed.

\(^4\) The percentage of protesting residents needed to void a municipality’s annexation proceedings varies according to the class of city attempting annexation. While KRS § 81.100 (1962) (authorizing annexation for first class cities) requires seventy-five per cent, only fifty-one per cent of the residents need to protest under KRS § 81.140 (1962) (authorization for annexation by cities of the second class).

\(^5\) KRS § 81.110 (1962). In essence this is the manner in which protesting residents or freeholders may remonstrate.

\(^6\) 419 S.W.2d 730 (Ky. 1967).

\(^7\) KRS § 81.290(1) (1962).

\(^8\) Id.
of the proposing ordinance in 1961, but it waited five and one-half years before the ordinance to annex was executed. The remonstrance proceeding was initiated with the remonstrants claiming that the delay was unreasonable since the composition of the fiscal court in 1960 and 1965 could vary, and, if so, the present court might not have had notice of the proceedings.9

The trial court dismissed the city's petition for annexation on grounds that the lapse of five and one-half years constituted an unreasonable delay. On appeal, the Court reversed, finding error in the dismissal of the city's petition without a hearing at which either the city would have the opportunity to explain the delay, or the remonstrants could demonstrate why they were prejudiced by the lapse of time.10 The Court indicated that in the absence of a statute fixing a time limitation, it is not empowered to legislate by imposing an arbitrary time limit.11 It stated that the rule required only that annexation proceedings be accomplished within a reasonable time.12

In a vigorous dissent, Judge Osborne found no reason to disturb the findings of the lower court. In declaring that St. Matthews' proposing ordinance was void without a hearing, he declared that courts should consider a municipality's continuity of action, reasoning that any delay which is so geared that public attention to the proceeding is lost, defeats the purpose of public notice and is unreasonable. Osborne stated:

The public has a right to know when action is to be taken upon an ordinance. Accordingly, where an ordinance is unduly stayed in its progress to final passage, as in the case of a failure to take action on it at the time to which it has been continued, it dies. Continuity is broken when a measure is considered at a regular meeting to which it has previously been laid over and where the adoption of the measure is deferred at such regular meeting, which adjourns, without the measure being continued over to a fixed day.13

He concluded by stating that the delay of five and one-half years be-

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9 Although the Jefferson County Fiscal Court is named an appellee along with the remonstrant, Arterburn, it is evident that the Fiscal Court did not protest the annexation by St. Matthews. 419 S.W.2d at 731.
10 Id. at 732.
12 Id., citing McClain v. City of Independence, 351 S.W.2d 512 (Ky. 1961), where a lapse of two years between the enactment of a proposing ordinance and an annexing ordinance was held not to void the annexation.
In his dissent, Judge Osborne attacks the credibility of this case because no authority was cited by the Court. A reading of McClain indicates that the remonstrants made no effort to supply the Court with any authority that a two year lapse was unreasonable. McClain v. City of Independence, supra, at 518.
13 419 S.W.2d at 734, citing 5 E. McQuillen, supra note 11, at § 16.73.
tween the notice to enact and the enactment defeated public notice and voided the proceedings.

While the dissenting opinion is the more appealing position at first glance, careful analysis of Judge Osborne's reasoning indicates that he has failed to meet the issue squarely. He would void the entire annexation without the aid of a hearing. But how can a circuit court determine whether public attention to an annexation proceeding has been lost when there has been no hearing at which this evidence can be gathered? Distilled of any surplusage, then, Judge Osborne seems to indicate that a delay of five and one-half years is unreasonable per se.\textsuperscript{14}

While the majority is doubtless correct in refusing to impose an arbitrary time limit in the absence of a hearing, this does not mean, however, that the dissenting opinion is without merit. Indeed, the dissent has supplied valuable and objective criteria for future courts to apply in determining, \textit{at a hearing}, whether a delay such as that presented here is reasonable.\textsuperscript{15}

Here the facts were somewhat simple: only one person owned the entire land to be annexed. In the future, however, the circumstances may be more involved. It is not difficult to envision a tract of territory occupied by many persons, with innumerable conveyances among hundreds of parties. This state of facts would undoubtedly prejudice the new purchasers' right to know of pending annexation proceedings. In such an instance, Judge Osborne's dissent can be of real value at the hearing. The objective criteria applied at hearings in other jurisdictions\textsuperscript{16} should be valid considerations for future courts to follow.

\textbf{B. Franchise}

Kentucky cities today are faced with the acute problem of providing satisfactory ambulance service for their citizens. It is presently as essential as any public utility, but, in recent years, many cities have been plagued with inadequate service. In the past, funeral establish-

\textsuperscript{14} While the dissent does not specifically state that a delay of five and one-half years is unreasonable per se, the following portion is indicative of Osborne's position:

\textit{It is my opinion that municipal councils should follow a certain continuity of action so that the public can be continually apprised of the proceedings before it [sic]. A delay of 5\\textfrac{1}{2} years in the enactment of an ordinance from notice of its initial introduction seems to me unreasonable. Id. at 734.}

\textsuperscript{15} See text \textit{supra}, at notes 12-14, for a discussion of Judge Osborne's criteria.

\textsuperscript{16} 419 S.W.2d at 733, citing Bass v. City of Chicago, 195 Ill. 109, 62 N.E. 913 (1902); DeVincento v. Town of West New York, 120 N.J.L. 541, 1 A.2d 36 (1938); Farish v. Linwood City, 12 N.J.L. 285, 170 A. 249 (1934).
ments were capable of supplying ambulance service at a profit. Today, many factors, including the high cost of the vehicle, its specialized equipment, and insurance, have combined to make it unprofitable for them to maintain adequate service. High cost of operation may also cause severe competition for business, often leading to nefarious practices such as collusion by ambulance services with wrecker services. The end product of these cutthroat practices may be one surviving ambulance business, offering whatever type of service it chooses.

At least one Kentucky city has taken steps to alleviate the problem. The city of Owensboro, in 1964, adopted an ordinance requiring a franchise for the operation of an ambulance service within the city. A franchise was duly awarded to the highest bidder, Community Ambulance Service.

In *Ray v. City of Owensboro*, Al's Ambulance Service, an unlicensed corporation, tested the franchise. After delivering a patient to an Owensboro hospital, the owner of the service was arrested and fined twenty-five dollars. The Service then sought to enjoin Owensboro from enforcing the ordinance, but the injunction was denied by the Daviess County Circuit Court and appeal was taken. The Service alleged that the city had no constitutional or legislative authority to enact the ordinance because the operation of an ambulance service was not a proper subject for franchise by a governmental authority. The Court of Appeals, however, affirmed the circuit court and held that sufficient authority existed in the Constitution alone to uphold the ordinance.

Franchises have long been a means by which urban communities have controlled businesses. The Court pointed out that the right of...
a Kentucky city to grant a franchise emanates from the Kentucky Constitution, and although ambulances are not therein specifically enumerated as being a proper subject of franchise, the interpretation which the Court has given the Constitution renders this possible.

(Footnote continued from preceding page) privilege or branch of the King's prerogative, subsisting in the hands of a subject.” . . . In American law, a franchise is defined as a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right. It is immaterial whether the grant is made directly by the legislature or by a municipality to whom the power is delegated. The term “franchise” includes the term “privileges,” but a privilege is not necessarily a franchise. The municipal corporation in granting such privileges acts as the agent of the state, in this way, representing the state's sovereign power. When granted, a franchise becomes property in the legal sense of the word by virtue of a contractual right and is termed an incorporeal hereditament, both separate and distinct from the property necessary in its use and exercise.

20 Ky. Const. § 163:

No street, railway, gas, water, steam heating, telephone or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys of public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith has been begun thereunder, the provisions of this section shall not apply.

Ky. Const. § 164:

No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for any term exceeding 20 years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly and award same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

21 In People's Transit Co. v. Louisville By., 220 Ky. 728, 295 S.W. 1055 (1927), the Court liberally construed Section 164 of the Constitution to include a bus company although busses were not specifically mentioned. In that case, the Court held:

[W]e are convinced that the all-inclusive language of Section 164 of the Constitution is not only broad enough to, but that its terms do include all intra-urban franchises conferring the right of an extraordinary or privileged use of the streets or other public ways of the city, regardless of the means employed in rendering the service, provided such user is one of the permanent nature contemplated by that section. Id. at 735, 295 S.W. at 1058.

In many other cases involving the interpretation of Sections 163 and 164, the Court has adopted a liberal approach as to what may be the subject of a franchise. See City of Bowling Green v. Davis, 313 Ky. 203, 250 S.W.2d 909 (1950) (garbage collection); Adams v. Burke, 308 Ky. 722, 215 S.W.2d 531 (1948) (taxicabs); Willis v. Boyd, 224 Ky. 732, 7 S.W.2d 216 (1929) (extraction of sand and gravel from river bed); Irvine Toll Bridge Co. v. Estill Co., 210 Ky. 170, 275 S.W. 634 (1925) (toll bridge).
The precise issue in this case, whether a private ambulance service may be the subject of a franchise, has little case precedent. However, in several cases cited by the Court it has been held that where the public streets are used for transporting persons for a fee, the state has a right to exert control over those parties so engaged. Ambulances clearly fall within this category.

Cities have a responsibility to their citizens to see that they are provided with services adequate to meet their needs. Thus, if city officials deem it necessary to franchise ambulance service in order to insure the quality of that service, the city is justified in doing so. By issuing an ambulance franchise, the city can guarantee that the service provided will be qualified, efficient, and reasonable. Arguments that such action by the city prohibits competition and is bad for the free enterprise system should not prevail. One of the reasons why ambulance service is often inefficient, unqualified, and unreasonable is that excessive competition has resulted in poor, and in some cases,

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22 The only other reported case involving the franchising of ambulance services is Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E.2d 498 (1962), wherein the court held that under Georgia law, the city was properly enjoined from enforcing a franchise ordinance to the extent that it purported to grant an exclusive franchise to operate ambulances within the city.

In the case at bar, the appellant alleged that the Community Ambulance Service had an exclusive franchise. The city responded by stating that the appellant had made no application for franchise. Since the appellant apparently had not applied for a franchise, there was no occasion for the Court to rule on the constitutionality of an exclusive one.

23 In Adams v. Burke, 308 Ky. 722, 723-24, 215 S.W.2d 531, 532 (1948), the Court stated:

[I]t must be conceded that the utilization of streets in the transportation of persons for hire is not an ordinary use to which all members of the public have a common right, but is an extraordinary use subject to regulation by the controlling public authority.

In Slusher v. Safety Coach Transit Co., 229 Ky. 731, 733, 17 S.W.2d 1012, 1013 (1929), the Court declared that:

[Highways belong to the public, but are primarily for the use of the public in the ordinary way. Their use for the purposes of private gain is special and extraordinary and, in general, may be restrained, prohibited, or conditioned as the legislative power may prescribe.

See generally 25 AM. JUR. Highways § 193 (1941).

24 In Ray v. City of Owensboro, the Court described the franchise issued to Community Ambulance Service, Inc. as follows:

The said Community Ambulance Service, Inc., shall at all times during the franchise period have a minimum of two ambulances available for service, together with the necessary qualified personnel to operate same. Reasonable charges only may be made for such ambulance service and no person shall be reasonably refused such service. 415 S.W.2d at 78.

25 This was one of the appellant's arguments. He contended that the franchise issued by the city was exclusive and that the city would not issue him a franchise to operate therein. The city responded by asserting that he had made no application.

26 See note 24 supra.
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no service. As recognized by the Court, regulation by the cities is the proper remedy for this problem.

C. ZONING

Control of billboards has long concerned state, county, and municipal governments. Prior to 1958, the federal government did not play a major role in billboard regulation, leaving the matter primarily to the states. The states responded by enacting regulatory measures aimed at providing greater highway safety. But in the mid-1950's there was a general opinion in Congress that something should be done to control outdoor advertising along the interstate highway system. Since the interstate network was essentially national in character, the federal government took the lead in encouraging uniform regulations designed to promote the safety, beauty, and maximum usefulness of the system.

The Federal-Aid Highway Act of 1958 was passed, offering financial incentive to states which chose to regulate billboards in accordance with prescribed standards. In order to take advantage of this fund, Kentucky passed its own Billboard Act in 1960.

However, those persons with vested interests in commercial advertising strongly resisted such regulation, and litigation over the constitutionality of many statutes passed pursuant to the federal act was prolonged. As a result, the Federal-Aid Highway Act did not

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27 These laws would often forbid the imitation of official signs such as those designating railroad crossings. Other signs proscribed included those placed on the right-of-way of public roads, signs placed on private property without permission of the owner, and signs obstructing the view of any portion of a public road. Additional requirements were the licensing of billboards, the issuance of permits and space regulations. Many states had distance limits along public highways, within which billboards could not be erected.

For further information regarding the history of billboard regulation prior to 1958, see HIGHWAY RESEARCH BOARD, SPECIAL REPORT No. 41, OUTDOOR ADVERTISING ALONG HIGHWAYS (1958); and ILLINOIS LEGISLATIVE COUNCIL, PUBLICATION No. 133, HIGHWAY BILLBOARD CONTROL (1958).


29 The standards prohibited signs visible from the road and within 600 feet of the edge of the right-of-way. There were exceptions, however, for signs advertising the sale of property, official directional signs, signs providing information to the traveling public, and other similar signs. See Comment, 46 CALIF. L. REV. 796 (1958) for a complete discussion of the Federal Aid Highway Act of 1958.

30 KRS §§ 177.880-.890 (1963) was patterned after the Federal Aid Highway Act and delegated power to the Commissioner of Highways to adopt regulations providing certain standards for billboard control. The Commissioner was authorized under KRS § 177.890 to enter into agreements with the United States Secretary of Commerce for the regulation of billboards.

31 Moore v. Ward, 377 S.W.2d 881 (Ky. 1964). In this case the Court of Appeals upheld the Billboard Act as a constitutional exercise of state police power.
achieve the anticipated benefits. Very few billboards were removed and little money was paid to the states under the bonus arrangements.\textsuperscript{32}

The Highway Beautification Act of 1965 was an attempt by Congress to alleviate the shortcomings of the 1958 Act.\textsuperscript{33} Although the previous statute was repealed, virtually the same zoning controls were retained.\textsuperscript{34} The important difference in the present statute is the method of obtaining the states’ cooperation. Instead of offering a bonus to those states adopting their own regulations, the Highway Beautification Act provides that if a state has not exercised effective control by 1970, its federal allocation for highway construction will be reduced by ten per cent.\textsuperscript{35}

\begin{itemize}
    \item \textsuperscript{32} See Hearings Before the Subcomm. on Public Roads of the Senate Comm. on Public Works, 89th Cong., 1st sess. 22 (1965).
    \item \textsuperscript{33} 23 U.S.C. § 131 (1964), as amended (Supp. 1, 1965).
    \item \textsuperscript{34} Id. Off-premise advertising signs still must be 660 feet from the edge of the right-of-way.
    \item \textsuperscript{35} U.S. Code Cong. & Ad. News 3712 (1965), citing 89th Cong., 1st sess. (1965):
\end{itemize}

Effective January 1, 1968, if a state has not acted according to the determination of the Secretary, to effectively control the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs displays and devices within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, then that state’s next annual apportionment of highway construction funds under Title 23 of the U.S. Code will be reduced by an amount equal to 10% of the amounts which otherwise would be apportioned to the State. This includes the State’s apportionment not only for the interstate and primary systems, but for the secondary system and the urban extensions thereon as well. Any amount which is withheld from apportionment to a State under this section must be reapportioned to the other states. Thus from the date of the enactment of this legislation until January 1, 1968, the states will have slightly more than 2 years to enact whatever legislation is necessary to amend their laws (including basic organic law) to make it possible for them to conform to this Act.

There is good reason to believe that enforcement may not be as strict as this interpretation would indicate. Shortly after passage of the Highway Beautification Act, the Bureau of Public Roads issued suggested enforcement standards that would have required the removal of 50,000 signs in commercial areas by 1970 and an additional 128,000 by 1973. Some states, including Kentucky, misinterpreted this “discussion draft” as a proposed unilateral regulation, and moved quickly to enact a strict law delegating wide zoning power to the Commissioner of Highways. See Tippy, Roads and Recreation, 55 Ky. L.J. 814-15 (1967) for a discussion of Kentucky’s statute.

Soon after these suggested standards were issued, angry protest from billboard lobbyists were heard. Under threat of rewriting the legislation, the House and Senate Public Works Committee forced the Secretary of Transportation to disregard the standards issued by the Bureau as a basis for negotiating agreements with the states. In essence, this means that states will be free to adopt whatever zoning laws they wish and the Transportation Department will be unable to question their decisions.

Kentucky, having already passed a “tough” billboard zoning law, is placed in an interesting position. Certainly the federal government is satisfied with this

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Moreover, the Federal-Aid Highway Act, as amended in 1959, had provided explicitly that the agreements entered into between the Secretary of Commerce and the State Highway Departments for billboard regulation would not apply to incorporated municipalities which were subject to municipal control. But the new Act provides that states shall have full authority to zone areas for commercial and industrial purposes. Thus, the states apparently are given the opportunity to effect billboard regulations superseding those of a municipality. In addition, the Act granted the states power to impose stricter limitations regarding billboard control than those imposed by the federal act.

Against this background, the Kentucky Legislature enacted the Billboard Act of 1966. This statute, amending the 1960 version, continued to delegate to the Commissioner of Highways the power to

(Footnote continued from preceding page)

state's enactment, but commercial advertisers are apt to be very disillusioned in view of concessions made by the Secretary of Transportation. However, since the federal act specifically permits stricter limitations than those imposed in the federal legislation (see 23 U.S.C § 131 (1964), as amended (Supp. 1, 1965), the state statute may remain as it was enacted. The answer probably will lie in the strength of the billboard lobby in the Kentucky Legislature. See Louisville Courier-Journal, Oct. 2, 1967 at 10, col. 1-2.

36 73 Stat. 612, amending 72 Stat. 904 (Supp. 3, 1959-61) provides:

Agreements entered into between the Secretary of Commerce and State highway departments under this section shall not apply to those segments of the Interstate System which traverse commercial or industrial zones within the presently existing boundaries of incorporated municipalities wherein the use of real property adjacent to the Interstate System is subject to municipal regulation or control, or which traverse other areas where the land use, as of the date and approval of the Act, is clearly established as industrial or commercial.

37 23 U.S.C. § 131 (1964), as amended (Supp. 1, 1965). Section (d) now provides:

In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several states and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. . . .

38 23 U.S.C. § 131(k) (1964), as amended (Supp. 1, 1965), provides:

Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-Aid highway systems than those established under this section.

adopt billboard regulations governing the interstate highway system. The significant feature of this statute, however, is that the Commissioner is given the power to enforce these regulations within incorporated municipalities, a right previously withheld.\textsuperscript{40} Pursuant to this Act, the Department of Highways enacted regulations which defined a commercially or industrially developed area for the purpose of billboard control.\textsuperscript{41}

\textit{Southeastern Displays, Inc. v. Ward}\textsuperscript{42} was the first case to reach the Court under the newly enacted version of the Billboard Act. This case involved a billboard erected in an area zoned industrial by the city of Louisville and adjacent to an interstate highway. The Department of Highways determined that the billboard was in an area which did not conform to its definition of an industrially or commercially developed area, and ordered it removed. The commercial advertiser prosecuted this appeal.

The main contention in \textit{Southeastern Displays} was that the state could not contravene the action of the city in zoning an area industrial or commercial. The Court met this argument squarely and asserted that the power of the city to zone is derived solely from express authority conferred on it by the Legislature.\textsuperscript{43} The Court also cited several decisions holding that where the Legislature delegates

\textsuperscript{40} KRS § 177.860 (1962) provides:

\begin{quote}
    The Commissioner of Highways shall prescribe by regulations reasonable standards for the advertising devices hereinafter enumerated . . .
    (4) Advertising devices which otherwise comply with the applicable zoning ordinances and regulations of any county or city, and which are to be located in a commercially or industrially developed area, in which the Commissioner of Highways determines, in exercise of his sound discretion, that the location of such advertising devices is compatible with the safety and convenience of the traveling public. (Emphasis added.)
\end{quote}

\textsuperscript{41} The Department of Highways defined a commercially or industrially developed area as follows:

\begin{quote}
    Any area within 100 feet of, and including, any area where there are located within the protected area at least ten (10) separate commercial or industrial enterprises, not one of the structures from which one of such enterprises is being conducted is located at a distance greater than 1620 feet from any other structure from which one of the other enterprises is being conducted . . .
\end{quote}

\textsuperscript{42} 414 S.W.2d 573 (Ky. 1967).
\textsuperscript{43} In Jones v. Russell, 224 Ky. 390, 395-96, 6 S.W.2d 460, 462 (1928), the Court stated:

\begin{quote}
    It is clear from our decisions that the various municipalities of the state possess police power to the extent it may be delegated to them by the General Assembly. . . . It appears obvious that the Legislature could itself exercise in the first instance any power it could delegate to that end in the cities. Plainly it could enact directly for cities and towns any law
\end{quote}

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authority to a state agency, its power is superior to that of a munici-
pality. Thus, there seems little doubt the state could delegate power
to regulate billboards to the Department of Highways, and the Depart-
ment could enact regulations which would supersede city zoning
ordinances.

An analogous situation where the state has found it necessary to
delegate certain zoning power to a state agency is in the field of air-
port regulation. Before the establishment of the Kentucky Airport
Zoning Commission, airports were regulated solely by local govern-
mental bodies. As in the cases of local billboard regulation, this often
led to a wide variety of ineffective zoning enforcement. In order to
assure the greatest possible safety for air travel, the state gave the
Commission jurisdiction of airport zoning “insofar as it pertained to
the safe and proper maneuvering of aircraft and the safe and proper
use of the airport involved.”

The purpose of delegating zoning powers to the Department of
Highways is almost the same as in delegating airport zoning. The
predominant consideration is the safety of the people who use the high-
ways or airports. Certainly, few would contend that such a purpose

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that it could indirectly enact by delegating to them the power to pass
it.

In City of Somerset v. Weise, 263 S.W.2d 921 (Ky. 1954), the Court held:
“The power of a municipality to place in force a zoning plan is not inherent but
is derived solely from the express authority conferred in it by the Legislature.”
_Id._ at 922. On the subject of municipal authority to zone, see also 58 Am. Jur.
_Zoning_ § 943 (1948).

In _O’Brien v. Department of Alcoholic Beverage Control_, 306 Ky. 238,
206 S.W.2d 941, 943 (1947), the Court held:
The Legislature in its discretion having chosen the Alcoholic Beverage
Control Board as its agency, and having delegated to it the power to
to control and regulate, we conclude that it was the legislative intent that
the Board has a superior right to control.
See also _Deckert v. Levy_, 308 Ky. 67, 213 S.W.2d 431 (1948).

_43_ _KRS § 183.865_ (1966) states the function of this commission:

(1) All of the powers, provisions and duties relating to the zoning
and use of land, structures and air space within and around public air-
ports within the state are hereby conferred upon, delegated to and rested
in the commission. The commission shall also exercise all powers, pro-
visions and duties relating to the use of navigable air space within the
state.

See also _Note, Zoning—The Airport and the Land Surrounding it in the

_44_ _KRS § 183.867_ (1964).

_45_ Legislative findings which preceded the delegation of authority to the
Airport Zoning Commission are found in _KRS § 183.866_ (1962):

It is hereby found and declared that an airport hazard endangers the
lives and property of users of the airport and the occupants of land in the
vicinity, and in effect reduces the size of the area available for landing,

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does not authorize delegation of zoning power to the agency best equipped to provide overall regulation.

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taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and public investment therein, and therefore such hazards are not in the interest of the public health, public safety or general welfare.

The purposes of the Billboard Act are found in KRS § 177.850 (1966):

(1) To provide for maximum visibility along interstate highways, limited-access highways . . .

(2) To prevent unreasonable distraction of operators of motor vehicles;

(3) To prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations;

(4) To preserve and enhance the natural scenic beauty or the aesthetic features of the aforementioned interstate highways . . .
XV. PROPERTY

A. ADOPTION

In Minary v. Citizens Fidelity Bank & Trust Co., the Court was presented with the vexing problem of whether the adoption of an adult under KRS 405.390 makes the adopted person an heir, allowing him to inherit from and through his adopting "parent."

In an earlier case, Bedinger v. Graybill's Executor & Trustee, the testatrix had established a testamentary trust for her son for life, and after his death, the remaining portion of the trust was to "be paid over and distributed by the trustee to the heirs at law of [the] son . . . according to the Law of Descent and Distribution in force in Kentucky at the time of his death." In the event the son died without heirs, there was a gift over to two charities. The son, having no issue, adopted his wife, and on his death, the Court held that since the adoption was authorized by statute, the wife was an heir by operation of law and should be permitted to inherit the remainder.

Similarly, the testatrix in Minary created a trust for her husband and three sons during their lives, and with termination of the trust upon the death of the last beneficiary, "the remaining portion of the Trust Fund [was to] be distributed to [her] then surviving heirs, according to the laws of descent and distribution then in force in Kentucky . . . " (Emphasis added.) One son adopted his wife, and on his death, the problem confronting the Court was whether this adoption made the wife eligible to share in the remaining portion of the trust. Answering this question in the negative, the Court concluded that while Bedinger could be distinguished on the basis of the language used, no useful purpose would be served by so doing. Viewing the adoption of an adult for the sole purpose of making that person an heir under the terms of a pre-existing testamentary instrument as an "act of subterfuge," the Court was confronted with a choice between carrying out the intent of the testator or giving a strict

1 419 S.W.2d 340 (Ky. 1967).
2 KRS § 405.390 (1962) provides: "An adult person over eighteen years of age may be adopted in the same manner as provided by law for the adoption of a child and with the same legal effect, except that his consent alone to such adoption shall be required."
3 309 S.W.2d 594 (Ky. 1957).
4 Id. at 596.
5 Id. at 600.
6 Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340, 341 (Ky. 1967).
7 This adoption also resulted in litigation. See Minary v. Minary, 395 S.W.2d 588 (Ky. 1966).
interpretation to the adoption statute.\textsuperscript{8} The Court indicated that the right to pass property at death to those persons representing the natural objects of a testator’s bounty was of primary importance, and since a literal reading of the statute would interfere with that intent, adoption which frustrated that intent would no longer be tolerated.\textsuperscript{9}

The decision is important in that the cardinal principle of carrying out the testator’s intent remains the controlling factor in the construction of a will. To provide for a situation like that presented in Minary probably never occurs to persons drafting wills. A fortiori it is more reasonable to conclude that the “natural objects of their bounty” does not include adopted adults than to conclude the reverse. Thus, the Court’s conclusion that such schemes will no longer be successful is to be commended.

Yet other aspects of the case are troublesome. As the Court declared, this case could be distinguished from Bedinger. In Bedinger, the devise was to the heirs at law of the testatrix’s son, while in Minary, the devise was to the surviving heirs of the testatrix.\textsuperscript{10} For the wife to be a beneficiary under the will in Minary, she had to inherit not directly from her “parent” but through him, i.e., not from a will of the parent, but from a will devising property to the heirs of the parent. This area has been one of great confusion. As late as 1945, the Court of Appeals held that the terms heirs, issue, or children, when used in a will, did not refer to adopted children but only to natural blood relations.\textsuperscript{11} This rule was eroded somewhat when adopted children were included in the terms “heirs at law”\textsuperscript{12} and “children.”\textsuperscript{13} However, Wilson v. Johnson\textsuperscript{14} held that when a testator other than the parent made use of the word “children,” he intended the term to carry its commonly accepted meaning, i.e., persons who were actually born of the parent, or if adopted, were adopted as children.

\textsuperscript{8} KRS § 199.520(2) (1962) provides:
From and after the date of the judgment the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural, legitimate child of the parents adopting it the same as if born of their bodies. . . .

\textsuperscript{9} 319 S.W.2d at 344.

\textsuperscript{10} Bedinger v. Graybill’s Ex’r & Trustee, 302 S.W.2d 594, 599 (Ky. 1967).

\textsuperscript{11} Copeland v. State Bank & Trust Co., 300 Ky. 432, 188 S.W.2d 1017 (1945).

\textsuperscript{12} Major v. Kammer, 258 S.W.2d 506 (Ky. 1953).

\textsuperscript{13} Edmands v. Tice, 324 S.W.2d 491 (Ky. 1959).

\textsuperscript{14} 389 S.W.2d 634 (Ky. 1965). In the course of the Wilson opinion, the Court acknowledged the fact that an adult may be adopted in the same manner as a child, but that he “does not ipso facto become a child.” Id. at 636. For a general discussion in this area, see Note, Inheritance Rights of the Adopted Child in Kentucky, 55 Ky. L.J. 874 (1967).
On the basis of these holdings, Minary declared that, but for the rule as to adopted adults, the phrase "my then surviving heirs" included adopted children.\(^\text{15}\)

Another tenuous aspect of the decision relates to statutory interpretation. While appearing to recognize the problem, the Court ignores it without setting forth valid reasons. In Bedinger, the Court held it was bound by the statutory law and could not write an exception into the statute.\(^\text{16}\) Since KRS 199.520 plainly provides that an adopted child shall be deemed for all purposes of inheritance and succession the natural child of the adopting parent, it would seem that the Court could not rule otherwise because the person adopted was an adult.\(^\text{17}\) However, the Court created an exception, and circumvented the statute because it conflicted with the intent of the testator. On what basis can a court prefer a well-established rule of construction over an express statutory rule? It would seem that this question is one for the Legislature, and the Court should give effect to the statute until there is a legislative pronouncement to the contrary.

**B. Dower**

Dower and curtesy are defined by KRS 392.020.\(^\text{18}\) This statute provides that a surviving spouse is entitled to one-half of all property, real and personal, remaining in a deceased spouse's estate after funeral expenses, administration expenses, and all other debts are paid.\(^\text{19}\) Common law dower, i.e., a life estate in one-third of realty, exists only with regard to property owned during coverture but disposed of before death without relinquishment of dower.

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\(^\text{15}\) 819 S.W.2d at 342.
\(^\text{16}\) 302 S.W.2d at 599.
\(^\text{17}\) See note 8 supra.
\(^\text{18}\) KRS § 392.020 (1962) provides:
After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half of the surplus real estate of which the other spouse or anyone for the use of the other spouse was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during coverture but not at the time of death, unless the survivors's right to such interest has been barred, forfeited, or relinquished. The survivor shall also have an absolute estate in one-half of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to "dower" or "curtesy" shall be deemed to refer to the surviving spouse's interest created by this section.
\(^\text{19}\) The statute says the wife is entitled to one-half of the "surplus" real and personal property. The interpretation given in the text to the word "surplus" is the accepted one in Kentucky. Towery v. McGaw, 22 Ky. L. Rptr. 155, 56 S.W. 727 (1900).
In *McMurray v. McMurray*, a wife's dower interest in realty was in issue. The husband had borrowed money from his father for a down payment on land. The vendor conveyed the land, without the father's knowledge, to the husband and wife as tenants by the entirety. Later, the husband borrowed again from his father, who was still unaware of the manner of the conveyance, to extinguish the vendor's lien securing payment of the balance. On each occasion the money was given as a simple loan with neither a mortgage nor a promissory note taken by the father.

After the son's death, the father brought suit under KRS 378.020 to set aside as fraudulent the conveyance of an interest in the realty to the wife. The Court held that this conveyance, having been made by the husband's procurement, was the same as if made directly from the husband to his wife. Hence, since there was no consideration, it was voidable to the extent of the husband's existing debts, totalling $12,200.

Although the conveyance was fraudulent, the Court indicated that the wife was not without interest in the property, i.e., her dower interest. This aspect of the case was not mentioned in the lower court's judgment or in the briefs of the parties, but the Court thought a determination of this issue was indispensable to a proper disposition of the case. The view adopted by some courts is that where the conveyance being voided did not come directly from the husband, there was never any estate in the husband from which dower could arise. However, this rule did not recommend itself to the Court since, in its view

[t]he purpose of the fraudulent conveyance statute . . . is to put the husband's creditors (as of the time of the conveyance) in the same posi-

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20 410 S.W.2d 139 (Ky. 1966).
21 KRS § 378.020 (1962) provides:

Every gift, conveyance, assignment, transfer, or charge made by a debtor, of or upon any of his estate without valuable consideration therefor, shall be void as to all his then existing creditors, but shall not, on that account be void as to creditors whose claims are thereafter contracted, nor as to purchasers from the debtor with notice of the voluntary alienation or charge.
22 *McMurray v. McMurray*, 410 S.W.2d 139, 142 (Ky. 1966). A point necessary for the disposition of the case was the loan of ten thousand dollars made after the conveyance. The wife contended that since this debt did not exist at the time of conveyance, then according to the statute, it could not be enforced. The Court, relying on *Pierce v. J.B. Pierce's Estate in Bankruptcy*, 258 Ky. 495, 88 S.W.2d 254 (1931), held that when the money was used to increase the salable value of the property by reducing or discharging a lien against it, the debt would be protected. For authority treating a conveyance of an interest to the wife the same as if made directly from the husband to the wife, see *Kinkead v. Brown's Estate*, 262 S.W.2d 465 (Ky. 1953).
23 *See McMurray v. McMurray*, 410 S.W.2d 139, 142 (Ky. 1966).
In other words, the creditor, although able to set aside the conveyance and levy against the property, takes subject to the wife's inchoate dower as of the time the fraudulent conveyance was made.

The case was remanded with directions to the lower court to secure the wife's dower consistent with the Court's opinion. However, a controversy arose as to what the Court had said the wife's dower interest was, and the case was again brought before the Court of Appeals.\textsuperscript{26} The Court merely reiterated what it had said in the previous opinion, indicating that the commuted value of the wife's life estate must be subtracted from the value of the property before the creditor can be satisfied. Any proceeds remaining would go to the wife since the conveyance would not have been fraudulent to this extent.

However, the Court, in spite of two opinions on the dower issue, has not completely cleared up the issue. It would seem unquestioned that prior to the passage of the present version of KRS 392.020 in 1956, a spouse's inchoate dower was a life estate in one-third of all realty and that this dower could not be defeated by a conveyance by the spouse or by the spouse's creditors levying on the property.\textsuperscript{26} The Court purported to decide this case under the 1956 dower statute, and, thus, it would appear that inchoate dower is exactly the same today as it was before the statute. The flaw in the Court's reasoning stems from the fact that by ruling that the conveyance was invalid, the creditor was placed in the position he enjoyed before the voidable conveyance, i.e., 1954. Thus, the case should not have been decided under the 1956 statute, a point which evidently escaped the Court.

This may well be a minor point and of little concern in future cases. The Court clearly indicated that the 1956 statute required the same result as would have been reached under the previous statute.\textsuperscript{27} Thus, there would seem little doubt that it will adhere to this position in future cases.

\textsuperscript{24} Id. This does not mean that a vendor's lien would be subject to dower. In McMurray, the Court expressly recognized the superiority of a vendor's lien over dower. 410 S.W.2d at 142, citing Chalk v. Chalk, 291 Ky. 702, 165 S.W.2d 534 (1942). This is true because the husband acquires his title subject to the lien. Where no lien for the purchase money exists, the wife's dower right is not affected by the fact that the original consideration has not been paid. McClure v. Harris, 51 Ky. (12 B. Mon.) 261 (1851).

\textsuperscript{25} Mattingly v. Gentry, 419 S.W.2d 745 (Ky. 1967).

\textsuperscript{26} Maryland Cas. Co. v. Lewis, 276 Ky. 263, 124 S.W.2d 48 (1939) (attachment by spouse's creditor); Redmond's Adm'x v. Redmond, 112 Ky. 760, 66 S.W. 745 (1902) (conveyance by spouse).

\textsuperscript{27} The predecessor to KRS § 392.020 was KRS § 392.020 (1953) and provided simply that dower was a life estate in one-third of all realty.
C. Future Interests

The most important and by far the most complex future interest case decided by the Court was *Atkinson v. Kish.* There, the testator devised his real property to his wife for life, and subject to certain restrictions, the property then went to his four children with substitution of the issue of any child who predeceased his brothers and sisters. If any child died without issue, his share would pass to the survivors of the class. The property so devised was subject to the condition that neither the testator's children nor their beneficiaries could sell, encumber, lease, or charge against or upon the property until twenty-one years and ten months after the death of the last survivor of the testator's children. Further, the will restrained the anticipatory disposal of any interest prior to its receipt pursuant to the terms of the devise, i.e., for twenty-one years and ten months after the death of the last survivor.

By 1927, the testator's widow had died; in addition, two children had died leaving no issue. In that year, the remaining two children, Robert and Fannie, entered into an agreement to divide the property equally, Fannie taking the upper portion and Robert the lower. The agreement provided for a survey and exchange of formal conveyances, but these were never carried out. A fence was erected, and each party lived by and respected the agreement.

The present controversy was instituted in 1957 by the children of the now-deceased Robert against Fannie and her children, asking to be declared the owners of the lower portion of the property as divided in 1927, or if such relief could not be granted that the entire property be divided pursuant to KRS 381.136. This statute provides for parti-

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28 420 S.W.2d 104 (Ky. 1967).
29 The Kentucky perpetuities rule, formerly KRS § 381.200, (repealed 1960), provided: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a period longer than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter. . . ." Thus, *Atkinson* did not involve a perpetuities problem.
30 KRS § 381.136 (1962) provides:
Where the land is held under a deed or will vesting a life estate in two or more persons or in trust for their benefit, with remainder as to the share of each to his or her children or descendants, it shall be lawful for a court of equity, on the petition of one of such life tenants and his or her children or descendants who would then be entitled to such remainder, all persons having interests in such lands being made parties, to partition such land so as to set apart to such life tenants and children or descendants so much of said land to which they shall be entitled in severalty; and to that alone shall attach the title or interest of after-born children or descendants in whom, by the terms of said deed or will, such remainder would vest.
tion of land held by life tenants whose children will take the remainder on the petition of one of the life tenants.

The circuit court, in a memorandum opinion, declared that Robert and Fannie were the owners, in 1927, of the fee, that the restraint on alienation imposed by the will was unreasonable and void, that KRS 381.136 was inapplicable because the parties bringing the suit were not life tenants, and that the 1927 division was valid. A supplemental circuit court opinion reiterated that the attempted restraint on alienation was void and reaffirmed the 1927 division of the property pursuant to KRS 381.136. The children of Robert were then declared the owners of the lower portion of the land.31

The Court of Appeals construed the will as devising a life estate to the testator's children and a remainder to the issue of those children.32 Hence, the validity of the attempted restraint and the extent to which the 1927 division violated the restraint, if valid, were presented for determination. The well-established rule in Kentucky is that a restraint prohibiting the voluntary alienation of a legal life estate is valid.33 Recognizing this principle, the Court stated that insofar as the restraint affected the life estates of Robert and Fannie, the voluntary division by them violated it. However, this question was now moot due to the 1960 statutory revisions.34 When the instrument creating the restraint contains no express provision for forfeiture, the law will imply one and create a right of entry in the grantor and his heirs.35 But KRS 381.22136 provides that rights of entry, created before July 1, 1960, become unenforceable thirty years after the effective date of the instrument creating them unless a declaration of intent to preserve the right was recorded before July 1, 1965. Thus, the heirs

31 Atkinson v. Kish, 420 S.W.2d 104, 107 (Ky. 1967).
32 Id. at 109. Gray v. Gray, 300 Ky. 265, 188 S.W.2d 440 (1945), involved a similar devise to the testator's wife for life, and to certain named beneficiaries during their lives. The remainder interest was devised to the descendants of the beneficiaries, but no fee could vest in any descendant until after the death of all the life tenants. The remainder interest was classified as a defeasible fee in remainder, i.e., subject to being divested by their predeceasing the life tenants.
33 Gray v. Gray, 300 Ky. 265, 271, 188 S.W.2d 440, 444 (1945); see also Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3, 83 (1960). This should not be confused with the doctrine of reasonable restraints on the alienation of a fee which is peculiar to Kentucky. See note 55 infra.
34 KRS §§ 381.215-.223 (1962).
36 KRS § 381.221(1) (1962) states: Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty years after the effective date of the instrument creating it, unless before July 1, 1965 a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is located.
of the testator forfeited their right of entry since they had failed to file the required declaration.\(^{37}\)

The question is not whether the Court was correct in its decision under the statute, as it clearly was, but whether the statute can constitutionally cut off a right of entry. A footnote in the Atkinson opinion\(^ {38} \) stated that a reversionary right of entry, like a possibility of reverter, amounted to no more than an expectancy and would not come within the constitutional protection of "vested rights." This appears to be the first constitutional construction of this question by the Kentucky Court, and one which deserved more attention than a brief mention in a footnote. The constitutionality of a retroactive statute is of vital importance today as regards the validity of future reform legislation in the property field. Contrary views on the constitutionality of these acts are supported by authority.\(^ {30} \) Thus, while not purporting to criticize the Court's ruling, it is hoped that the Court will give more consideration to such pressing questions in the future.

After disposing of the restraint on alienation issue, the Court addressed itself to the circuit court's decision that KRS 381.136, the partition statute, was inapplicable since the suit was not instituted by life tenants. To determine the applicability of this section, the Court of Appeals first had to determine the interests held by the children of Robert who had instituted the suit. Relying on Gray v. Gray,\(^ {40} \) the Court held that these children were at least the holders of a fee simple subject to divestment by their death prior to twenty-one years and ten months after the death of the last life tenant. However, these interests could not be divested because, upon further construction,\(^ {41} \)

\(^{37}\) 420 S.W.2d at 109. In Withers v. Pulaski County Bd. of Educ., 415 S.W.2d 604 (Ky. 1967), the Court held the filing of an action under a deed calling for a forfeiture of property if such property ceased to be used for a school, obviated the necessity of filing a declaration of intent to preserve the right of entry under KRS § 381.221 (1965). The Court further affirmed the circuit court's dismissal of the action on the ground that a twenty-six day non-use of the property was not sufficient to bring about a forfeiture under the deed. The Court did state, however, that the use of the property for farm-hand classes or adult education courses would not constitute the keeping of a school within the meaning of the deed since the generally accepted definition of school is a place where instruction is imparted to the young.

\(^{38}\) 420 S.W.2d at 109, n.5.

\(^{30}\) Biltmore Village v. Royal, 71 So. 2d 727 (Fla. 1956), held unconstitutional a Florida statute purporting to cancel all reverter provisions which had been in effect more than twenty-one years. The decision, however, was based on the impairment of contract rights. Contra Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 159 N.E.2d 111 (1958), holding a similar provision constitutional on the ground that these interests were only expectancies.

\(^{40}\) 800 Ky. 265, 188 S.W.2d 440 (1945). See note 32 supra.

\(^{41}\) The will provided:

I devise and give the . . . [property] in remainder unto my . . .

(Continued on next page)
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The will was found to convey fee simple interests in an undivided one-half of the property. Basing this construction on the policy in favor of early vesting, the Court concluded that the limitations placed in the will were not intended to postpone the vesting of the fee but, rather, were to set the outer limits for the application of the restraints on alienation. To justify this position, the Court noted that once the title reached Robert's children, there was no provision for a shifting of any interest outside the direct line of inheritance. If any of the children were to die without issue, the testator intended that child's interest to remain in the family line, i.e., that it not be transferable by deed or will. Thus, the limitations amounted only to a restraint and not a withholding of title.

By this construction, the Court seems to be establishing a preference for limiting restraints only to alienability and not to vesting. In the ordinary case, this adds little since the restraint remains in effect and the property continues to be unmarketable until the restraint becomes non-existent. In Atkinson, however, the vesting of title in these remaindermen made the property alienable by them since the restraint was made unenforceable by the failure to preserve the right of entry.

This construction does pose one problem in the instant case. As was stated previously, KRS 381.136 limits the class of persons who can bring the action for partition. Thus, the Court was faced with a situation where the children of Robert could not bring the action be-

(Footnote continued from preceding page)

[children] in equal shares but in the event one or more of my said children shall die before or after the death of my said wife without legal issue him or her surviving the equal portion so devised to the one or more of them so dying shall pass and go to the survivor of the one or more of my said children so dying.

Should one or more of my said children die before or after the death of my said wife leaving issue him or her surviving the issue of such deceased child shall take the share devised to the parent so dying.

But the devise in this clause contained is subject to the express condition that neither of my said children herein specifically named nor his, her or their issue shall have power to incumber, sell, charge against or upon or lease said real estate or any part thereof or interest therein until twenty-one years and ten months after the death of the last remaining survivor of my said children herein specifically named. . . .

And provided further that upon the death of all my said children before the expiration of twenty-one years and ten months from the death of the last survivor of them, said real estate shall thereupon be vested absolutely and without further restriction in the real representative or representative of my respective children then owning the said real estate and interest created therein by this will.

420 S.W.2d at 107.
42 Id. at 111.
43 See note 30 supra.
cause their interest was not a life estate, while Fannie, a life tenant, and her children could maintain the suit. Partition could not be accomplished under KRS 381.1354 because there was some question whether all the interests, as required by the statute, were before the court, i.e., the interests of those persons not in esse. The Court believed that this lack of statutory authority to bind future interest holders not in esse was a major reason KRS 381.136 was enacted. Consequently, the partition would have to be confirmed under that statute or not at all. The Court held that common sense and the basic purpose of the statute required that since Fannie and her children could maintain the action, the children of Robert could also seek partition. A contrary construction was viewed by the Court as absurd and not intended by the Legislature.

While this decision may be necessary in the instant case to obtain the objective of partition—the enjoyment of the property in severalty—this case must be limited to its facts. To continue to write exceptions

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44 KRS § 381.135(1) (1962) provides:
A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit court or county court of the county in which the land or the greater part thereof lies a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition.

Since Fannie was still alive, there was a possibility that she may have more children who would be remaindermen, and these interests would not be before the court.

45 A judgment under KRS § 381.135 (1962) or the non-statutory powers of an equity court (the basic partition procedures along with KRS § 381.120 (1962) would not bind future interest holders not in esse and not before the court. Cf. Burchett v. Clark, 162 Ky. 586, 172 S.W. 1048 (1915). Contra, Milligan v. Masden, 25 Ky. L. Reptr. 144, 74 S.W. 1049 (1903), quoting STORY, EQUITY JURISPRUDENCE § 889 (14th ed. 1918):
Doubts were formerly entertained whether in a suit in equity for a partition brought only by or against a tenant for life where the remainder is to a person not in esse, a decree could be made which would be binding upon the persons in remainder. That doubt however is now removed, and the decree is held binding upon them on the ground of virtual representation of them by the tenant for life in such cases.

Kentucky is in accord with the view that to maintain an action for partition the party instituting the action must have a possessory estate, i.e., a present right to share possession; the purpose is to secure to the owner of the possessory estate the right to enjoy such possession in severalty. See Duke v. Allen, 198 Ky. 363, 248 S.W. 894 (1923). Once this premise is accepted, it necessarily follows that to secure the effective partition of the entire estate of the possessor owner, all other interests, present and future, may be held subject to partition. L. SMITH & A. SMITH, THE LAW OF FUTURE INTERESTS § 1768 (2d ed. 1956).

46 420 S.W.2d at 112.
into the statute will result in unwarranted partitioning of property in which persons not in esse hold future interests. The statute clearly defines the circumstances by which this may be accomplished, and the present case is not such a situation. Although courts in their judicial function must interpret the words of the Legislature, the statutes themselves define the limits of this interpretation, and in Atkinson, this limit has been reached and possibly exceeded.

In Slowey v. Jenkins, the Court of Appeals was presented with a question involving the validity of gifts over after the devise of an apparent fee simple title. The testatrix devised all her property to her husband without any limitations or restrictions. However, a subsequent clause provided for the daughter of the testatrix to take the property in the event the father predeceased her. This contingency did occur and a controversy arose between the daughter and her father's second wife. The daughter contended that the property should be distributed to her in accordance with the terms of the will because her father had taken only a life estate or, in the alternative, a defeasible fee. The Court of Appeals agreed with the daughter's second contention and reversed the lower court's holding that the gift over was void because the father had taken a fee simple absolute. The Court defined the father's estate as a defeasible fee simple with a power to convey a fee simple absolute as to any and all the property. The defeating event for the father was his death before his daughter without having exercised his power of disposal.

The majority of jurisdictions in this country follow the rule that a gift of a fee simple with an absolute power to dispose when coupled in the same instrument with a gift over of what remains undisposed, voids the gift over. This rule has been classified by the Kentucky Court as taking a "large bite" from the intent of the testator; it was prospectively discarded in Hanks v. McDanell. Hanks ruled that the "Polar Star" rule, i.e., the intent of the maker, as gathered from the whole of the instrument, would prevail and be enforced unless it violated a statute or public policy. However, Hanks construed the estate of the first taker as a life estate rather than a fee. Such a construction of what initially appears to be a fee would not violate

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47 408 S.W.2d 452 (Ky. 1966).
48 The testatrix provided that "without any limitation, restriction or encumbrance as to the title of my husband, Allen L. Jenkins, in and to the property devised and bequeathed to him . . .", and then made certain requests of the husband to allow the daughter to make her home with him. Id. at 455.
49 Id.
50 See L. SIMES & A. SMITH, supra note 45, at § 1482, and cases cited there-in.
51 307 Ky. 243, 210 S.W.2d 784 (1948).
any statute or public policy of the state. Slowey, on the other hand, construes the estate of the first taker as a defeasible fee rather than a life estate. By adopting this construction, Kentucky is following the minority view which in the consensus of many writers is the correct view.\textsuperscript{52}

The basis of the rule voiding the remnant gift over, which by definition would be an executory interest, is found in the dictum of Chancellor Kent in the case of \textit{Jackson v. Robins}.\textsuperscript{53} The Chancellor assumed that an executory interest was indestructible and, therefore, could not exist if it could be destroyed by the fee owner exercising an unlimited power to dispose of the property and prevent the vesting of the executory interest. Some authorities say the rule is illogical as a matter of theory since there is no reason why a valid executory interest cannot be subject to destruction by the exercise of a power of disposal held by another.\textsuperscript{54}

The modern rule is based on the rationalization that the executory limitation is repugnant to the fee. This same argument would likewise be applicable to restraints on alienation of a fee, but Kentucky does not find it repugnant to follow the doctrine of reasonable restraints on alienation.\textsuperscript{55} Conceptually, all executory interests are repugnant to a fee since a fee has infinite duration, but fee simple interests subject to executory limitations have been recognized since the Statute of Uses in 1536.\textsuperscript{56} These interests do not violate the public policy against the unmarketability of land because in cases involving a power of disposal, that power may be exercised by the holder of the first estate to convey the property in fee simple absolute, thereby defeating the executory interest. Striking down such interests is, on the other hand, contrary to the primary policy of carrying out the intent of the testator.

Kentucky, in \textit{Slowey}, took the step urged by some scholars\textsuperscript{57} and recognized the validity of a gift over after a fee title, albeit a defeasible fee with an absolute power of disposal. Although difficult to rationalize with traditional property concepts, the modern view suggests that by

\textsuperscript{53} 16 Johns 537 (N.Y. 1818).
\textsuperscript{54} Dukeminier, \textit{supra} note 52, at 28.
\textsuperscript{55} See Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 246 (1916). This is the landmark case in this area. For a general discussion of this doctrine, see Dukeminier, \textit{Kentucky Perpetuities Law Restated and Reformed}, 49 KY. L. J. 3, 83 (1960).
\textsuperscript{56} Dukeminier, \textit{supra} note 52, at 29.
\textsuperscript{57} L. SIMES & A. SMITH, \textit{supra} note 50, at § 1489.
focusing on the intent of the testator regarding the creation of the remnant gift over, the problem can be solved. When viewed in this manner, the first taker has "full (but not exclusive) ownership in the form of a possessory fee simple subject to an executory interest over contingent on the first taker failing to dispose of the property." The Court has thus shed an artificial classification based upon a speculation of whether the testator intended to create a life estate or a fee in the first taker.

Two cases related to this problem were also decided this term by the Court of Appeals. In Creason v. Prince, the testator devised property to his wife in fee simple except as provided subsequently in the will. The wife was given full power of disposal over the property although the last clause of the instrument provided for a gift over of the undisposed property. After the gift over the testator reiterated that this provision was not to be construed to hamper the wife from disposing of the property in any manner. Reading the instrument as a whole, the Court construed the intent of the maker to confer upon his wife a full power of disposal, which would include transferring, as the wife did, the property by way of a trust, with the corpus being distributed at her death.

This case is illustrative of the situation which could have arisen in Slowey had the power to dispose been exercised. By following the "Polar Star" rule to reach the testator's intent, the gift over was defeated by the devisees' action in disposing of the property under the power conferred by the instrument.

In Chaffin v. Adams, a testatrix in a holographic will devised all her property to her husband. A later clause read, "at my husband's death I will my real property to .....................," the name of the remainderman being left blank. In awarding the husband a fee simple, the Court could find no reason for the testatrix to reduce her husband's estate unless she intended to benefit a "secondary object of her bounty." The failure to name a beneficiary of the remainder indicated that she had no fixed intention to reduce the husband's estate.

The principle function of a court in construing a testamentary instrument is to find the intent of the testator. Chaffin determined this intent by following the "Polar Star" rule, i.e., by construing the will as a whole. Although the testatrix at one time may have meant to limit
According to the weight of authority, execution of mutual or reciprocal wills\textsuperscript{64} does not of itself indicate that the two parties have entered into a contractual relationship concerning their testamentary dispositions.\textsuperscript{65} Finding a contractual intent, in the absence of contractual language, must be accomplished by inference. In \textit{Arndell v. Peay},\textsuperscript{66} such an inference could not be made despite the fact that a husband and wife executed separate wills containing reciprocal provisions indicating a common purpose; they were drawn by the same scrivenor and were executed on the same day.

Although the general rule is that no contractual inference will be raised, the Court seems to be retreating from a position taken earlier in \textit{Boner's Administrator v. Chestnut's Executor}.\textsuperscript{67} There, wills which specifically referred to each other and contained identical provisions were held contractual. \textit{Arndell} limits \textit{Boner} to its facts and implies that the Court will require reciprocal wills to at least specifically refer to each other if a contract is to be found.

Possibly, the Court's reluctance to find contractual wills is based on a general policy of sanctioning these devices, but not favoring them since they are cumbersome and difficult to enforce.\textsuperscript{68} This is evidenced by one of the remedies for the revocation of a contractual will: the estate of the defaulting party is impressed with a trust in favor of that party's legatees,\textsuperscript{69} resulting in the continuous supervision of the trust by the courts. In addition, while joint or reciprocal wills may be executed as a result of common intent, this does not mean they are executed with respect to a contract. A more logical reason for the similarity of dispositions, particularly where the wills are those of husband and wife, is the similar tastes and affections resulting from years of living together.\textsuperscript{70} Standing alone, the fact that two wills were

\textsuperscript{64} Mutual or reciprocal wills are created when parties to a common plan execute separate instruments rather than using a single or joint will embodying the testamentary plan of two or more persons. Only when the provisions of the separate wills are reciprocal, identical, or substantially similar are they mutual. 1 W. PAGE, \textit{Wills} \S 11.1 (W. Bowe & D. Parker ed. 1960).

\textsuperscript{65} Id. at \S 10.3. See also Annot., 169 A.L.R. 10 (1947).

\textsuperscript{66} 411 S.W.2d 473 (Ky. 1967).

\textsuperscript{67} 317 S.W.2d 867 (Ky. 1958).

\textsuperscript{68} 97 C.J.S. \textit{Wills} \S 1367 (1957).

\textsuperscript{69} This remedy was applied in \textit{Boner's Administrator v. Chestnut's Executor}, 317 S.W.2d 867 (Ky. 1958). See also Watkins v. Covington Trust & Banking Co., 303 Ky. 694, 193 S.W.2d 964 (1947); Tapp v. Reynolds, 353 S.W.2d 334 (Ky. 1964). Another remedy is that of an action at law for breach of contract. 1 W. Pace, \textit{supra} note 64, at \S 10.3.

\textsuperscript{70} W. PAGE, \textit{supra} note 64.
executed at the same time and contain identical provisions should not give rise to an inference or presumption the wills were made pursuant to a contract.\footnote{Id.}

In light of modern authority,\footnote{Id.} the Arndell decision is sound. Moreover, no undue hardship is placed on parties wishing to make contractual wills. The problem can be met by carefully analyzing the parties' desires and concisely and strictly drafting the wills.

E. Adverse Possession

In order to acquire title by adverse possession, the possession must be hostile, actual, open, notorious, exclusive, and continuous for the statutory period.\footnote{KRS § 413.010 (1962): The statutory period necessary for adverse possession in Kentucky is fifteen years; see Tarter v. Tucker, 280 S.W.2d 152 (Ky. 1955).} This black letter property law does not seem difficult to comprehend; problems arise, however, when an adverse holder attempts to quiet title or raise the defense of adverse possession in an ejectment action. The question becomes one of the sufficiency of evidence utilized to prove adverse possession. Since the taking of property from a record owner is an alarming act in the United States where real property is a revered institution,\footnote{Land is not technically taken by adverse possession; rather the record owner is not allowed to assert his claim to the property.} the burden placed upon an adverse possessor should be heavy. The primary justifications for allowing title to be acquired by adverse possession are to keep land producing and to perfect defective titles.\footnote{See W. Walsh, \textit{Law of Real Property} 115 (1947).} It logically follows that with an increase in population, the consequential scarcity of land, and more efficient systems of land registration, title by adverse possession should become even more difficult to establish.

In \textit{Kentucky Women's Christian Temperance Union v. Thomas},\footnote{412 S.W.2d 869 (Ky. 1967).} the Court of Appeals reversed the circuit court's decision for the adverse claimants, and ruled as a matter of law that the evidence was insufficient to sustain their claim. In 1948 a former occupant, not then in possession, deeded approximately one hundred acres to appellee.\footnote{Cases against two adverse holders of adjacent tracts of land claimed by the Union were joined. The second appellee, Tabor, received a deed from the same person who was grantor of Thomas's deed in 1949. Tabor did not hold for the statutory period and evidence of his occupancy was less substantial than that of Thomas.} Between 1948 and 1967, appellee seeded ground, cleared some land...
by bulldozer, grew one crop, cut hay once every other year, dug a pond, placed land in soil bank from 1959 to 1963, cut bushes each year, and extended a mineral lease under which there was no development. In 1950 the Court had ruled that acts of cutting timber and giving or selling a small strip of land to a neighbor constituted sufficient evidence to uphold an adverse possession claim. In a 1960 case the Court upheld the defense of adverse possession where the evidence showed that for the requisite statutory period, defendants had cut and removed timber, leased for minerals, paid taxes, and moved a cabin from one point on the land to another.

Evidence of possession presented in these earlier cases was no stronger than that presented by appellee Thomas, although admittedly possession in those cases existed for longer periods of time. The digging of a pond, cutting of hay, placing of land in a soil bank, and the execution of mineral leases would seem to be as open, hostile, notorious, and exclusive as cutting timber or removing minerals. Since the length of holding beyond fifteen years should make no difference, that aspect of the earlier cases should provide no distinguishing factor. These cases indicate that the Court is requiring more stringent evidence of adverse possession, perhaps with the idea of making real property even more sacred. More stringent evidentiary requirements for a finding of adverse possession are warranted in that it further protects the rightful owners of real property.

In Department of Parks v. Stephens, a case of first impression, the Court indicated that the Commonwealth could gain title to land by adverse possession. Suit was brought by the Department of Parks to quiet title to a two acre tract of land adjoining certain property it owned near Cumberland Falls. The Department, which had no color of title, built a stable and later a parking lot on the disputed tract. The lower court ruled that the State could not obtain title by adverse possession, and moreover, that the evidence was insufficient to uphold a finding of adverse possession. The Court of Appeals disagreed with regard to the Commonwealth's power to obtain land by adverse possession, but it affirmed because the requisite evidence of adverse holding was lacking. The Court reasoned that the constitutional provisions forbidding a taking of property without compensation would not prevent the state from taking land by adverse possession since the

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7 Arnold v. Heffner, 330 S.W.2d 943 (Ky. 1960).
8 The holding period in Cornelius was for over fifty years, in Arnold, thirty-six.
9 407 S.W.2d 711 (Ky. 1967).
original owner was no longer in a position to assert title to the property.

Whether a state can obtain title by adverse possession has been an infrequently litigated issue. As pointed out in Stephens, at least one authority states without equivocation that states and other governmental entities may acquire title in this manner. The opinion further states that no decisions to the contrary could be found. However, there have been contrary decisions in at least one other jurisdiction. A line of Pennsylvania cases holding that corporations with the power of eminent domain could not acquire title by adverse possession is apparently still operative authority.

The basis of most decisions holding that governments can obtain land by adverse possession and the case relied on by the Court of Appeals was a Supreme Court case, Stanley v. Schwalley. There, the plaintiff's claim was based on a land sale contract inherited from her father. The father had never received a deed and was in substantial default at his death. The vendor had continued to pay taxes on the property, and he later conveyed the tract to the city of San Antonio which conveyed it to the United States. So the government was holding the land as a bona fide purchaser for value under a conveyance duly recorded; it appears that plaintiff's claim was rather weak and unworthy.

Although universally cited as a basis for the proposition that states can obtain title by adverse possession, Stanley did not explicitly hold this. As Judge Field pointed out in his strong dissent, the Supreme Court did not expressly approve the doctrine, but it merely implied that the United States might plead adverse possession. Speaking out against the consequences foreseeable from the majority's opinion, Field said that to allow the government to claim property by adverse possession would conflict with the whole course of judicial decisions in England, as well as every state in the Union.

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11 See Brankin v. Philadelphia N. & N.Y. Ry., 286 Pa 331, 133 A. 563 (1926); Carter v. Ridge Turnpike Co., 208 Pa. 565, 57 A. 988 (1904). These cases and others cited therein enunciated a general rule that governmental entities and public utilities could not obtain land by adverse possession. However, to benefit from this rule, it was necessary for a plaintiff to rebut a presumption, raised after twenty years of government possession, that the land was paid for.


13 The majority's opinion was almost exclusively addressed to the issue of sovereign immunity—whether a citizen could sue a U.S. Army officer for his official acts.

Sections 13 and 242 of the Kentucky Constitution prohibit the taking of property without just compensation. In State Park Commission v. Wilder, the Court said:

Section 13 of the Constitution declares that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him. This declaration of an inherent and inalienable right has been a part of all four Constitutions of Kentucky, and there is no exception in favor of the state or subdivision. . . . Section 242 of the Constitution requires that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall pay or secure the payment of just compensation before the taking thereof. . . . Both sections prohibit the actual taking of property without payment. (Emphasis added.)

The Court's circumvention of these constitutional provisions was somewhat shaky. It reasoned that after the running of the statute of limitations the original owner was no longer in a position to assert title to property since that title had effectively vested in the adverse possessor. Thus, continued the Court, the original owner had lost his claim of title, and the state was no longer taking his property. However, the Court has overlooked the fact that the record owner would still technically be the owner of the property; he is simply barred from raising his claim. His rights are secured as against the whole world except the adverse holder. Further, the state would still have wrongly possessed the property fifteen years before such a claim would be available.

15 Ky. Const. § 13 provides:
No person shall, for the same offense, be twice put in jeopardy of his life or limb nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

Ky. Const. § 242 provides:
Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction.
The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.

16 Kentucky State Park Comm'n v. Wilder, 260 Ky. 190, 84 S.W.2d 38 (1935); see also Carrico v. Colvin, 92 Ky. 342, 17 S.W. 854 (1891).
17 Kentucky State Park Comm'n v. Wilder, 260 Ky. 190, 84 S.W.2d 38, 39 (1935).
18 Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711, 712 (Ky. 1967).
Already vested with powers of escheat and eminent domain, it seems that the state should not need the right to claim by adverse possession. Adverse possession implies a wrongful taking. The question raised, then, is why should one citizen be wrongfully injured for the benefit of society? If the state really needed the land, it could condemn. The main reason for constitutional protection against uncompensated exercise of the power of eminent domain is to prevent the taking of private property for public use without just compensation being paid before possession is taken. Furthermore, the average citizen would not suspect the state of having wrongful designs on his property. True, the citizen would have an action in reverse condemnation until the adverse possession matured, but why should he be subjected to the necessity of court action to protect his land from the state? The state should be above such acts. Since adverse possession cannot be maintained against the state, a citizen should be entitled to a reciprocal right. If the state is going to deny adverse possession of its property, it is only fair that it should refrain from similar acts on the property of others.

F. Boundaries

Property boundaries are lines indicated by various descriptive elements, e.g., monuments, distances, quantities, and adjacent boundaries. In the construction of deeds, it is well established that descriptions of material objects and monuments will prevail over inconsistent calls for courses and distances. This rule of construction, however, should be flexible, with the primary objective being to discover the intent of the parties.

19 At one time the cases on this issue held that a citizen could not sue the state. For an enlightening discussion of the evolution of reverse eminent domain, see Oberst & Lewis, Claims Against the State of Kentucky—Reverse Eminent Domain, 42 Ky. L. J. 163 (1953). Where the power of eminent domain has been improperly exercised, i.e., where just compensation has not been given, governmental immunity is waived without legislative action, and a citizen may sue the state.


21 Bowling v. Gayheart, 396 S.W.2d 62 (Ky. 1965); Creech v. Jackson, 375 S.W.2d 679 (Ky. 1964). Application of this general rule was sufficient to dispose of Marcum v. Cantrell, 409 S.W.2d 159 (Ky. 1966). In Marcum the appellee had been conveyed a deed which included a passway in the courses and distances description. After the passway had been built, the appellant received a deed from the same grantor which also included in the courses and distances description the same land on which the passway was built. In an action to quiet title, the Court affirmed the lower court's decision that a passway constituted a monument which prevailed over the courses and distances description in the second deed.

22 Lainhart v. Shepherd, 246 S.W.2d 460 (Ky. 1952); Morris v. Judy, 216 Ky. 593, 288 S.W. 332 (1926).
In *Jackson v. Metcalf*\(^{23}\) the plaintiff held title to a tract of land in Harrison County. The patent from which this title originally stemmed described one boundary of the tract as extending to the top of a ridge and stated that this was a distance of one hundred and sixty poles. However, these two descriptions were inconsistent. If the monument marked the boundary, a small parcel of timber land would have been excluded from the plaintiff's property. Likewise, a 1918 deed to the property and the plaintiff's deed contained a description of the property which excluded the timber land.

The dispute in this case arose when the defendant sold the timber rights to that small parcel. This action in trespass ensued. Plaintiff was denied relief at trial; the circuit court applied the general rule that monuments\(^{24}\) prevail over distances and held that the plaintiff had not established title to the timber land. On appeal, the Court of Appeals reversed.

Initially the Court determined that the disputed parcel was conveyed by the patent since following the distances seemed more reasonable than following the monuments. Turning to the 1918 deed, the Court again ruled that the timber land was in fact conveyed, saying: "To hold otherwise would require us to presume that the grantor in the 1918 deed intended to retain a small landlocked tract, a presumption we are not willing to indulge under the circumstances presented."\(^{25}\) The Court pointed out that while the presumption was against the retention of a small landlocked tract, it was a rebuttable presumption since the primary question was the intention of the grantor.\(^{26}\)

*Jackson* is apparently the first Kentucky decision recognizing an exception to the general rule. Although the Court cited several prior decisions as authority, those cases merely upheld the rule of monuments over distances.\(^{27}\) Only past dicta to the effect that the intention of the parties is the primary objective in the construction of deeds supports the Court's position. Yet *Jackson* is a sound decision. The disputed tract was generally considered as being owned by the plaintiff and his predecessor in title, and it was obviously intended to be conveyed by the grantor of the 1918 deed. To affirm the lower court's decision would have allowed the application of a general rule to defeat a reasonable result consistent with the intent of the parties.

\(^{23}\) 415 S.W.2d 363 (Ky. 1967).
\(^{24}\) The monument in the controverted deed in *Jackson* was the top of a ridge.
\(^{25}\) 415 S.W.2d at 365.
\(^{26}\) Id. See also 23 Am. Jur. 2d Deeds § 241 (1965).
\(^{27}\) See cases cited note 22 *supra*. 
G. Conversion

The standard normally used in assessing damages for conversion is the market value of the converted property, i.e., the price at which the property could have been sold by a willing seller to a willing buyer. However, where the property is such that the market value fluctuates, e.g., corporate stock, the additional problem arises of determining the time for establishing the value. There are three primary rules for the solution of this problem.

The first rule, still followed by many courts, is the common law rule which makes the value of the property at the time of conversion the measure of damages. The basic difficulty with this rule arises when the value of the property increases after the conversion. In this event, it can be argued that the defendant has been granted a windfall, and it may be said that he is permitted to speculate at the plaintiff's expense.

The second rule awards the highest value from the time of conversion to the time of the judgment. This is known as the "highest intermediate value" rule and is followed by a majority of jurisdictions. Clearly, this rule affords the plaintiff an opportunity to speculate at the defendant's expense. The plaintiff is encouraged to delay the trial so that a longer period will be available for the market to rise. As McCormick states, "[The plaintiff] runs no corresponding risk, for no matter how low swings the pendulum of prices, [he] gets the peak price." Thirdly, the rule of "highest replacement value" awards plaintiff "the highest value which the commodity reaches from the time when the plaintiff first learns of the conversion ... until the end of the period within which the plaintiff might, acting with reasonable promptness, have replaced [the property] on the market." This rule (the "New York" rule), presumes that had the plaintiff wanted the stock for speculative reasons, he could have, within a "reasonable time," purchased replacement shares. The plaintiff is awarded the highest value

29 See Barkhausen v. Bulkley, 90 Colo. 558, 11 P.2d 220 (1932); Rogich v. Dressel, 45 Wash. 823, 278 P.2d 367 (1954). Barkhausen states that this is the majority rule, 90 Colo. at 559, 11 P.2d at 221. But see discussion in text infra.
30 C. McCormick, DAMAGES § 48 (1935). This treatise cites Ricketts v. Crittenden, 2 Ky. Opin. 499 (1863) for dictum approving this view. See C. McCormick, supra, at § 48 n. 131, for a compilation of cases adopting these three rules in the various states.
31 Id. at § 148, at 187.
32 C. McCormick, supra note 30, at § 48, at 188.
33 Id.
he would have paid had this self-protective course of action been employed. Neither party is allowed to speculate to the other's disadvantage, and nothing more is expected of the plaintiff than the exercise of sound business judgment. Nor is the plaintiff encouraged to postpone the defendant's day in court as under the highest intermediate value rule. McCormick says this rule "seems the most equitable and practical of the three."\(^3\) However, the rule is not without weaknesses, e.g., the question of a "reasonable time" and the imposition on the plaintiff of the burden of double investment for single advantage.

The Kentucky Court of Appeals in *Amlung v. Banker's Bond Co.*,\(^3\) had the opportunity to choose among these three rules. The plaintiff had inherited certain shares of stock from her father's estate. Her husband (not a party to this action) converted the stock over an eight year period by forging her name to the certificates and transferring them through the defendant's agent. Since the plaintiff left business and financial matters to her husband, she was unaware of the conversion until after her husband's hasty and unexplained departure. At the trial, the plaintiff was awarded the market value of the stock at the time of conversion. She appealed, contending that she should have been awarded the increased current value of the stock. The Court of Appeals affirmed the judgment of the trial court.

By such affirmation, the Court of Appeals adopted the common law rule. Realistically, this was a case of first impression since the only case discussing the measure of damages for conversion of corporate stock was decided in 1868, and it presented the rule by way of dictum.\(^3\)\(^7\) The common law rule was reasonably applied here even though it is a rule subject to much criticism. In addition to the criticisms noted previously, this rule has been condemned because it deprives the plaintiff of all opportunity to speculate which he may have had after the conversion. However, on the facts of this case, awarding the plaintiff the lowest judgment available under the three rules is just.

The equitable nature of this decision is noted because the Court apparently reached a compromise. The defendant was an innocent converter and was held liable only because brokers are impressed with a fiduciary duty. Since there was no overt criminality, there were no compelling reasons to impose higher damages. The other side of the compromise arises from the fact that it cannot be clearly shown that


\(^{36}\) 411 S.W.2d 689 (Ky. 1967).

\(^{37}\) Ricketts v. Crittenden, 2 Ky. Opin. 499 (1868).
laches should not have barred the plaintiff’s claim. The Court did not want to hold this defendant liable to the fullest extent due to his “innocence,” but neither did it want to release him entirely. Therefore, the Court awarded the lowest judgment available under the three rules.

Conversely, the Court could reasonably have barred the plaintiff because of laches. A basic element of laches is that a party will be charged with knowledge where the evidence leads to the conclusion that he could have informed himself of the facts by the degree of “diligence” which the law exacts... or where circumstances of which he was cognizant were such as to put a man of “ordinary” prudence on inquiry.38

The question before the Court in the instant case was whether a wife, who left all financial matters to her husband, should be required, in order to satisfy “ordinary prudence,” to investigate his management of those affairs. Such an investigation would only have required that the plaintiff checked her lockbox once in the eight years preceding the trial. Because this does not appear to be an onerous burden, and because it can be argued that “ordinary prudence” would demand that one not abandon the care and control of his lockbox for a period of eight years, laches was not totally inappropriate as a defense in this case. However, the Court’s argument was that “Mrs. Amlung was an ordinary, unassuming housewife with no business experience or acumen, a good woman trusting her husband,”39 and, therefore, she satisfied the requirement of ordinary prudence. This argument is not without force.

The Court has reached a good decision by applying the common law rule. But for purposes of stare decisis, it has adopted the least acceptable rule since all defendants are now given the benefit of speculating with stock rightfully belonging to another. Individuals should not be compelled to suffer the loss of the opportunity to speculate. The Court has not allowed for the more realistic cases which will arise in the future, wherein the plaintiff has been wronged without fault or irresponsibility on his part. It is hoped that the Court will recognize this in future cases and limit Amlung to its facts.

H. EASEMENTS

Kentucky Mountain Coal Co. v. Hacker40 involved both a trespass

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38 27 Am. Jur. 2d Equity § 167 (1966). The Court in Amlung cited and followed Taylor v. Commonwealth, 302 S.W.2d 584 (Ky. 1957), which conforms with this basic element as quoted.
39 411 S.W.2d at 695.
40 412 S.W.2d 581 (Ky. 1967).
and an easement problem. The coal company apparently had been hauling coal across appellee’s land for some time before instituting an action to condemn a right-of-way. Both parties acquiesced in the condemnation proceedings, and appellant conceded trespass over appellee’s land. Damages of $3,625.94 were awarded for the trespass and $1,000 for the easement. Appellant appealed both awards. Trespass damages were computed by charging two cents per ton for coal conveyed across the land. This figure was used because the evidence showed that two cents per ton was customary rental for a right-of-way in the area. The one thousand dollar figure evidently came solely from the circuit judge’s experience and estimation. The Court overruled both figures and remanded the case.

The proper amount of damages for temporary trespass is the depreciation in the rental value of the land during the period of occupancy if the land is rental property, but if the land is occupied by the owner, it is the diminution in the value of the use of the property. Since appellee’s land was neither occupied nor rented, the Court held the reasonable rental value of the use was the proper measure of damages, citing Cary-Glendon Coal Co. v. Carmichael. Thus, the same test for measuring damages was announced in both Carmichael and Hacker, but its components have changed. Carmichael awarded damages of one and one-half cents per ton of coal conveyed across the property since this was customary under private contract. However, the customary tonnage formula used in private contracts was not regarded by the Court as a correct means of determining reasonable rental value. Thus, the Hacker Court stipulated that Cary-Glendon was overruled to the extent that it was in conflict.

The Court’s decision to diminish the damages for the coal company’s trespass is questionable. In effect, the coal company is in a better financial position because it chose to trespass instead of dealing legally with the landowner. If the coal company had leased the right-of-way, it is reasonable to say it would have had to pay approximately

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41 The facts were not set out well in the case, but after several readings the general ideas set out in the text began to emerge.
42 Condemnation proceedings were under KRS §§ 381.580-620 (1962), the statutory parallel of easement by necessity. Under these sections the coal company was empowered to claim a right-of-way from the defendant.
43 Edwards v. Lee’s Adm’r, 265 Ky. 418, 96 S.W.2d 1028 (1936); Cary-Glendon Coal Co. v. Carmichael, 258 Ky. 411, 80 S.W.2d 29 (1935); Price v. Dawson Springs, 190 Ky. 349, 222 S.W. 470 (1920).
44 Cary-Glendon Coal Co. v. Carmichael, 258 Ky. 411, 80 S.W.2d 29 (1935).
45 Id. Two previous litigations and a purported lease arrangement influenced the decision. There the landowner, who had a judgment for one and one-half cents per ton, wanted more damages. Since the trespasser had not appealed, damages were left in the amount previously determined.
two cents per ton for coal conveyed across the property since evidence showed this was the amount that other lessees in the area were paying. This was the amount of damages awarded by the circuit court, and the amount the Court of Appeals remanded as being too large. By choosing to act illegally, the coal company ended up paying less to haul their coal. The practical result of this case is to encourage illegal acts. If the Court thought it necessary to change the measure of damages, logically it should have raised it. Such a move would have a detrimental effect on potential trespassers.

The Court also reversed the lower court's award of damages for the easement. A proper measure of damages for the easement was the depreciation in land value—the difference between the market value before and after the easement was granted. The Court pointed out quite sharply that its opinion in Adams Construction Co. v. Bentley did not allow the trial judge to value depreciation from his own knowledge of the property. The record contained no evidence to support the award of the trial judge.

I. OIL AND GAS

An oil and gas lease involves the law of contract, and because of its peculiar nature, it also involves the law of conveyance. A lease usually contains a granting clause, an habendum clause, and a drilling and delay rental clause. The purpose of the latter clause is to encourage the testing, development, and operation of the leased premises. These "incentive" clauses fall basically into two categories. One is the so-called "or" lease and the other the "unless" lease.

Due to the speculative nature of oil and gas operations, operators would prefer a lease which secures their right to drill at any time rather than one requiring immediate development under the threat of

46 Commonwealth v. Mann, 387 S.W.2d 848 (Ky. 1965); Commonwealth v. George, 387 S.W.2d 580 (Ky. 1965); Young v. Tennessee Gas & Transmission Co., 367 S.W.2d 270 (Ky. 1963).
47 335 S.W.2d 912, 914 (Ky. 1960) provides: "But in any event, there must be introduced in evidence some tangible figure from which the value of the use reasonably can be deduced, else the court and jury are left to draw entirely on their experience aliunde, or upon naked speculation."
48 R. Sullivan, HANDBOOK OF OIL AND GAS LAW 86-123 (1955). A granting clause is that which is conveyed; and an habendum clause fixes the ultimate duration of the lessee's interest. The drilling and delay rental clause fixes the obligation of the lessee to commence drilling or pay stipulated rentals.
49 Kelley v. Hardwick, 228 Ky. 349, 351-52, 14 S.W.2d 1098, 1099 (1929): "The lease must be construed if possible to bring as strong a pressure to bear as possible on the lessee to begin development as soon as he can."
50 An "unless" lease is contrasted with an "or" lease in as much as the latter provides for either payment of delay rentals in the event of failure to drill, or forfeiture of the leasehold. See Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 8 Texas L. Rev. 483, 528 (1930).
forfeiture for non-production. To secure this privilege, the lease generally provides that a well be drilled within a certain time or the lessee must pay a certain sum called delay rental. This enables a lessee to postpone drilling by paying rent when this alternative appears favorable. However, failure of the lessee to pay or drill makes the lease voidable since courts have construed this to be a forfeiture clause in favor of the lessor. Hence, the lessee can lose his lease for failure to comply with the provision to drill or pay, or, at the lessor's option, the lessee can remain liable during the primary term, i.e., the length of the lease, to either drill or pay delay rentals. Therefore, even if the land proves to be "dry," the lessee may remain liable to pay the rentals until the expiration of the primary term.

To alleviate this problem a surrender clause is added, giving the lessee the right to terminate the lease at anytime. This alternative drill or pay provision combined with a forfeiture and a surrender clause is known in the parlance of attorneys and the oil and gas industry as an "or" lease. The lessor benefits by having, as an alternative to development, a stipulated rent as long as the lease is held by the lessee. The lessee benefits by being allowed to defer drilling and, in the alternative, to absolve himself from liability in the case of a "dry hole." An alternative to the surrender clause is the "unless" lease which allows the lessee to absolve himself of liability for further development or for paying rent where the land proves to be non-productive. This clause provides that if no well is drilled within a certain time, the lease will terminate as to both parties unless delay rentals are paid. Thus, if the lessee fails to drill, the lease will automatically terminate unless the leaseholder keeps it alive by paying the stipulated rentals. If the lessee finds the land unproductive, he can refuse to drill or pay the rentals, and a termination of the lease will re-

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51 R. SULLIVAN, supra note 48, at § 45.
52 Delay rentals are payments, usually under a gas and oil lease, made by the lessee for the privilege of extending the time for which he might utilize the leasehold. BLACKS' LAW DICTIONARY (4th ed. 1951).
53 R. SULLIVAN, supra note 48, at § 45.
54 Id.
55 Id.
56 See note 52 supra.
57 R. SULLIVAN, supra note 48, at § 45.
58 H. WILLIAMS, OIL & GAS LAW § 606.2 (1966):
The courts have been substantially unanimous in holding that if the lessee fails to pay or tender the rental on or before the due date, the lease ['"unless" form] terminates automatically regardless of the fact that subsequent to the due date the lessee may tender the rental payment. See Gasaway v. Teichgraeber, 107 Kan. 340, 191 P. 282 (1920) wherein payment was mailed on the due date, but not received until the following day, and the court held that the leasehold terminated.
sult. No forfeiture or surrender is involved in the "unless" lease. The lease simply terminates on the inaction of the lessee.69

Both the "or" and the "unless" clauses give the lessee three choices: 1) to drill a well within the specified time; 2) in lieu thereof to pay the stipulated delay rental; 3) or to terminate the lease even during the primary term and thus avoid further liability of any kind.60 The lease can be terminated under the "or" clause by surrendering the lease, and under the "unless" clause by simply failing to drill and to pay delay rentals.

The lessee does not affirmatively covenant under an "unless" clause, and no action can be brought against him for failure to drill or pay. However, under an "or" lease, the lessee affirmatively covenants that he will either drill or pay. Thus, courts have construed this type of lease in favor of the lessor,61 compelling the lessee to do one or the other. The "or" lease is seldom used today except where the lessor is primarily interested in having his land promptly developed. Even in this situation, the "unless" form may be used but modified by an express covenant to drill.62

The "or" lease creates a condition subsequent and when the condition occurs, i.e., the lessee does not drill or pay, the estate continues in existence until the lessor exercises his right of re-entry.63 Consequently, the lessor may waive the default and the principle of ratifica-

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60 H. Williams, supra note 58, provides:
This rule of automatic termination of the lease for failure to make timely payment or tender of rental may seem unduly harsh in many cases . . . [but these cases] seem correct. The "unless" type drilling and rental clause is a clause of limitation, not one of covenant or condition. The lessee may relieve himself of further liability under the lease by simply failing to commence operations or pay rentals during the primary term. The lessee who has this benefit of the automatic termination of the lease should have no standing to claim relief from automatic termination when he is responsible for a failure to make timely payment of rental.

61 R. Sullivan, supra note 48, at § 45.

62 Comment, 18 Ky. L.J. 240 (1924):
The object of the rule is to promote development and prevent delay and unproductiveness, and this is regarded as the real intent of the lessor even if there are no express words of forfeiture. An opposite holding would deprive the lessor of valuable royalties and grant to the lessee the use of the land at a mere nominal rental.

See also Kolachnr v. Galbreath, 26 Okla. 772, 110 P. 902 (1910), which holds that the surrender clause of an oil and gas lease will be strictly construed in favor of the landowner.

63 R. Sullivan, supra note 48, at § 46.

64 Monarch Oil & Gas Co. v. Richardson, 124 Ky. 602, 99 S.W. 668 (1907):
"The lessor must first refuse rentals, demand development, and wait a reasonable time." See also Bloom v. Rugh, 98 Kan. 583, 160 P. 1135 (1916): the failure to assert the right of forfeiture ("unless" lease) allowed the lease to continue.
tion and estoppel will operate to extend the lease. The "unless" lease, in a majority of jurisdictions, creates a special limitation on the estate granted and is construed as similar to a determinable fee. Thus, a strict interpretation of the clause will not permit a court of equity to prevent termination. If the lessee fails either to develop or to tender timely payment of the delay rentals, the lease is said to terminate automatically. Accordingly, there is nothing to forfeit, because at the moment the rentals become due and are not paid, there is no lease. Despite this strict interpretation, courts of equity have granted relief from termination of "unless" leases in cases where the lessor has been at fault, or because of accident, mistake, or inadvertence, the lessee was unable to pay on time.

In *Ledford v. Adkins*, the appellee was holder of an oil lease which provided that delay rentals must be paid on or before May 1, 1965, and that failure to make such payment would terminate the lease. Stricken with a serious illness in March, 1965, the appellee was hospitalized until April 25, 1965, and required the care of a special nurse until May 2. As a consequence of his illness, the delay rentals were not tendered until May 13, 1965. The appellee had expended $250,000 developing the lease, and he alleged that forfeiture would cause appellant's unjust enrichment in that amount. After considering several policies and subconsciously admitting that an "unless" lease required automatic termination (if, indeed, this case involved one),

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64 H. Williams, supra note 58, at § 607.7: Unlike the termination provision of an "unless" clause which operates automatically and, at least in theory, without regard to equitable considerations, the termination provision of an "or" clause operates by way of condition and relief from forfeiture may be granted on the basis of equitable considerations.

65 H. Williams, supra note 58, at § 606.2.

66 Annot., 5 A.L.R.2d 993 (1949): With allowances to be made for ordinary variances in rulings from state to state, explained in part at least by differences in the circumstances of cases, and except for negative doctrines supported with more or less consistency in one or two jurisdictions, the correct general conclusion seems to be that equity will grant relief from termination of an "unless" lease, or from forfeiture of an "or" or other lease, for nonpayment of delay rentals, when it appears the leaseholder had fully intended to pay the full amount, but, without gross negligence, and because of accident, mistake, inadvertence, mischance, etc., failed to do so strictly on time.

See also Gloyd v. Midwest Ref. Co., 62 F.2d 483 (10th Cir. 1933) (an attempt to pay was prevented by an accident over which the lessee had no control); Jones v. Southern Nat. Gas Co., 213 La. 1051, 36 So. 2d 34 (1948) (three hundred dollars was tendered rather than $323 due to a mistake in the amount of acreage leased). Contra, Ford v. Barton, 224 S.W. 268 (Tex. 1920); Oldfield v. Gypsy Oil Co., 123 Okla. 298, 298 P. 298 (1926) (mail clerk erroneously delivered the check to the wrong bank); Harvey v. Benmo Oil Co., 272 F. 475 (D.C. Okla. 1921) (delay in mailing was not the fault of the lessee).

67 413 S.W.2d 68 (Ky. 1967).
the Court concluded that equity must prevail and granted the lessee the right to continue under the lease. The Court of Appeals has dealt with the problem of forfeiture of oil and gas leases in many cases over the years, but Ledford is the first in which the delay was caused by severe physical incapacity.

It would seem that a proper analysis of the problem necessitates that the Court determine whether the case involved an "or" or an "unless" lease. However, the Court failed to mention the nature of the lease, and whether the omission was intentional or merely inadvertance is uncertain. Thus, it might be contended that the case has little importance for purposes of stare decisis because of this failure. However, the Court of Appeals has interpreted a statute in a manner which indicates that these two types of leases have the same effect. The statute states that if an oil and gas lease provides for "the payment or tender of the rental on or before a certain day, and the rental is not so paid or tendered, the lessor or landowner may avoid the lease or contract."

In Walter v. Ashland Oil & Refining Co., the acceptance of overdue rentals had the effect of avoiding a forfeiture of the lease and rendering the doctrine of waiver and estoppel available to the appellants. The Court specifically stated that this was an "unless" lease. In allowing equitable relief, the Court interpreted the above quoted statute:

The legislature was well aware of the difference in phraseology between an "or" and an "unless" lease, and if it had intended that section of the Act to relate to "unless" leases only or to "or" leases only, it would have been a very natural and a very simple thing for it to say so specifically. Its failure to do that, coupled with the language which it used, admits of only one view; namely, that it was the legislature's intention that the section should relate to any oil and gas lease which provided in substance that drilling might be postponed by the payment of rental.

A reasonable reading of the statute and the Court's interpretation thereof demonstrates that neither type of lease terminates automatically upon a failure to pay exactly on time. The statute says that the lessor may avoid the lease; this indicates that he has an option, and the Walter case held that this option applied to both an "or" and an "unless" lease. The "unless" lease in Walter was considered to be

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63 See Sapp v. Massey, 358 S.W.2d 490 (Ky. 1962); Young v. Dunn, 302 Ky. 832, 194 S.W.2d 378 (1946); Bell v. Kilburn, 192 Ky. 809, 234 S.W. 730 (1921); Jenkins v. Williams, 191 Ky. 165, 229 S.W. 94 (1921); Niles v. Meade, 189 Ky. 243, 224 S.W. 854 (1920).
64 KRS § 353.020 (1962).
65 300 Ky. 43, 187 S.W.2d 425 (1945).
66 Id. at 46, 187 S.W.2d 427.
67 Id. at 50, 187 S.W.2d 428.
voidable and not absolutely void, a result that could not have been reached under the common law theory of automatic termination. Interpreting Ledford as an extension of Walter would indicate that all distinctions between “unless” and “or” leases are eliminated in Kentucky. Indeed, the nature of the lease is unimportant in disposing of the case. Unfortunately, the Court has been too unscrutable to allow such broad statements. It is impossible to do more than speculate as to the sweep of Ledford without a more detailed explanation by the Court as to why it reached the result it did.

73 Id. at 48, 187 S.W.2d at 428.
XVI. TAXATION

In 1965, the Court decided, in Russman v. Luckett,\(^1\) that the constitutional provision\(^2\) requiring the assessment of property for taxation at one hundred per cent of its “fair cash value” would be strictly enforced, regardless of the fact that it was a long-standing custom for public officials to assess property at a fraction of its “fair cash value.”\(^3\)

A natural outgrowth of Russman was the problem of computing “fair cash value.” In Department of Revenue v. Oldham County,\(^4\) the Court was presented with the problem for the first time. The case concerned the Oldham County officials’ rejection of the method of computation used by the Department of Revenue. The Department of Revenue had made a study of all farm sales in Oldham County during 1964 and 1965 by taking statements from the parties to the sales transactions, obtaining the sales prices recited in the deeds, and observing the amounts paid for federal tax stamps.\(^5\) Those transactions which did not appear to be bona fide, arms length transactions were eliminated from consideration. Each sales price was compared with the county tax commissioner’s 1964 and 1965 assessments of the transferred property. This comparison showed the assessment for the years 1964 and 1965 represented 21.6 per cent of the “fair cash value,” i.e., the assessments for those years had to be multiplied by 4.6 to produce an amount representing “fair cash value.” Applying this method and making appropriate adjustments, the Department of Revenue computed the 1966 assessment.

The actual assessment for 1966, made by the county tax commissioner, was below the Department of Revenue’s assessments, and a fifteen per cent blanket increase was needed to produce the proper assessment as computed by the Department of Revenue.\(^6\) The Oldham County officials argued that the Department of Revenue’s method was erroneous and that the Department of Revenue was not relying on any case, regulation, or statute as authority for the application of such method. The Court, in upholding the method of computation used by the Department of Revenue, stated that it was somewhat astonishing that the Oldham County officials had made such an argument in spite of the expressed direction of KRS 133.150, which provides:

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\(^1\) 391 S.W.2d 694 (Ky. 1965). The Court struck down fractional assessments and ruled that all property must be assessed at its “fair cash value.”

\(^2\) Ky. Const. § 172.


\(^4\) 415 S.W.2d 886 (Ky. 1967).

\(^5\) Brief for Appellant at 11, Department of Rev. v. Oldham County, 415 S.W.2d 388 (Ky. 1967).

\(^6\) 415 S.W.2d at 388.
The Department of Revenue shall equalize each year the assessments of the property among the counties. It shall compare the recapitulation of the county tax commissioners' books from each county with the records of sales of land in such county or with such other information that it may obtain from any source and shall determine the ratio of the assessed valuation of the property to the fair cash value. The Department of Revenue shall have power to increase or decrease the aggregate assessed valuation of the property of any county or taxing district thereof or any class of property or any item in any class of property. The Department of Revenue shall fix the assessments of all property at its fair cash value. When the property is not assessed at its fair cash value, such assessments shall be increased or decreased to its fair cash value by fixing the percentage of increase or decrease necessary to effect the equalization.

(Emphasis added.)

If the Oldham County officials had taken a closer look at the statute, they would have found that it expressly authorized the method of computation used by the Department of Revenue.

Even though the statute sets forth a formula to use in computing the "fair cash value," is this the only formula that will be upheld by the Court? Prior to Russman, tax commissioners were not restricted to any particular formula in computing property values for the assessment of property taxes so long as the assessments were fair and equitable. The formula stated in KRS 133.150 seems to be the market or comparative method of valuation. This method is based on the actions of landowners buying and selling property and the theory that the sales price of a particular piece of property will indicate the value of a comparable piece of property. In applying this approach, the property being assessed is compared to similar property sold within a reasonable time before the date of appraisal. Sales within the preceding year are the most reliable, but if there is an insufficient number of sales of comparable property within this period, then sales from an earlier period can be used. These earlier sales are reliable as a standard if proper adjustments are made for market fluctuations. The number of sales to be used may vary with the class of property, but there should be enough sales to form a pattern; otherwise, the value estimate is mere speculation. Property characteristics to be considered in comparing property include location, size, and use of streets, sidewalks, sewers, and gas. This seems to be the best approach to use regardless of whether the appraisal is a mass appraisal or only appraisal of a single piece of property.

Another approach to the valuation of property is the reproduction cost method. This approach is founded on the theory that a piece of

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7 Fayette County Bd. of Supervisors v. O'Rear, 275 S.W.2d 577 (Ky. 1955); Borders v. Cain, 252 S.W.2d 903 (Ky. 1952).
8 DEPARTMENT OF REVENUE, REAL PROPERTY APPRAISAL MANUAL 24 (1962).
9 Id. at 4.
property should be worth no more than the cost to reproduce it. In applying this method, land is classified according to its use, i.e., residential, commercial, industrial, or farm. In classifying property, it is always valued by its highest and best use.\textsuperscript{10}

A third procedure for valuing property is the income approach\textsuperscript{11} which is based on the theory that the value of property is the present worth of the net return it may be expected to produce during its useful life. Of course, this procedure is applicable only to investment property.

Since different methods of valuation are more appropriate in some situations than others,\textsuperscript{12} the Court should not put the Department of Revenue in a straitjacket and limit its methods of valuation. The method of valuation is not a sword by which the Department cuts into the taxpayers' pockets without a remedy for the taxpayer. The Court, in Fitzpatrick v. Patrick,\textsuperscript{13} a declaratory judgment action, gave Montgomery County landowners a temporary injunction against the collection of taxes where the landowners alleged that their property was assessed in excess of "fair cash value" and that they had no administrative remedy. The Court admitted that neither the revenue statutes nor the Department of Revenue provided a method by which an individual taxpayer may seek relief from an improper assessment,\textsuperscript{14} but that the statutes had to be construed as providing an opportunity for a hearing and appellate review. The Court set forth a procedure which they thought was necessarily contained within the statutes and which would provide an adequate remedy against assessments in excess of "fair cash value."\textsuperscript{15}

When the Department of Revenue ascertains that it will be necessary to raise the assessed valuation of particular property, notice of the contemplated action must first be given to the county clerk of the county where the property is located, to the school districts affected, and to the taxpayers of that county. This notice is delivered through the county judge, who will post it on the courthouse door. In addition to being posted, notice shall also be published in the newspaper as required by the legal notice statutes.\textsuperscript{16} If the property of an individual landowner is singled out for an increase, he shall be notified

\textsuperscript{10} Id. at 45.
\textsuperscript{11} Id. at 10.
\textsuperscript{12} Due to the nature of the property, one of the approaches to the valuation of property may be the only approach that can be applied. In the mass appraisal of property usually only one approach can be utilized as it is impossible to apply all three approaches within the time allotted.
\textsuperscript{13} 410 S.W.2d 143 (Ky. 1966).
\textsuperscript{14} KRS §§ 138.150-170 (1962).
\textsuperscript{15} 410 S.W.2d 143, 146 (Ky. 1966).
\textsuperscript{16} KRS ch. 424 (1962).
by a registered letter from the Department of Revenue,\textsuperscript{17} fixing the
time and place for a hearing. If the increased assessment involves a
blanket raise of assessments, the notice must state that any individual
taxpayer who believes the proposed raise would increase his assess-
ment above "fair cash value" may file with the Department of Revenue,
on or before the date of the hearing, an application for exoneration of
his property from proposed increase.\textsuperscript{18}

At the hearing, any taxpayer who had duly filed an application for
exoneration is entitled to be heard and present evidence in support of
his claim that the proposed blanket increase would cause his property
to be assessed above "fair cash value."\textsuperscript{19} The Department of Revenue
will take the evidence into consideration and then value the property.
This action is then certified to the county judge of the county where
the proposed raise is to occur\textsuperscript{20} and notice is then mailed to each tax-
payer who applied for exoneration, stating the disposition of the ap-
plication.\textsuperscript{21}

A taxpayer whose application has been denied, in whole or in part,
shall then have a right of appeal to the Kentucky Board of Tax Appeals.
The Board is vested with exclusive jurisdiction to hear and determine
appeals from rulings of any state agency affecting revenue and
taxation.\textsuperscript{22} All proceedings before the Board are de novo. If the final
ruling of the Board is unfavorable to the taxpayer, he may appeal to
Franklin Circuit Court or the circuit court of his home county.\textsuperscript{23} The
Department of Revenue shall then be summoned to file an answer
within twenty days. After such answer, the court will enter judgment
affirming, modifying, or remanding the entire matter to the Board for
further consideration. The ruling in the circuit court may be appealed
to the Court of Appeals as provided by the Rules of Civil Procedure.
Through this elaborate procedure, the Court has guaranteed the tax-
payer protection from arbitrary action by the Department of Revenue.

The dissenters in the \textit{Oldham County} case used \textit{Fitzpatrick} as a
basis for their dissent.\textsuperscript{24} They contended that the majority approved
a method of increasing property assessments which was considered
erroneous in \textit{Fitzpatrick}. This is not accurate. \textit{Fitzpatrick} does not
hold that the method of assessment used in Montgomery County was
erroneous, but rather, it merely requires that where the assessment

\textsuperscript{17} KRS § 133.160 (1966).
\textsuperscript{18} 410 S.W.2d at 146.
\textsuperscript{19} 410 S.W.2d at 146.
\textsuperscript{20} KRS § 133.170 (1966).
\textsuperscript{21} 410 S.W.2d at 146.
\textsuperscript{22} KRS § 131.340 (1966).
\textsuperscript{23} KRS § 131.370 (1966).
\textsuperscript{24} 415 S.W.2d at 391.
of property is alleged to be in excess of "fair cash value" and the landowners have no adequate administrative remedy, the Court would temporarily enjoin the collection of taxes. The dissenters' reliance on this case does not seem to be well-founded.

Another problem considered in the *Oldham County* case was the interpretation of KRS 133.180 which reads: "When the Department of Revenue has completed its action on the assessment of property in any county it *shall*, not later than June 20, certify the assessment to the county clerk." (Emphasis added.) In spite of this statute, the Department of Revenue certified the increased assessment to the County Court Clerk of Oldham County on July 29, 1966. However, the Court did not regard this delay as fatal to the proposed increase.

With regard to the effect of the word "shall," the Kentucky Legislature has provided: "As used in the statute laws of this state, unless the context requires otherwise; ... 'shall' is mandatory." Before the enactment of this statute Kentucky had no universal or inflexible rule by which directory provisions could in all circumstances be distinguished from mandatory provisions. Generally, provisions regarding time were considered directory and not a limitation of authority. If there was substantial compliance with the terms of a statute containing a time limit, so as to effectuate the purpose of the statute and no harm resulted, the provision was deemed directory and a slight variation did not invalidate the proceedings. As late as 1963, in *Webster County v. Vaughn*, the Court held that the word "shall" was directory. It might be questioned what the Legislature has really accomplished by enacting KRS 446.010. If the Court continues to construe "shall" as directory where the context of the statute does not require such a construction, it would appear that a meaningless statute has been enacted. Such construction clearly contravenes the Legislature's intent and lacks ostensible authority. An interesting event will occur when the Department of Revenue contends "shall" as used in the taxing statutes, is mandatory.

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25 Stanfield v. Willoughby, 286 S.W.2d 908 (Ky. 1956); Clark v. Riehl, 313 Ky. 142, 230 S.W.2d 626 (1950); Stevens v. Coleman, 311 Ky. 318, 224 S.W.2d 149 (1949); Ward v. Hurst, 300 Ky. 464, 189 S.W.2d 594 (1945).

26 Middletown's Adm'x v. Middletown, 297 Ky. 109, 179 S.W.2d 227 (1944); Ewing v. Union Cent. Bank, 254 Ky. 623, 72 S.W.2d 4 (1934); McCrery v. Speer, 158 Ky. 783, 162 S.W. 99 (1914).

27 365 S.W.2d 109 (Ky. 1964).

The doctrine of assumption of risk developed late in the law of torts\(^1\) and has since been surrounded by controversy and confusion.\(^2\) Most of the difficulties have stemmed from the fact that the distinction between assumption of risk and contributory negligence has been difficult to conceptualize and apply. Kentucky acted to eliminate these difficulties when, in *Parker v. Redden*,\(^3\) the Court of Appeals abolished the defense of assumption of risk. Commenting on past problems the distinction has created, the Court noted in *Parker*: "As seems to be true of the courts of most other jurisdictions, our court has worked around in this area. Sometimes purporting to recognize a distinction... and other times saying there is no distinction."\(^4\) Although most agree that a distinction does exist,\(^5\) the utility of recognizing it has been neglected,\(^6\) and the result of this neglect has been to confuse the distinction almost hopelessly.\(^7\)

\(^1\) *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967).

\(^2\) W. Prosser, *Torts* 450 (3d ed. 1964). The general confusion is noted in *Parker v. Redden*, 421 S.W.2d at 591-92. Most authorities agree that the distinction between assumption of risk and contributory negligence was never clearly made, and that this lack of explanation is the origin of the confusion. Prosser himself fails to clearly explain assumption of risk. He thinks that where a plaintiff acts reasonably, then assumption of risk has the effect of denying the defendant's negligence.

\(^3\) W. Prosser, supra note 2, at 453. See also F. Harper & F. James, *Law of Torts* 1162 (1956).

\(^4\) *Parker v. Redden*, 421 S.W.2d at 591. For specific evidence of this inconsistency, see *Whitaker v. Cole*, 390 S.W.2d 893 (Ky. 1965); *Lanzer v. Wentworth*, 315 S.W.2d 622 (Ky. 1958); *Carlisle v. Reeves*, 294 S.W.2d 74 (Ky. 1956); *Morrison & Curklin Const. Co. v. Cooper*, 256 S.W.2d 505 (Ky. 1953).


\(^6\) Some courts have viewed the two doctrines as interchangeable, resolving that a voluntary choice to encounter a known danger and thereby assume the risk is equivalent to an unreasonable choice to encounter the danger; assuming the risk of a known danger is contributory negligence. Schlemmer v. Buffalo R. & P. Ry., 205 U.S. 1 (1907); *McGregor v. O'Byrne*, 205 Ala. 266, 82 So. 508 (1919); *Schaleif v. Grigsby*, 88 Cal. App. 174, 263 Pac. 255 (1927). See Note, *Distinction Between Assumption of Risk and Contributory Negligence*, 23 Wash. & Lee L. Rev. 91 (1966).

\(^7\) The legal problem of distinguishing the difference between assumption of risk and contributory negligence is made more difficult by the many irreconcilable (Continued on next page)
Perhaps the confusion can be explained by observing that the two doctrines (contributory negligence and assumption of risk), while distinct, are symbiotic and somewhat overlapping. Although there are many points of similarity between the two doctrines, they differ in that assumption of risk is inherent in a situation where a non-negligent plaintiff, when faced with another's negligent act, assumes the risk of being harmed by that pre-existing negligence. Contributory negligence, on the other hand, places fault on the plaintiff who is himself originally negligent by traditional tort standards, and whose negligence is a prime contributing cause of his injuries.

A majority of the courts have retained this distinction for widely variant reasons. In the main, however, retention is due to the sound policy behind recognizing those cases where the plaintiff knew of the danger and acquiesced in it.

In Parker, the plaintiff, while driving his car on a two lane highway, saw a car disabled with a flat tire in the oncoming lane. To

(Footnote continued from preceding page)


Perhaps that is why some courts are questioning the doctrine. For example, the Oregon Court recently held that if the plaintiff voluntarily placed himself in danger, the jury might find his action was contributory negligence. Assumption of risk would then become redundant. Ritter v. Beals, 225 Ore. Rep. 504, 358 P.2d 1060 (1961). While the Oregon court seemed to abolish the doctrine of assumption of risk, other courts, while perhaps not going that far, have nevertheless indicated the significant resemblance between the two doctrines. Schlemmer v. Buffalo, R. & P. Ry., 205 U.S. 1 (1907); Swift & Co. v. Schuster, 192 F.2d 615 (10th Cir. 1951); Freedman v. Hurwitz, 116 Conn. 283, 164 A. 647 (1933); Schrader v. Kriesel, 232 Minn. 238, 45 N.W.2d 395 (1950); Camp v. J. H. Kirpatrick Co., 250 S.W.2d 413 (Tex. Cir. App. 1952).

The traditional basis for distinguishing the two doctrines has been the theory that assumption of risk requires knowledge of the danger, while contributory negligence requires deviation by the plaintiff from the standard of a reasonable man. W. Prosser, supra note 2, at 452. See Cassidy v. Quisenberry, 346 S.W.2d 304 (Ky. 1961); Sennba v. Wedger, 156 Mass. 462, 31 N.E. 642 (1892); Halepeska v. Callahan Interest Inc., 371 S.W.2d 368 (Tex. 1963).

Contributory negligence is conduct by the plaintiff which deviates from the standard to which he should comply for his own welfare and which is a legally contributing cause co-operating with the negligence of the defendant in bringing injury to the plaintiff. Most legal scholars agree that the doctrine of contributory negligence arose in the English case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). See 2 F. HARPER & F. JAMES, supra, note 3, at 1193, for a comprehensive definition and development of the defense of contributory negligence. See also RESTATEMENT (SECOND) OF TORTS § 463 (1965).

facilitate changing the tire, plaintiff parked his car facing the front of the disabled car. Using the lights from his car, plaintiff placed himself between the two cars in an effort to help change the tire. The defendant smashed into the rear of the disabled auto, pushing it into plaintiff’s auto and pinning him between the cars. A judgment was rendered for plaintiff and the driver of the disabled car. Defendant appealed on the ground that the plaintiffs were either contributorily negligent as a matter of law or that they had assumed the risk (it is unclear which theory was relied on).

In abolishing the doctrine of assumption of risk, the Court of Appeals held that whether the plaintiff had acted as a reasonably prudent man was a jury question. The decision was rationalized on the ground that assumption of risk, as applied by the courts, acts as a complete bar to a plaintiff’s cause of action regardless of the reasonableness of his conduct. The Court concluded that reasonableness of conduct should be the prime consideration in all negligence cases. Thus, the doctrine of assumption of risk should be eliminated from tort law since it can “operate as a bar to recovery in certain situations where in pure application contributory negligence would not affect a bar.” The authorities agree that assumption of risk can be a more complete bar to recovery than contributory negligence.

In Parker, the Court reviewed the Kentucky decisions and confessed that confusion was the best way to describe them. If this confusion has led to unjust results, the distinction was rightly abolished.

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12 Parker v. Redden, 421 S.W.2d at 593. But see Mullins v. Bullens, 383 S.W.2d 130 (Ky. 1964); Carlisle v. Reeves, 294 S.W.2d 74 (Ky. 1956).
13 Parker v. Redden, 421 S.W.2d at 593.
14 The Court stated that the assumption of risk doctrine should no longer be recognized because reasonableness of conduct should be the basic consideration in all negligence cases. The instant case is distinguished from previous holdings because Redden had a more justifiable reason for subjecting himself to the danger. He was defined as a “good samaritan” helping a lady in trouble. Id. at 593.
15 Id. at 592. It is interesting to note that the Court cited no authority for this proposition, although the decision does contain a generalized basis in its discussion of the strict rule of assumption of risk. Nonetheless, the proposition seems correct.
16 “Assumption of risk, whether or not it is called contributory negligence will bar recovery in an action founded on strict liability, where the plaintiff’s ordinary negligence will not... It seems clear that assumption of risk may also be a defense where defendant has the last clear chance.” W. Prosser, supra note 2, at 454. See generally 2 F. Harper & F. James, supra note 3, at 1162-92.
17 See notes 2-4 supra.
18 The assumption of risk defense is disliked by many because of its history of barring recovery in cases of genuine hardship, particularly in cases of injury to employees. A movement is on foot by some legal writers to abrogate the defense. W. Prosser, supra note 2, at 452. See also J. Fleming, Law of Torts 249-58 (2d ed. 1961); 2 F. Harper & F. James, supra note 3, at 1162-92.
for the “integrity of the decisions” is, and should be, the overall concern. Although a majority of courts have refused to merge these two doctrines, a growing minority has abolished assumption of risk because its application was deemed unfair in certain factual situations. Moreover, other objections to retaining the distinction have appealed to some courts. These seem to be procedural rather than substantive:

Quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts such as scope of duty or contributory negligence. Therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion.

The Court of Appeals has, in effect, adopted this approach. Where the injury revolves around the plaintiff's action when encountering defendant's negligence, the question will not be whether plaintiff assumed the risk, since an affirmative answer to the question would bar recovery. Rather, the question will be whether, whatever the factual situation, the plaintiff acted reasonably: "We think any problem [arising because of the separate doctrines] can be eliminated by weighing reasonableness in the light of necessity or urgency for the [plaintiff's] action and the difficulty of removing the risk before acting." Thus, Parker has substantially altered the law with regard to questionable behavior on the part of a plaintiff. If a plaintiff is contributorily negligent, he is barred. Heretofore, consideration has always been given to the reasonableness of the plaintiff's actions where

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19 The West Virginia court opined that the doctrines of contributory negligence and of assumption of risk are not identical, but that the failure to distinguish them has been characteristic of the judicial decisions. Hunn v. Windsor, 119 W. Va. 215, 193 S.E. 57 (1937).

20 See note 5 supra.

21 See, e.g., the cases in note 8 which have abolished or altered the content of assumption of risk. See generally, J. Fleming, supra note 18.

22 F. Harper & F. James, supra note 3, at 1191. It is argued that assumption of risk serves no purpose which is not covered by other doctrines. It is not only confusing but often results in denial of recovery in cases where it should not be denied. W. Prosser, supra note 2, at 453. See also Note, supra note 6.

23 Parker v. Redden, 421 S.W.2d at 593. See generally Restatement (Second) of Torts § 466 (1955). See W. Prosser, supra note 2, at 512, on the considerations inherent in the merger of the doctrines.

24 Goetz v. Green River Rural Elec. Co-operative Corp., 398 S.W.2d 712 (Ky. 1966); Skees v. Whitaker, 398 S.W.2d 715 (Ky. 1965); Hunts Adm'r v. Chesapeake & O. Ry., 254 S.W.2d 705 (Ky. 1952); Peerless Mfg. Corp. v. Davenport, 281 Ky. 654, 136 S.W.2d 773 (1940); Archer v. Bourne, 222 Ky. 268, 300 S.W. 604 (1927); Straight Creek Fuel Co. v. Mullins, 189 Ky. 661, 225 S.W. 726 (1920).
contributory negligence was in issue. But, where the question was whether the plaintiff had assumed the risk, he was barred without regard to the reasonableness of his conduct if he had voluntarily placed himself in a position where he took the chance of being hurt by a known danger. In view of Parker, whether the issue is couched in terms of contributory negligence or assumption of risk, the test will be the reasonableness of plaintiff's actions. The "abolition" of the assumption of risk doctrine is complete. It is no longer enough to prove that a plaintiff did certain acts which exposed him to injury. Henceforth, it will also be necessary to prove that these actions were unreasonable.

Two additional facets of Parker not handled directly by the Court should be discussed. The first is that under the traditional assumption of risk doctrine, the plaintiff must have had knowledge of the risk involved. Moreover, the plaintiff must also have comprehended and appreciated the danger itself. A plaintiff can know of the defect, but not appreciate the danger. In such a case no risk could be assumed, since for the doctrine to apply, both knowledge of the risk and appreciation of the danger are necessary. Presumably however, under Parker, the defendant need only show that plaintiff either knew or should have known of the danger in the exercise of ordinary care, and with this knowledge, he would not have proceeded as he did.

A second area of conjecture is the standard to be applied to the plaintiff. Ordinarily, under assumption of risk, the standard has been

25 In using the reasonableness criteria for contributory negligence cases as distinguished from assumption of risk, the West Virginia court cogently explained: "The essence of contributory negligence is carelessness; of assumption of risk, venturesomeness." Hunn v. Windsor, 119 W. Va. 215, 193 S.E. 57 (1937). See Mullins v. Bullens, 383 S.W.2d 130 (Ky. 1964); Sweeney v. Schadler, 259 S.W.2d 680 (Ky. 1952); Tate v. Hall, 247 Ky. 843, 57 S.W.2d 968 (1933).

26 In a Kentucky case involving the question of whether a passenger in an automobile was contributorily negligent in continuing to ride with a driver she saw was intoxicated, the Court stated that assumption of risk amounts to contributory negligence so as to bar recovery when a plaintiff is not only aware of dangerous conditions but also appreciates the danger. If the danger is a matter of common knowledge, the Court opined, it will be conclusively presumed that the injured person appreciated the danger. Sutherland v. Davis, 286 Ky. 743, 745, 151 S.W.2d 1021, 1022 (1941). See also Porter v. Cornett, 306 Ky. 251, 206 S.W.2d 83 (1948).

27 As a forerunner to this proposition in Parker, the Court held in Whitaker v. Cole, 390 S.W.2d 898 (Ky. 1965) that in order for intentional exposure to danger to operate as a bar, it must be unreasonable.

28 Unless expressly agreed by the plaintiff he does not assume the risk of harm arising from the defendant's conduct unless he knows of the existence of the risk and appreciates its unreasonable character. Restatement (Second) of Torts § 496(D) (1965). See Nantz v. Nantz, 354 S.W.2d 283 (Ky. 1962); Dean v. Nartz, 392 S.W.2d 371 (Ky. 1959); Richards v. Richards, 324 S.W.2d 400 (Ky. 1959).

29 Restatement (Second) of Torts § 496(D) (1965).
subjective.\textsuperscript{30} Since \textit{Parker} looks only to contributory negligence, the test would be objective,\textsuperscript{31} and the Court so indicated. The inquiry now may be as to the fairness of the ordinary prudent man test as applied to the unique fact situations which have usually given rise to the defense of assumption of risk.\textsuperscript{32}

### B. LAST CLEAR CHANCE

Recent Kentucky cases\textsuperscript{33} involving the last clear chance doctrine\textsuperscript{34} serve only to point out disagreement rather than to provide solutions as to when a last clear chance instruction should be given. In Kentucky, as in most jurisdictions, the doctrine applies when the plaintiff, through his negligence, places himself in a position of inextricable peril, and the defendant knows of his peril.\textsuperscript{35} The question then becomes whether the defendant exercised reasonable care after discovering plaintiff's peril.

In \textit{Fenwick v. Daugherty}, \textsuperscript{36} the Court dwelt on the meaning of the term "clear chance." A clear chance, if it exists in a given case, is "a point in time at which the curtain closes on the ability . . . (to avoid

\textsuperscript{30} Assumption of risk and contributory negligence are based on different standards. Assumption of risk is concerned with a \textit{subjective} standard requiring knowledge on behalf of the plaintiff of the danger. Contributory negligence relates to an \textit{objective} standard requiring the conduct demanded of a reasonable man. Note, \textit{supra} note 6, at 95. See \textit{Surface v. Safeway Stores, Inc.}, 169 F.2d 937 (8th Cir. 1948); \textit{Murdich v. Standard Oil Co.}, 153 Ohio St. 31, 90 N.E.2d 859 (1950); \textit{Halepeska v. Callihan Interests, Inc.}, 371 S.W.2d 368 (Tex. 1963). The Court verified that the objective standard will be injected in place of the "old" subjective assumption of risk standard. The controlling question is whether the defendant acted reasonably. \textit{Parker v. Redden}, 421 S.W.2d at 592.

\textsuperscript{31} See, e.g., \textit{cases cited in note 30} for application of the subjective assumption of risk standard. It is important to note that for some situations, Kentucky has statutorily abolished the defenses of assumption of risk and contributory negligence. \textit{See} KRS \S 277.320 (1962).

\textsuperscript{32} The doctrine of last clear chance had its origin in the English case of \textit{Davies v. Mann}, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). In this case the plaintiff negligently left his donkey fettered in the highway and the defendant drove into it. Defendant was held liable because even though the plaintiff was negligent, the defendant should have been able to prevent the injury with reasonable precaution. This case is probably the reason for calling last clear chance the "Jackass doctrine." For appropriate instruction on last clear chance, and the necessity of contributory negligence for its application, see O. \textit{STANLEY, KENTUCKY INSTRUCTION TO JURIES \S 597 (2d ed. 1957). See also Washington Mfg. & Mining Co. v. Barnett, 19 Ky. Law. Rptr. 958, 42 S.W. 1120 (1897).}

\textsuperscript{33} \textit{Fenwick v. Daugherty}, 418 S.W.2d 243 (Ky. 1967); \textit{Butts v. Wright}, 418 S.W.2d (Ky. 1967); \textit{Frank v. Silvers}, 414 S.W.2d 887 (Ky. 1967).

\textsuperscript{34} \textit{The new duty is created when: (1) the plaintiff is in a position of peril; (2) the situation is obvious to the reasonable man; and (3) there is reasonable time for defendant to avoid the accident. Kentucky & West Virginia Power Co. v. Lawson}, 240 S.W.2d 843, 846 (Ky. 1951). \textit{See also Jones v. Gardner}, 262 Ky. 813, 91 S.W.2d 520 (1936); \textit{Hensley v. Braden}, 262 Ky. 672, 91 S.W.2d 34 (1935).

\textsuperscript{36} 418 S.W.2d 243 (Ky. 1967).
the accident). Whether that interim constitutes a 'clear' chance should be left to the jury."\textsuperscript{37} This problem, i.e., whether the time lapse between discovery and collision provided a "clear" chance, arose in \textit{Butts v. Wright}.\textsuperscript{38} That case involved a collision between a tractor stopped to make a left turn and a following car. The Court of Appeals affirmed the lower court decision refusing a last clear chance instruction, ruling \textit{as a matter of law} that it was "apparent [from the evidence] that . . . [the defendant] did not have a clear chance in the exercise of ordinary care to avoid the collision."\textsuperscript{39}

Two judges dissented, pointing out that wherever there is a "clear" chance and a party does not avail himself of it, there would be no accident. In other words, failure to take a "clear" opportunity to avoid injuring the plaintiff would constitute an intentional wrong. In arguing that last clear chance is a question for the jury, the dissenters offered this theory:

If either party to an accident could have avoided or averted it by the exercise of ordinary care after it was too late for the other party to do so by the exercise of ordinary care on his own part, he alone is responsible. . . . [T]he last negligence in point of time is the superseding and proximate cause. And this is true whether the damage is to person or property; last clear chance is premised on \textit{cause}, not effect.\textsuperscript{40}

The dissenters seem to be referring to two gray areas which arise in those cases wherein last clear chance becomes a theory of the case.

First, there may be some concern that the use given the term is creating confusion as to its exact application. This concern can be seen in that part of the dissent which pointed out that where a chance is\textsuperscript{37} \textit{Id.} at 245. It has been suggested that a man's conduct at any given time should be judged according to what a reasonable man would be able to do. This of course disregards the acts of the substandard man. It is wrong not to look for danger when reasonable people would even though failure to look may spring from an inevitable habit. Where both negligences are antecedent, and defendant cannot avoid the event, his negligence may be the latest but it cannot be the graver wrong. 2 F. Harper & F. James, \textit{supra} note 3, at 1253.

\textsuperscript{38} 418 S.W.2d 653 (Ky. 1967). It has been contended that if the defendant does not discover the plaintiff's situation, but merely might do so by reasonable care, it is obvious that neither party can have a last clear chance. The plaintiff, still in a position to escape, causes the injury by his own inattentiveness. He cannot reasonably expect of the defendant any more precaution than he exercises himself. W. Prosser, \textit{supra} note 2, at 441. See Underwood v. Gardner, 249 S.W.2d 950 (Ky. 1952).

\textsuperscript{39} 418 S.W.2d at 655. "The 'last clear chance' rule is in effect in this jurisdiction and where \textit{it becomes applicable under the facts}, the antecedent negligence of the injured party becomes the nonimportant factor." (Emphasis added.) Weintraub v. Cincinnati, N. & C. Ry., 299 Ky. 114, 184 S.W.2d 345 (1945).

\textsuperscript{40} 418 S.W.2d at 656. Modern judicial statements on the doctrine of "last clear chance" seem to agree that last clear chance is only an extension in logic of the proximate cause principle. \textit{See} cases collected in Green, \textit{Contributory Negligence and Proximate Cause}, 6 N.C. L. Rev. 3 (1927).
"clear," there can be no "accident." A parallel exists between the history of the assumption of risk doctrine and the last clear chance doctrine. Courts created confusion in both areas with rulings "as a matter of law," and it became necessary to rectify the confusion. The last clear chance doctrine should not be abolished merely because the courts have confused its application.

The second gray area in last clear chance law is whether the doctrine applies to situations where two motor vehicles are involved. In Fenwick the Court implied, as did the majority in Butts, that the doctrine is applicable only where one party is a pedestrian. The dissenters in Butts sought to clarify this point by indicating that if Butts had been standing on the highway, the doctrine would apply; however, the dissent urged that there is no reason not to apply the doctrine merely because Butts was sitting on a tractor.

C. NEGLIGENCE PER SE

In Kentucky, as elsewhere, violating a statute and thereby causing injury to another is negligence per se and only the issue of damages goes to the jury. In Service Lines, Inc. v. Mitchell, the plaintiff

41 See text supra at note 40.
42 Butts v. Wright, 418 S.W.2d at 656.
43 Id.
44 By scrutinizing the history of the "last clear chance" doctrine it is obvious that it is not exclusively applied to pedestrian cases in highway accidents. 2 F. Harper & F. James, supra note 3, at 1255. See generally Rose v. Vasseur, 320 S.W.2d 608 (Ky. 1959); Lexington Roller Mills v. Thomberry, 314 Ky. 11, 234 S.W.2d 491 (1950); Weintraub v. Cincinnati N. & C. Ry., 299 Ky. 114, 184 S.W.2d 345 (1944); Cincinnati N. & C. Ry. v. Remaker, 287 Ky. 358, 153 S.W.2d 506 (1941).
45 "[T]he great majority of the courts hold that an unexcused violation [of a statute] is conclusive on the issue of negligence, and that the court must so direct the jury." W. Prosser, supra note 2, at § 35. For the violation of a statute to be considered negligence per se in Kentucky, the statute must be one that was enacted for safety purposes and not just for governmental convenience. Vissiman v. Koby, 309 S.W.2d 345 (Ky. 1958). The injury sustained must be one that the statute was enacted to prevent. Phoenix Amusement Co. v. White, 306 Ky. 361, 208 S.W.2d 64 (1948). The injury must be sustained by a person or by a property interest which the statute contemplated protecting. Buren v. Midwest Indus., Inc., 350 S.W.2d 96 (Ky. 1964). In addition, before liability will be imposed on the violator, the violation of the statute must be the proximate cause of the injury sustained. Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966); Commonwealth v. Ragland Potter Co., 305 S.W.2d 915 (Ky. 1957). See Note, 38 Ky. L.J. 479 (1950).
46 In Marmor v. Marmor, 409 S.W.2d 526 (Ky. 1966), the Court confused the question of violation of statutory duty with the question of causation. It noted, "Ordinarily a violation of statutory duty is evidence of negligence entitling the adverse party to submission of that issue to the jury," basing this statement on Phoenix Amusement Co. v. White, 306 Ky. 361, 208 S.W.2d 64 (1948), and Greyhound Corp. v. Hounshell, 351 S.W.2d 64 (Ky. 1961). These cases did not hold that the negligence issue was to be submitted to the jury, but that where

(Continued on next page and footnote 47 on next page)
stopped his car on a highway at night when it quit running. Over fifteen minutes of effort failed to restart the car, but no precautions were taken to remove it from the highway. Defendant's truck driver approached this scene from behind and a collision occurred killing two children in the car. A verdict was returned for the plaintiff.

On appeal, the defendant relied on KRS 411.130(2) and KRS 189.450(1), arguing that the plaintiff's actions constituted negligence per se, and, therefore, a directed verdict was required. The appeal revolved around whether it was "impossible" or "impracticable" within KRS 189.450(1) to get the car off the highway. The Court of Appeals held that it was impossible or impracticable, citing *Corpus Juris Secundum* as authority. That source says the rule is clear that violation of a statute by leaving a car on the highway is not negligence per se where it was impossible or impracticable to move it, "provided proper precautions are taken in other respects." (Emphasis added.)

The Court overlooked the proviso emphasized above. The plaintiff admitted that he made no examination to determine whether the car could have been moved onto the shoulder of the road. In fact, testimony of another witness showed that at least a portion of the shoulder could have been used, and was used later to move vehicles around the wreckage. Even under these facts, the Court ignored the statutory violation and concentrated on the alternatives facing the plaintiff with respect to the deceased infants.

(Footnote continued from preceding page)

there is an issue of causation, that issue is for the jury. In a later case, Tooke v. Adkins, 418 S.W.2d 220 (Ky. 1967), where there was no question of causation, the Court found the defendant negligent as a matter of law for the violation of a statute.

47 418 S.W.2d 525 (Ky. 1967).
48 "If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased. ..." This statute precludes negligent parents from obtaining a recovery for a tortious act to their child. Emerine v. Ford, 254 S.W.2d 938 (Ky. 1953).
49 This statute provides:
(1) No person shall stop a vehicle, leave it standing or cause it to stop or be left standing upon the main traveled portion of a highway. ...
(a) A vehicle that has been disabled while on the main traveled portion of such a highway in such a manner and to such extent that it is impossible to avoid the occupation of the main traveled portion or impracticable to remove it from the highway until repairs have been made or sufficient help obtained for its removal. ...
50 60 C.J.S. Motor Vehicles § 332 (1949).
51 Id. See also Duet v. Tramontana, 26 So. 2d 324 (La. App. 1946); Horn v. Barras, 173 So. 451 (La. App. 1937); Camp v. Wilson, 258 Mich. 380, 241 N.W. 844 (1932); Bornemann v. Lusha, 221 Wis. 359, 266 N.W. 789 (1936). All of these cases support the interpretation that violation of a statute similar to Kentucky's is negligence per se even where it was impossible or impracticable to move the car, unless proper precautions are taken in other respects.
52 418 S.W.2d at 529.
The plaintiff was confronted with two dangerous conditions. There was obvious danger in permitting the children to remain in the car which was parked in the nighttime on the paved portion of the highway. Obviously, it also was dangerous to remove three children to a narrow shoulder . . . in close proximity to heavy traffic passing by at high speed.5

This position ignores the obvious fact that perhaps the car could have been moved off the road instead of just the children. But the Court compounded the mistake with its next sentence. “It is universally held that where a person is confronted with two dangerous conditions he is not required to select, in an emergency, the one which on mature reflection might appear to be the least dangerous.”5

It could be argued that this driver was parked on the pavement for so long a period that not a day or even a week could have provided a more “mature reflection.” There was nothing “sudden” about plaintiff’s emergency. It would be unwise to draw inferences from the opinion since it is not clear what instructions were given the jury. But it would seem that they were more complicated than the case would warrant, i.e., either the plaintiff was negligent per se or he was not—and if he was, did this negligence cause the injuries. Furthermore, does the court or the jury decide whether it was “impracticable or impossible” to move the car? Apparently this question was not considered by either the lower court or the jury.6 The Service Lines case seems to portend holes in Kentucky’s statutory negligence law.

D. Admission and Release

Two cases were decided last term involving situations in which a plaintiff, whether unwittingly or not, settled his case against himself.

5 Id. at 530. The Court completely overlooked the third course of action the plaintiffs could have taken: leaving the children in the car and pushing it onto the shoulder. This action would have avoided both dangerous alternatives, and might well have saved the lives of the children.

54 RESTATEMENT (SECOND) OF TORTS § 298, comment a (1965) provides: The [emergency] rule . . . is applicable when the sudden emergency is created in any way other than by the actor’s own tortious conduct, or where it is created by the unexpected operation of a natural force or by the innocent or wrongful act of a third person. The fact that the emergency is created by the actor’s own conduct does not prevent the rule from being applicable if his conduct is not tortious.

56 The time span was more than fifteen minutes. The basis of the special rule in emergencies is that the actor is left no time for thought, or is reasonably so disturbed or excited that he cannot weigh alternative causes of action and must make a speedy decision based very largely upon impulse or guess. W. Prossen, supra note 2, at 171.

56 The opinion is silent on this point. Other courts have held this to be a question for the jury. Breaux v. Soares, 18 Cal. App. 2d 489, 64 P.2d 146 (1937); Dare v. Boss, 111 Ore. 190, 224 P. 646 (1926); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).
In *Nunellee v. Nunellee*, the plaintiff was a passenger in a car which was owned by her son and driven by her granddaughter, and which collided with another automobile at an intersection. The plaintiff sued both drivers, and both contended that the other was at fault. The jury determined the issue against the plaintiff's driver. However, despite this finding, the Court of Appeals ordered entry of a judgment n.o.v. against the plaintiff because she had sworn during a pre-trial deposition and again at the trial, that her granddaughter had not run a red light: "No amount of reasoning can produce any interpretation of the testimony quoted above except that [the plaintiff] had absolved [her granddaughter] of any negligence insofar as her claim is concerned."

This judgment was rendered despite the fact that a jury had found that the defendant (plaintiff's driver) had been negligent. Thus, the defendant was negligent as to the other driver but not negligent as to her passenger. The passenger here was a seventy-nine year old woman who had been contradicted by four impartial witnesses. Ordinarily, the plaintiff's testimony would have been discounted, as it was here by the jury, by reason of her age and the conflicting testimony. Nonetheless, the Court of Appeals took the case away from the jury and rendered a judgment n.o.v.

If such relatively weak testimony can negate an otherwise viable cause of action, plaintiffs would be well advised to keep quiet. In any event, it would seem that a jury question should remain unless the "admission" absolutely negates the elements of the complaint.

In *Commonwealth, Department of Highways v. Cardwell*, an insurance company settled Cardwell's claim against other parties, who were joint tort-feasors with the Highway Department. In return for

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57 415 S.W.2d 114 (Ky. 1967).
58 Id. at 116.
59 The factual situation and result are similar to *Zipperle v. Welsh*, 352 S.W.2d 556 (Ky. 1961). In that case, two passengers in the defendant's car had sued both the defendant and the driver of the other car involved in the collision. They testified that the light was in the defendant's favor, but were contradicted by the other driver and another witness. The jury found the other driver not negligent and the defendant negligent. Judgment n.o.v. was entered for the defendant due to the plaintiffs' judicial admissions.
60 Brief for Appellee at 7, *Nunnellee v. Nunnellee*, 415 S.W.2d 114 (Ky. 1967).
61 The rule on judicial admissions was not always so strict in Kentucky. Before *Zipperle v. Welsh*, 352 S.W.2d 556 (Ky. 1961), a judicial admission barred a plaintiff's recovery only if the facts testified to were peculiarly within his knowledge. *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021 (1941). See also *Bell v. Harmon*, 284 S.W.2d 812 (Ky. 1955). In *Bell*, the Court advised that "[t]he rule should be applied with caution because of the variable nature of testimony and because of the ever-present possibility of honest mistake." 284 S.W.2d at 815.
62 409 S.W.2d 304 (Ky. 1966).
the settlement, Cardwell signed a general release. Six days later Cardwell initiated a Board of Claims action against the Highway Department. The Board of Claims found as a matter of fact that the prior release was not intended to release the Highway Department and awarded damages to Cardwell. The Highway Department appealed.

The Court of Appeals, relying on *Kingins v. Hurt*, reversed, finding the release was intended to release the Highway Department and that the plain meaning of the release document itself should control. In addition, if the right to proceed against a non-settling tort-feasor is not expressly reserved, all tort-feasors are thereby released.

In Kentucky there have been two lines of decisions with the *Cardwell-Kingins* line representing the strict rule. That rule holds that the release document controls and that the intent of the releasing party is of no importance if it is not incorporated into the release. In the name of “orderly procedure” this rule curtly states: “Surely it does not ask too much of draftsmen and others dealing in such instruments to take the time and trouble to have them say what is meant.”

This strict rule can only benefit tort-feasors since injured parties desiring to settle rarely “deal” in drafting insurance companies’ adhesion documents. Most defendants in tort cases are represented by insurance companies whose main concern is with their own clients. Thus, any settlement and release is drawn to fully protect the defendant. The plaintiff’s rights against other tort-feasors are of no concern to the insurer.

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63 344 S.W.2d 811 (Ky. 1961).
64 The release stated:
   and by these presents do for myself, my heirs, executors, administrators and assigns, release and forever discharge the said J. R. White Contracting Co. and James Smith and all other persons, firms or corporations from all claims, demands, damages, actions or causes of action, on account of damage to property, bodily injuries or death, resulting, or to result, from an accident to myself which occurred on or about the 28th day of September 1955. . . . 409 S.W.2d at 305.
65 409 S.W.2d at 306.
66 As is pointed out by Judge Stewart in his dissent, Prosser, Harper and James, and Corbin all criticize the rule. See W. Prosser, *supra* note 2, at 272; 1 F. Harper & F. James, *supra* note 3, at 712; A. Corbin, *Contract* § 590 (1960). Corbin is particularly strong in his criticism:
   The tendency to relax the operation of the “parol evidence rule” when a stranger to the writing is involved is to be thoroughly approved when it prevents a writing from being held to be a substitution integration and discharge when the contracting parties have not so agreed. It is also to be approved in those cases where it is used to prevent what appears on the face of an instrument to be a “release” of one joint obligor or joint tort feasor from operating or a discharge of another such obligor or tort feasor. Offered testimony showing that the claimant did not intend the document to be a discharge of all of his claims should be, for that purpose, admissible in any suit against anybody.
The parallel line of cases in which the intent of the releasing party controls\(^6\) was recognized by Judge Stewart in an able dissent.\(^6\) The "intention" approach was the law prior to Kingins. This is the so-called "modern" view as opposed to the "common law" rule set down in Cardwell. Actually, the "common law" rule of Cardwell is not the strict common law rule under which release of one tort-feasor released all. Rather, the "common law" rule in Cardwell is a hybrid form and will allow a subsequent suit against a joint tort-feasor, provided such intent is clearly expressed in the release document. The trend of authorities is to prefer the modern view\(^6\) and to criticize the common law rule.\(^7\)

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\(^6\) Louisville & Evansville Mail Co. v. Barnes, 117 Ky. 860, 79 S.W. 261 (1904) is the initial case in this line.

\(^7\) See notes 66 and 69 supra. The basis of the common law rule had been that when the cause of action, being one and indivisible, is released, all persons otherwise liable therefore are consequently released. This approach later gave way to the more equitable reason that the single injury could have but one satisfaction and the release, being construed more strictly against the releasor, is...
The state of the law is confused. It is submitted that the Cardwell dissent is more persuasive, particularly in view of its criticism of Kingins. Both the majority and the dissent in Cardwell agree that Kingins was the first use of the hybrid rule in Kentucky. However, the Kingins opinion deserves some investigation since it was based on the assumption that Kentucky was then "committed to the basic rule itself," i.e., the common law rule. Actually, the "modern" rule was the law of Kentucky before Kingins. The cases cited in Kingins appear to be indicative of this modern interpretation, but the Court overlooked this and dogmatically reiterated the Restatement, or hybrid rule. Thus, the dissent in Cardwell seems clearly correct and cogent in suggesting that Kingins is insufficient authority for the proposition that Kentucky has been committed to the variation of the common law rule, and that Kingins should be interpreted correctly and overruled.

As seen from the above discussion, the Kingins and Cardwell decisions are contrary to the trend of authorities and represent a backward step in Kentucky's treatment of the release problem. A return to the prior "modern view," allowing parol evidence as to the intention of the parties when a stranger to the release agreement claims its benefit, should be made as soon as possible. Plaintiffs should not be denied full recovery and co-tort-feasors, not involved in the settlement, should not benefit from that settlement.

E. Invasion of Privacy

The right of privacy has recently provoked much legal debate and last term a controversy arose involving this important, though...
nebulous, right. In *Wheeler v. Sorenson Manufacturing Co.* the Court had occasion to investigate the right in the milieu of a labor controversy.

The employer was resisting unionization, and a part of this campaign involved publishing a large flyer revealing an employee's wages, pay increases, and other salary information, in an effort to show that unionization was unnecessary and would actually hurt the employees. The plaintiff filed suit alleging that this publication made her an unwilling party to the labor dispute, caused her to be held in disfavor by her fellow employees, caused her to be summarily fired, and rendered her unable to find another job in the area. She alleged that the publication was unwarranted and issued without her knowledge or consent. The trial court dismissed the complaint for failure to state a claim for relief, and the Court of Appeals affirmed, holding as

(Footnote continued from preceding page)

prospective employers have already interviewed his associates and teachers concerning his political opinions. Their daughter, in high school, is completing a questionnaire which will analyze the family and sexual adjustment to allow the school to better understand her. V. Packard, The Naked Society 3-4 (1964).

The right of privacy has also been recognized constitutionally. It has been held that various guarantees of the Bill of Rights have a penumbra creating a zone of privacy which the government may not force the citizen to surrender. Griswold v. Connecticut, 381 U.S. 479 (1965).

Prosser categorized the right to privacy tort according to the consequences that may result from the individual injury: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. W. Prossen, supra note 2, at § 112.

This formulation fails to articulate the underlying interest protected by the tort, seeking to explain it in the terms of other existing torts, mental distress, defamation, and misappropriation. The unique interest protected in privacy cases is best defined by Professor Bloustein. "[T]he injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered." Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 1003 (1964).

One of the grounds for the dismissal of the action given by the trial court and argued on appeal was that the National Labor Relations Board had preempted the jurisdiction of the Court to entertain an action to recover damages for invasion of the right of privacy arising out of tactics employed in a union organization campaign. 415 S.W.2d at 583. The flyer showed that the plaintiff had received an increase of twenty cents per hour in a little more than a year, and contrasted it with an agreement made by a neighboring firm with the union calling for only a five cent per hour annual increase, minus four dollars a month union dues.

The complaint further alleged that by the unwarranted and unauthorized use of her name and wage statement, the appellee had violated her right to privacy, and seriously jeopardized her ability to work and earn money. Moreover, it alleged that her right to live peaceably and quietly had been violated, and by reason of such use she had sustained and would continue to sustain intense mental suffering and distress, causing her damage in the sum of fifty thousand dollars. 415 S.W.2d at 584.
a matter of law that the invasion, if any, was warranted and reasonable.\textsuperscript{78}

The Court recognized that the right to privacy was "well established" in Kentucky,\textsuperscript{79} but that it is not "exact or absolute."\textsuperscript{80} Rather, the right of privacy is relative to the customs of the time and place, and it is determined by the norm of the "ordinary man."\textsuperscript{81} The Court went on to decide this factual, "ordinary man" issue. It admitted that it did not know why the flyer was circulated,\textsuperscript{82} and merely held that in its "opinion" the distribution was not actionable. Thus, the allegations made by the plaintiff were summarily dismissed.\textsuperscript{83} If this issue, which the Court admitted was barred on the "ordinary man" test, was not for the jury, it is difficult to conceive of one which would be.\textsuperscript{84}

\textsuperscript{78}Since the right of privacy as a tort has never been clearly defined, the cases coming before the Court have almost invariably involved demurrers, dismissals of complaints, and summary judgment. Most such actions have been dismissed by the Court as failing to state a claim. Bell v. Louisville Courier-Journal & Times Co., 402 S.W.2d 34 (Ky. 1966) (publication of police judge's tax delinquency); Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956), Pangallo v. Murphy, 243 S.W.2d 496 (Ky. 1951), and Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W.2d 510 (1943) (all involving oral publication); Lucas v. Moskins Stores, Inc., 262 S.W.2d 679 (Ky. 1954), and Voneye v. Turner, 240 S.W.2d 588 (Ky. 1951) (both involving letters of indebtedness sent to a plaintiff's employer); Perry v. Moskins Stores, Inc., 249 S.W.2d 812 (Ky. 1952) (advertisement come-on sent to a plaintiff signed with a girl's name and telephone number); Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W.2d 369 (1944), and Tomlin v. Taylor, 290 Ky. 619, 162 S.W.2d 210 (1942) (both involving corporations which were held not entitled to the personal action of violation of right of privacy); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929) (publication of a wife's picture and statements made by her after seeing her husband slain). A few claims have been remanded by the Court for further action. Sellers v. Henry, 339 S.W.2d 214 (Ky. 1959) (publication of picture of a mutilated child, not clear from pleadings whether child had been identified in the publication); Rhodes v. Graham, 235 Ky. 225, 37 S.W.2d 46 (1931) (tapping telephone wires); Brents v. Morgan, 235 Ky. 765, 299 S.W. 967 (1927) (publication of plaintiff's indebtedness to public).

\textsuperscript{79}415 S.W.2d at 584.
\textsuperscript{80}Id. at 585.
\textsuperscript{81}Id. Of the character of the ordinary man Prosser says:
He is not to be indentified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment. W. Prosser, supra note 2, § 32, at 154.
\textsuperscript{82}415 S.W.2d at 585.
\textsuperscript{83}Although the Court does not state its rationale for disallowing the jury to

(Continued on next page)
F. Products Liability

Two recent products liability cases reaffirmed the landmark case of *Dealers Transport Co. v. Battery Distributing Co.*,\(^8\) which committed Kentucky to the developing theory of strict liability. In both *Kroger v. Bowman*\(^6\) and *Rogers v. Karem*,\(^7\) injuries were sustained when soft drink carrying cartons proved defective and bottles fell and broke, cutting the plaintiffs. *Dealers Transport* was cited in both cases to impose liability on the remote bottling companies regardless of proof of negligence.

In *Kroger*, the Court held that a grocery owed no duty to a bottler to inspect the carton. Such a duty does run from the grocer to the customer, but failure on the part of the grocer to discharge his duty to the customer does not preclude indemnity against the bottlers for injuries to the customer. In *Rogers*, the Court held that even though the claims were based on implied warranty,\(^8\) the customer could sue the store owner and the owner could in turn sue the bottling company on the strict liability theory.\(^9\)

The two cases do not appear to add appreciably to the law of the area, and the results were predictable in light of *Dealers Transport*. Kentucky can be said to have joined a number of jurisdictions in applying a strict liability theory\(^6^0\) to achieve the desirable social philosophy requiring the manufacturer to spread the risk among all its consumers via the expediency of liability insurance. In addition, the Court is no longer concerned with whether the complaint sounds in

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\(^6\) See, e.g., *Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957); W. PROSSER, supra note 2, at § 97.

\(^6^0\) **Footnote continued from preceding page**

decide whether the invasion of the plaintiff’s right to privacy was reasonable, it is probably analogous to reasons the Court takes the reasonable man test away from juries in negligence cases. Assuming that it is the exclusive function of the jury to fix standards of conduct, the Court tends to usurp this function. The reason is that in questions of whether a defendant has been guilty of conduct, which creates an undue probability of harm to others, those who judge his conduct must weigh the utility of the act against the probability of harm which it contains, not the utility of the act to the actor alone but the utility of the act to society. However, the general utility of such conduct is not likely to receive much consideration from a jury who sees before them a plaintiff whose vital interests have been harmed by a particular instance of it. Only the most confirmed optimist would dare to hope that they would judge the defendant’s conduct by what that ideal creature, the “reasonable man,” would do. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 118, 119 (1924). See also Restatement (Second) of Torts § 328(B) (1965).

\(^8\) 402 S.W.2d 441 (Ky. 1966).

\(^9\) 411 S.W.2d 339 (Ky. 1967).

\(^7\) 405 S.W.2d 741 (Ky. 1966).

\(^8^8\) In *Dealers Transport* there were counts of negligence and breach of implied warranty. 402 S.W.2d at 443.

\(^9^9\) This, of course, is the normal procedure in pure warranty actions.
tort or in contract. Implied warranty is the basis for strict liability theory, and privity is not necessary.\footnote{Dealers Transport points out that recovery against a remote vendor sounds more in tort than in contract, but that this determination is irrelevant in view of the policy genesis of strict liability theory. 402 S.W.2d at 445-46. See Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 446 (Ky. 1966). See also W. Prosser, supra note 2, at 681. For a discussion of this case, see 1965-66 Court of Appeals Review, 55 Ky. L.J. 472-77 (1967).}
A workmen's compensation case is initiated by a hearing conducted in the county where the alleged accident or exposure to occupational disease occurred. The hearing is conducted by one or more members of the Workmen’s Compensation Board [hereinafter referred to as the Board], by the Director, or by a hearing officer. A report of each hearing is forwarded to the full Board, which renders a decision. Each case is automatically submitted to the Board at its first regular meeting following the expiration of the time for the taking of all proof. The plaintiff may file a brief on the merits of the case within fifteen days after its submission, and the defendant then has fifteen days, after the filing of the plaintiff’s brief or the expiration of plaintiff’s time for filing, in which to file his brief. Apparently, the Board has traditionally sent each counsel notice of an order of submission to enable them to be aware of deadlines for filing briefs. During the last term, the Court of Appeals had before it two cases which dealt with this custom.

In Collista Coal Co. v. Castle, the claimant filed his brief on October 15, 1964, four days before the date of submission. The Board did not send the defendants a notice of submission, and on November 9, 1964, it awarded the claimant compensation benefits for permanent, total disability. Defendant requested a reconsideration of the award, alleging that he received no notice from the Board that the case had been submitted for decision. The Board reconsidered and set aside its previous award. After receipt of defendant’s brief, a new award was entered denying compensation for permanent injury. On appeal, the circuit court reversed the Board and reinstated the first award of permanent, total disability. Before the Court of Appeals, the defendant argued that the Board had ample grounds to reopen the case under KRS 342.125 on the basis of change of condition, mistake, or fraud.
The Court held that no notice of an order of submission was necessary in view of the Board's rules providing for automatic submission. In effect, the parties were held strictly accountable for the rules.

In *American Tobacco Co. v. Sallee,* the Board awarded compensation to the claimant three weeks after the taking of proof had been completed. No notice of an order of submission was received by counsel and neither filed a brief. Defendant appealed on the ground that he relied on the Board's established custom and practice of giving notice of an order of submission. Defendant distinguished *Collista* by urging that the unfair and misleading aspects of the Board's custom of sending notice had not been fully made apparent to the Court in that action. Although the defendant was denied relief, the Court nevertheless expressed its sympathy for his position by stating:

Basic fairness would suggest that if the Board, regularly and consistently over a period of at least two years, had ignored its automatic submission rule and had given notice of an order of submission, counsel with knowledge of the custom should have been entitled to expect notice.\(^9\)

The variance in the Court's attitude in the two cases can only be explained by observing that *Collista* apparently was not argued from the standpoint of unfair and misleading practices on the part of the Board as was *American Tobacco, i.e.*, the Court was not made aware that these practices existed and were relied upon by the attorneys. However, this distinction is questionable when viewed in light of the Court's previous decisions regarding the Board's right to reopen a case.

On numerous occasions the Court has held that the Board has broad discretion in determining whether a case should be reopened under KRS 342.125.\(^{11}\) *Collista* points up the wisdom of these previous cases. There, the Board was aware of its own procedure in notifying parties of submission in all cases and that attorneys had come to rely upon such notice. Being aware of the unfairness to defendant's counsel (who was not given notice), the Board permitted relief by reopening the case and allowing defendant to submit his brief. However, in reviewing this decision, the Court did not apply its usual "large dis-

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\(^{(Footnote continued from preceding page)}\)

immediately to the parties a copy of its subsequent order or award. Review under this section shall be had upon notice to the parties interested and shall not affect the previous order or award as to any sums already paid thereunder.

\(^9\) 419 S.W.2d 160 (Ky. 1967).

\(^{10}\) *Id.* at 161.

\(^{11}\) *Davenport v. National Carbide Co.,* 339 S.W.2d 473 (Ky. 1960); *Clear Fork Coal Co. v. Gaylor,* 286 S.W.2d 519 (Ky. 1956).
cretion” test. Instead, it attempted to review the facts and fashion its own equitable result. The Court’s conclusion was to hold the parties strictly accountable to the rules.

Clearly, the Court reached an unjust result. Since the Board had engaged in the practice of giving notice for over two years, it is apparent that the Collista attorneys were just as misled as were the attorneys in American Tobacco. In American Tobacco, the Court indicated that if prejudice were shown, the defendants would be entitled to reopen the case and file their brief. Prejudice is obvious in Collista since the filing of defendant’s brief effected a reversal in the Board’s decision. Since the defendant in Collista relied upon the Board’s custom and was prejudiced thereby, it follows that the defendant should have been granted the relief he sought. This is exactly what the Board had done until reversed by the Court of Appeals. Since the Board is more familiar with the pertinent facts in cases arising under KRS 342.125, it should be permitted broad discretion in attempting to reach a just result. Had the Court of Appeals applied its “large discretion” test in Collista, the Board’s ruling would have remained unchanged, and a just result would have been reached.

As stated previously, the Court in American Tobacco acknowledged the unfairness in the situation where counsel had relied upon the Board’s custom of sending notice. However, the Court refused to allow the defendant to submit his brief, reasoning as follows: “Were the case a closer one on the two issues above mentioned we would be inclined to hold that the board committed prejudicial error in failing to give notice of an order of submission according to its established custom and practice.”\(^1\) The Court went on to say that the Board’s decision on the two points was so eminently correct as to make it “extremely unlikely”\(^2\) that the defendant’s brief could have persuaded the Board to reach a different decision. In addition, the Court said the evidence “amply supports” one of the issues,\(^3\) and the proof on the other issue was “more than adequate.”\(^4\) Clearly the Court based its decision on the grounds that there was ample proof to support the Board’s findings in favor of the claimant. However, rather than look at the sufficiency of the claimant’s evidence, the Court should have looked at the sufficiency of the defendant’s evidence. It is urged that the proper test for the Court to apply should be: if there is sufficient evidence to support a verdict for a party, he is entitled to

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\(^{12}\) 419 S.W.2d 160, 161 (Ky. 1967).
\(^{13}\) Id. at 162.
\(^{14}\) Id.
\(^{15}\) Id.
file a brief. Such a test would not prejudice the defendant. If there was insufficient evidence to support his case, he would lose regardless of the effectiveness of his brief. On the other hand, if the evidence was sufficient to support a verdict for the defendant, as in the American Tobacco case, he would be given his opportunity to argue the probative force of his evidence.

To further illustrate the point, assume all of the facts are the same in American Tobacco except that the Court determines that ample proof to support the claimant’s award was lacking. Would the defendant have been entitled to submit his brief? Of course, but it would have been an idle gesture since he would also have been entitled to a directed verdict. It appears that the Court’s action in refusing defendant the opportunity to argue the probative force of his evidence had the effect of directing a verdict for the claimant. However, the Kentucky test for a directed verdict in favor of the plaintiff is much more stringent than the test used in American Tobacco. In Thomas Jefferson Fire Insurance Co. of Louisville v. Barker, the Court said that a directed verdict is proper for the plaintiff where “there is no conflict in evidence”; “the evidence introduced is susceptible of but one interpretation by reasonable men; [or] all the evidence tends to support the cause of action alleged and to disprove the defense.” Compare the stringency of these tests with the “amply supported,” “more than adequate,” and “extremely unlikely” language of the Court in American Tobacco.

The defendant was denied his day in court in so far as having his counsel heard on the probative force of the evidence, simply because it was “extremely unlikely” he could have persuaded the Board to a different decision. It is urged that the mere possibility of the defendant’s success should be sufficient grounds for permitting submission of a brief.

B. REOPENING AN AWARD—EVIDENCE OF MISTAKE

The Kentucky Workmen’s Compensation law provides that the Board may reopen and review a case upon evidence of fraud, change of condition, or mistake. Two cases handed down last term are significant as guides for the interpretation of this statute.

In Turner Elkhorn Mining Co. v. O’Bryan, the employee had

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10 251 S.W.2d 862 (Ky. 1952).
11 Id. at 863.
12 KRS § 342.125(1) (1962). The text of this statute is fully set out in note 8, supra.
13 414 S.W.2d 410 (Ky. 1967).
filed a claim for compensation alleging total and permanent disability due to silicosis, a disease of the lungs frequently contracted by coal miners. Medical testimony disagreed as to the employee's disability and whether he was indeed suffering at all from silicosis. The parties agreed upon a lump sum settlement of $2500 which was approved by the Board. But some ten months later the employee filed a motion to reopen pursuant to KRS 342.125. In support of his motion, he filed the affidavit of a physician who had examined him before and after the agreed award. The affidavit contended that the employee's condition had regressed to the point of total and permanent disability. The Board, in denying this motion, said that since the agreed award was in settlement of the original claim of total disability, there had, in effect, been no "change of condition." The Court reversed this decision, stating that if there was no change of condition, a "mistake" existed in that the Board approved a settlement of $2500 for total disability when statutory allowances in such a case would have exceeded $16,000.

In Beth-Elkhorn Corp. v. McFall,\(^2\) the employee had prosecuted a claim against his employer and the Special Claim Fund. The Board entered an order which stated that the employee recover compensation from the Special Claim Fund, and also recover of "said defendant" his medical expenses. The order further stipulated that the claim against the employer be dismissed. That portion of the order which held "said defendant" (evidently the Special Fund) liable for the medical expenses was doubtless erroneous since the statute provides that medical expenses are to be recovered from the employer.\(^2\) Since the employee obviously could not recover his medical expenses from the Special Fund, he later filed a motion seeking recovery of the expenses from his employer. The Board sustained this motion but was overruled by the Court of Appeals. The Court held that Board without authority to enter such an order since the original order was final, and the matter became res judicata with regard to the employer.

The Court obviously saw fit to place the O'Bryan case within the purview of KRS 342.125, but specifically rejected similar treatment for the McFall case, stating that "there was nothing to reopen."\(^2\) In O'Bryan the employer argued that since the claimant asserted total disability in his original application, it was obviously no change of condition for him to reiterate this claim on motion to reopen. The

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\(^{20}\) 415 S.W.2d 857 (Ky. 1967).

\(^{21}\) KRS § 342.020 (1962) states that "the employer shall furnish . . . medical, surgical, and hospital treatment. . . ."

\(^{22}\) 415 S.W.2d at 858.
Court rejected this theory, basing its decision on the rationale of *Messer v. Drees*,23 in which a claimant was allowed to reopen when new medical testimony asserted he was totally disabled due to brain damage. *Messer* does appear relevant because the Court therein stated that:

when subsequent events indicate that an award was substantially induced by a misconception as to the . . . extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a "mistake" or a "change in conditions" is a matter of mere semantic taste.24

In *McFall*, the Court pointed out that no appeal was taken from the original award. The Court relied on *Hysteam Coal Corp. v. Ingram*,25 which held that the doctrine of res judicata applies to the Workmen's Compensation Board the same as it does to a decision of a court.

It would appear that *O'Bryan* was correctly decided whether based on a "mistake" theory or on the obvious change of condition. The Court refused to let a technical argument defeat the reality of the situation, i.e., that the employee deserved a reopening for consideration of competent medical testimony that his condition had considerably worsened. The decision followed a statement of the Court in *Messer v. Drees*: "The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it."26 Larson, the principal authority on workmen's compensation law, also supports the holding, stating: "the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to claimant's changed condition."27

On the other hand, the decision in *McFall* seems somewhat tenuous. When examined in the light of KRS 342.020, it appears that the Board's order was a mistake. This position is strengthened by the fact that the Board sustained the employee's subsequent motion to recover from his employer, thereby admitting that the original order contained a mistake.

Moreover, the decision in *McFall* seems clearly inconsistent with *Black Mountain Corp. v. Gilbert*.28 There, the employee filed a motion to correct an apparent clerical error in the original award, allowing

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23 382 S.W.2d 209 (Ky. 1964).
24 Id. at 213.
25 283 Ky. 411, 141 S.W.2d 570 (1940).
26 382 S.W.2d at 213.
27 2 A. Larson, WORKMEN'S COMPENSATION LAW § 81.10 (1965).
28 296 Ky. 514, 177 S.W.2d 894 (1944).
disability payments for eight years instead of the then-allowed ten year period. The Board sustained the motion, and its order was affirmed by the Court. This was done despite the employer's argument that the original order was a final disposition of the case, an argument similar to the one asserted by the employer in McFall. In the instant case, the Court, as in Black Mountain, should have allowed the Board to change its order on the basis of mistake. It is established law that the Board has large discretion in determining whether a case shall be reopened, but McFall seems to limit such discretion.

It would appear that by its decision in O'Bryan and McFall the Court is somewhat inconsistent. O'Bryan may show a loosening in the requirements of reopening for adjustment, but this liberality is overshadowed by the strict decision in McFall.

C. IMMUNITY FROM NEGLIGENCE ACTIONS

KRS 342.015(1) creates an "employer" class, immune from common law negligence actions by employees. This immunity arises from the employee's election to come under workmen's compensation, thereby waiving his common law rights against his employer. The combined cases of Peters v. Radcliff Ready Mix Concrete, Inc. and Miller v. Thomas J. Nolan & Sons are significant in that they clearly designate those persons who fall within the bounds of this "employer" class.

The Court, on an ad hoc basis, has gradually been defining who is and is not immune from common law negligence actions. The first important case was McEvilly v. L. E. Myers Co. which held that KRS 342.015(1), read in conjunction with KRS 342.055, meant that

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29 Davenport v. National Carbide Co., 339 S.W.2d 473 (Ky. 1960); Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519 (Ky. 1956).
30 KRS § 342.015(1) (1962) provides:
Where at the time of the injury both employer and employee have elected to furnish or accept compensation under the provisions of this chapter for a traumatic personal injury, received by an employee by accident and arising out of and in the course of his employment ... the employer shall be liable to provide and pay compensation under the provisions of this chapter and shall be ... released from all other liability.
31 Greene v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916).
32 412 S.W.2d 854 (Ky. 1967).
33 211 Ky. 31, 276 S.W. 1068 (1925).
34 KRS § 342.055 (1962) provides:
Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil

(Continued on next page)
“some other person than the employer refers to a third party having no connection with the general work being performed, and whose act of negligence was wholly disconnected with the work.” \(^{35}\) McEvilly would not allow an employee of a subcontractor to recover common law damages against the principal contractor. After McEvilly came Dillman \(v.\) John Diebold & Sons Stone Co., \(^{36}\) holding that to declare a subcontractor immune from suit by the employees of a superior contractor on the same job would amount to “taking away their right to sue and putting nothing in its place” \(^{37}\) since they have no right in workmen’s compensation against him. Then Jennings \(v.\) Vincent’s Administratrix \(^{38}\) extended employer immunity to a superior contractor under KRS 342.060, \(^{39}\) which makes him secondarily liable to employees of the subcontractor for workmen’s compensation. On the basis of McEvilly, the Court in Miller \(v.\) Scott \(^{40}\) held that an employee covered by workmen’s compensation, who is injured by the negligence of a fellow employee working on the same job, cannot sue the latter for common law damages.

In Peters, the employees of one subcontractor, injured while engaged in work for their employer, filed common law negligence actions against other subcontractors working on the same job. The employees appealed from a judgment for the subcontractors. The Court of Appeals reversed and held that the employees of one subcontractor, although covered by workmen’s compensation through their own employer, could bring a common law negligence action against other subcontractors working on the same job.

Distinguishing and narrowing its previous holdings in McEvilly, Miller \(v.\) Scott, and Jennings, the Court indicated that an injured employee may maintain a common law negligence action against any person other than fellow servants and those liable, either primarily or secondarily, to him in workmen’s compensation. Stated simply, one

\(^{35}\) McEvilly \(v.\) L. E. Myers Co., 211 Ky. 31, 34, 276 S.W.2d 1068, 1071 (1925).

\(^{36}\) 241 Ky. 631, 44 S.W.2d 581 (1931).

\(^{37}\) Id. at 634, 44 S.W.2d at 583.

\(^{38}\) 284 Ky. 614, 145 S.W.2d 537 (1940).

\(^{39}\) KRS § 342.060 (1962) provides:

A principal contractor, intermediate or subcontractor shall be liable for compensation to any employee injured while in the employ of any one of his intermediates or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer.

\(^{40}\) 339 S.W.2d 941 (Ky. 1960).
who has none of the obligations of an employer can no longer claim immunity under the doctrine espoused in McEvilly, Miller, and Jennings.

The decision in Peters represents the majority view. A contrary view is taken in five jurisdictions; however, four of those states find the basis for their decision in statutory language which varies considerably from that in the Kentucky statute. Massachusetts is the only state with statutory language similar to Kentucky which accepts the contrary view.

While Kentucky looked to the specific language in its statute in reaching the Peters decision, Massachusetts looked to the purpose of its act as set forth in one of its earlier decisions. Massachusetts defined its policy as follows: "One purpose of the Workmen's Compensation Act was to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer insured under the act. . . ." From this stated purpose Massachusetts reasoned that a "common employer" would be the principal contractor. Hence, all subcontractors and their employees working under this principal contractor were included within the immunity. However, it seems that Massachusetts should have been able to find language within its statute to justify its decision. If the Court could not, then it seems probable that the court may have stated the purpose of the act too broadly in its earlier opinion. By interpreting the act's purpose rather than its specific language, it seems that the Massachusetts court unduly broadened the sweep of the statute.

Larson is critical of the Massachusetts decision and labels it as the type of reasoning by which "black" is determined to be "white." Larson states that it is necessary to interpret the words of the statute which say the employer is immune to mean the employee is immune, in order to reach the result the Massachusetts court did. Larson argues that since the subcontractor has assumed no statutory responsibility toward other subcontractor's employees, he has no reason to expect immunity from common law suits due to their injury. It appears that both authority and sound reason support the Kentucky Court's decision in Peters.

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41 Massachusetts, Florida, Minnesota, Oregon, and Virginia.
44 2 A. Larson, supra note 27, at § 72.32.
45 Id.
46 Id.