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I. INTRODUCTION

Each year, the Journal staff undertakes to report the Court of Appeals decisions of the previous term. This is the fourth such Review, and, like its predecessors, it is directed primarily to Kentucky practitioners and judges and to scholars interested in the details of state law. Its purpose is to categorize, describe, analyze, and evaluate the cases from the 1965-66 term. This Review also discusses certain important cases from the 1964-65 term of the Court which were reported too late for inclusion in last year's publication.

A survey of this type tends to become either a mere collection of headnotes or an interminable series of loosely drawn essays. This year, in attempting to solve the problem, we have discussed in detail those decisions which seem significant and treated briefly those which do not. Generally speaking, the more important cases are described at the beginning of a section or subsection; the others, at the end or in a footnote. When a decision called for extensive analysis, either because of what the Court held or because of what it failed to hold, we attempted to respond. Occasionally, a Kentucky decision has been used as a springboard to topics of broad significance not essential to an understanding of the case. For the most part, however, we have confined ourselves to analyzing state law and making recommendations for its improvement. Hopefully, some of the discussions will also suggest useful approaches to attorneys faced with the task of persuading the Court.
II. ADMINISTRATIVE LAW

A. Administrative Agencies

1. Alcoholic Beverage Control Board.—In some instances, a large discretion may be vested in administrators issuing licenses, so that considerations of the "human element" and of social policy may be taken into account for each applicant. Such is the situation for the Kentucky Alcoholic Beverage Control Board, which has a wide discretion to either grant or deny licenses to otherwise qualified persons. As stated in the relevant statute, "a license that might be issued under KRS 243.020 to 243.670 may be refused by a state administrator for any reason which he, in the exercise of his sound discretion, may deem sufficient." Two cases decided last term involved discretion in situations where the Board had already established a quota for the number of licenses necessary to serve a neighborhood and was requested to issue a new license. Taken together, the cases seem to result in a rule that the ABC Board may, but is not required to, reconsider the adequacy of existing outlets in reaching its determination of whether to issue a new license, even though the quota for the vicinity is not yet filled.

The first half of the rule—that the board may reconsider the adequacy of existing outlets—was applied in Moberly v. Berry. There the Court held that, even though the personal qualifications of the applicant had been established and the quota for licenses in the county had not been filled, the ABC Board did not abuse its discretion in refusing to grant a license, since existing outlets for the rural community were already adequate.

The second part of the rule—that the Board is not required to reconsider the adequacy of existing outlets if the quota is unfilled—is found in Southside Liquor, Inc. v. Moberly. There a quota had been established for the number of licenses to be issued in the vicinity. The Court held that the Board did not abuse its discretion when it approved, without reconsidering the adequacy of existing outlets, an application for a retail package liquor license, even though the new location would be only 700 feet from its nearest competitor.

Although the ABC Board in its discretion may refuse to grant a license...
license which will adversely affect the public interest, the refusal must be supported by substantial evidence. In Moberly v. Thompson, therefore, the Court ruled there was no substantial evidence to support the Board's denial of an application for a liquor and beer license one block from the location where the applicant had held similar licenses for fourteen years. The testimony of a few non-drinkers that they would feel unsafe or uncomfortable if the store were moved to the new location was insufficient where a party adverse to the applicant testified that the neighborhood would not be harmed by the move, and a veteran police officer testified that the applicant ran a "very orderly tavern." Additionally, the proposed area was commercial, parking facilities were to be improved, and the distance between present and proposed locations was slight. In allowing the change of location, the Court thus evinced its concern with the quantity and quality of evidence needed to support an order of the ABC Board refusing a license on the grounds of public interest.

In George v. Kentucky Alcoholic Beverage Control Bd., an applicant for a liquor license was held to be so vitally interested in an appeal from an order of the Board granting a license that he was considered an indispensable party. An appeal to the circuit court by the applicant's competitor which named only the Board and did not join the applicant was, therefore, unavailing. The rule that a misjoinder of parties is not ground for dismissal did not apply, because the post-Board proceedings here attacked were not an action, but an appeal.

2. Department of Revenue.—In Commonwealth, Dep't of Revenue v. Schmid, the Court laid down the rule that the Department of Revenue is an indispensable party to an appeal from a decision of the Board of Tax Appeals if the Department of Revenue is not named as a party. However, the rule was not applied in this case because of the novelty of the statutes creating the Board.

Department of Revenue v. Derringer held that a county clerk must register and license an automobile purchased at a non-judicial lien sale upon presentation of an affidavit establishing the purchaser's

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6 Moberly v. Bruner, 382 S.W.2d 406 (Ky. 1964).
7 Moberly v. Johnson, 376 S.W.2d 529 (Ky. 1964) (detrimental influence on passing children too speculative).
8 404 S.W.2d 277 (Ky. 1966).
9 Id. at 279.
10 403 S.W.2d 24 (Ky. 1966).
11 CR 21.
12 404 S.W.2d 458 (Ky. 1966).
14 399 S.W.2d 485 (Ky. 1966).
status as lienholder, even though a bill of sale is required by statute.\textsuperscript{15} The lienholder-purchaser had complied with the statutory procedure\textsuperscript{16} of notifying the owner of the automobile by registered mail and newspaper advertisement of the impending sale. The Court ruled that as long as the sale is commercially reasonable it will be allowed. The terms of the sale do not appear in the opinion.

3. Department of Motor Transportation.—In Davis v. Lynn Moving & Storage Co.,\textsuperscript{17} the Court interpreted certain statutes\textsuperscript{18} as requiring that an applicant for certification as a motor carrier must be found fit for the proposed service. Overcoming evidence of unfitness will not satisfy the statute. An unequivocal finding of the applicant’s fitness for the proposed service is a prerequisite to the approval or transfer of certification as a motor carrier. Nor may the applicant be approved for any probationary period before the approval becomes final; the approval must be absolute when given.

4. Board of Hairdressers and Cosmetologists.—Kentucky Bd. of Hairdressers & Cosmetologists v. Stevens\textsuperscript{19} held that a circuit court, by ordering an administrative agency to conduct a hearing on an application for a license, thereby made a judicial determination that the agency had jurisdiction and that, after the agency had held a hearing, its order could be attacked only by timely statutory administrative appeal. Because the order of the circuit court (that the agency hold a hearing) was final and not interlocutory, the applicant’s appeal to the circuit court failed because it was not made within the prescribed thirty days for an appeal from an order of the Board.\textsuperscript{20}

5. Interstate Commerce Commission.—In Pinsly v. Thompson\textsuperscript{21} the transfer of the ownership of a railroad had previously been authorized by the Interstate Commerce Commission, on the condition that subsequent disputes would be subject to arbitration. When a dispute arose the railroad refused to arbitrate on the ground that the dispute in no way resulted from the transfer. Because there is no statutory administrative appeal available to a petitioner seeking arbitration, as opposed to damages, the Court held that the action could be brought directly into our courts under the Declaratory Judgment Act\textsuperscript{22} to protect the right acquired under the order of the ICC. The

\footnotesize{\bibliographystyle{acm}
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\textsuperscript{15} KRS § 376.275 (1962).
\textsuperscript{16} KRS § 376.280 (1962).
\textsuperscript{17} 394 S.W.2d 888 (Ky. 1965).
\textsuperscript{18} KRS §§ 281.630(4), 281.630(6) (1950).
\textsuperscript{19} 393 S.W.2d 886 (Ky. 1965).
\textsuperscript{20} KRS § 317.520(3) (1960).
\textsuperscript{21} 397 S.W.2d 61 (Ky. 1965).
\textsuperscript{22} KRS §§ 418.040-.090 (1942).}
provision of the Interstate Commerce Act which confers exclusive jurisdiction upon the federal courts was not applicable, since there was no claim that the Interstate Commerce Act had been violated.

I. Delegation of Powers.—In order to preserve Ashland’s junior college program, the Court last term upheld a contract between a local school board and the University of Kentucky. The board had transferred presently-held property and had placed title to newly acquired property in a non-profit, no-capital stock corporation from which it leased the property. It had then contracted with the state university for the operation of the school, which the board financed with revenue from a special tax which had already been approved by the voters in accordance with the constitution. Because the board could withdraw from the contract if its responsibilities and obligations were not met, it did not unlawfully delegate or surrender its power to either the corporation or the university.

The Court seemed quite concerned with the result to be reached in the case. But for the device upheld, the continuation of Ashland’s junior college would have been doubtful. And, said the Court, “It seems plain that the purpose of the special tax was to assure a junior college facility for the people of the Ashland community.”

2. Illegal Sales—Conflict of Interest.—The prohibition of sales to a school board by a member of the board is strictly enforced. A board member who violated the statute prohibiting sales to the school board by board members was held in Commonwealth ex rel. Matthews v. Coatney to have vacated his office by the violation. Neither ill will toward the defendant board member by the school superintendent who initiated the suit, nor failure to show that the board member did not act in good faith, mitigated the violation.

3. Term of Employment of School Superintendents.—In Board of Educ. of Pendleton County v. Gulick the Court held that a term of employment for a school superintendent, once fixed, must be served out by the superintendent or his successors. No contract which is to become effective before the expiration of a term fixed by some previous

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25 Ky. Const. § 184.
26 402 S.W.2d at 97.
27 KRS § 160.180(1)(e) (1942).
28 396 S.W.2d 72 (Ky. 1965).
29 398 S.W.2d 483 (Ky. 1966).
contract will be valid. The rule, however, does not state that the school board cannot contract with the superintendent for a period extending beyond the presently existing term, admittedly a subtle distinction.

In *Wesley v. Board of Ed. of Nicholas County* the statutory provision\(^{30}\) that a school superintendent may be removed only by the concurrence of four members of his school board was held to contemplate a normal five-man board and mean eighty per cent of a school board, regardless of the number of members. After the decision, KRS 160.350 was amended to read “four-fifths of the membership of a board” rather than “four members.”

4. Use of Tax Levy.—The Court refused in *Earle v. Harrison County Bd. of Educ.*\(^{32}\) to enforce campaign promises. It held that the school board was not bound by the passage of a special tax levy to carry out any proposal that was not specifically stated on the ballot, campaign promises notwithstanding.

C. Counties

In *Garner v. Harris*\(^{33}\) two questions were raised in relation to a reapportionment which reduced the number of the county’s magisterial districts from eight to five. On the first question, that of the sufficiency of notice to the public, the posting of the notice of application for reapportionment on postal cards at eye level in places the public was accustomed to pass was considered sufficient. As the Court noted, “certainly the public got the news as evidenced by the prompt filing of exceptions . . . and persistent opposition in the courts.”\(^{34}\) On the second question, that of the propriety of the reapportionment, it held that, despite numerous procedural errors, the county court did not abuse its discretion or act arbitrarily in reapportioning the districts, because there was a reduction in the difference in population between the largest and smallest districts from 6,038 to 474.

D. Zoning

In *Hobbs v. Markey,*\(^{36}\) a landowner sought to change his commercial greenhouse to a filling station. A horse farm across the road

\(^{30}\) 403 S.W.2d 28 (Ky. 1966).

\(^{31}\) KRS § 160.350 (1950).

\(^{32}\) 404 S.W.2d 455 (Ky. 1966).

\(^{33}\) 394 S.W.2d 465 (Ky. 1965).

\(^{34}\) Id. at 467.

\(^{36}\) The *Journal* appreciates the assistance of Mr. Chester Care in the preparation of this section. Mr. Care, a second year student at the College of Law, is a research assistant for the Bureau of Business Research, University of Kentucky,
was sufficiently proximate to support a complaint without proof of devaluation of the farm. After the board of adjustment had allowed the change, the owner of the horse farm appealed to the circuit court. While the action was pending in the circuit court, the relevant zoning statute was amended. The circuit court decided the case under the amended statute, and the proposed change from a commercial greenhouse to a filling station was not allowed. The Court of Appeals then affirmed. In the most significant part of the opinion, the Court recognized the legal theory, already established in some jurisdictions,\(^3\) that a change in statutory law or, it may be assumed, a local ordinance, may defeat an appeal and that the amended statute will be controlling in such cases. It is sometimes assumed that the mere filing of an appeal establishes or preserves some vested right. Obviously, this is not true. The Court must consider an appeal on the basis of the ordinance or statute existing at the time of the hearing. The Court held that the expenditure of time and money in connection with the application or appeal is not sufficient to create a vested right. This rule will control future administrative appeals where the controlling ordinance or statute has been amended after the filing of the appeal in such manner as to remove the appeal from the Board's jurisdiction. An example might be a request for a special use where the special use has been removed from the ordinance after the filing of the request but prior to the hearing.

Additionally, \textit{Hobbs} held that a qualified complainant is not necessarily estopped from filing a valid protest with respect to a nonconforming use merely because he has failed to protest earlier and has permitted the use to continue for a substantial period. This would not be true in the case of a zoning map amendment or variance, where time limits for the taking of an appeal are established by statute.\(^3\)\(^8\)

In \textit{Blancett v. Montgomery}\(^3\)\(^9\), a zoning ordinance was held a valid exercise of the police power. In this question of first impression, the Court upheld a city ordinance prohibiting drilling for oil in an area zoned residential.\(^4\) In a sense, such an ordinance is much more

\(^{Footnote continued from preceding page}\)

a planning consultant, an Associate Member of the American Institute of Planners, and a former Director of Planning Services, City-County Planning Commission, Lexington, Kentucky.

\(^3\) Attorney Gen. v. Inhabitants of Town of Dover, 327 Mass. 601, 100 N.E.2d 1 (1951); Lacey v. Zoning Bd. of Adjustment of Hamilton Township, Mercer County, 4 N.J. Super. 422, 67 A.2d 466 (1949).

\(^8\) KRS § 100.261 (1966).

\(^9\) 398 S.W.2d 877 (Ky. 1966).

\(^10\) Blancett v. Montgomery also discussed, \textit{infra}, Sec. XVII, \textit{Property}, text at note 34.
restrictive than ordinary prohibitions of business use of property in a residential area because the particular drilling operation could be carried on nowhere else. Still, because the ordinance is a valid exercise of the police power, the property was held not to have been taken without due process of law, and the landowner was prevented from removing natural resources from his land. The principle is not a new one, and the Court applies it in order to allow cities to protect themselves from industry which they do not want to tolerate. The rule is not that oil and gas cannot be produced within a city, but only that a city, if it chooses, may restrict such production by zoning ordinances, just as it may restrict other types of activity. Although the Director of Oil and Gas had issued a permit for exploration for oil and gas on the plaintiff's property, the Director's statutory authority did not preempt the municipal power to regulate oil and gas activities within their city limits.

Property zoned by a city-county zoning board was held in Farley v. DeMuth to have become unzoned when annexed by the city because the zoning plan of the city-county zoning board was effective only in unincorporated areas. Once the property was annexed by the city, it could be zoned only by the city. The Court also held that the city, which zoned the annexed property as residential except for an eight and one-half acre tract which it zoned as commercial to allow a shopping center, did not "spot-zone" the eight and one-half acre tract. The shopping center was beneficial to the community as a whole. The Court has previously held, regarding a question of spot zoning, that the zoning ordinance will be upheld if reasonable minds could differ as to whether the ordinance has a substantial relation to public health, morals, safety, or general welfare. Spot zoning creates for a small area "a particular zoning classification differing from that of the surrounding property. '[S]pot zoning' is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare." Thus, it seems that access to shopping facilities is a matter of public welfare and an appropriate object of the police power. The reason for this is that a shopping center, which usually consists of from five to twenty-five acres, is a more or less "self-contained" land use or land use unit. Therefore, it may exist in almost any reasonable location.

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41 Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931).
42 KRS § 353.500 (1960).
43 399 S.W.2d 469 (Ky. 1965).
44 Luetkenmayer v. Mathis, 333 S.W.2d 774, 776 (Ky. 1960).
without constituting spot zoning. The fact that it lies at the intersection of two major thoroughfares, as in this case, is not controlling, and a planned shopping center can be just as valid when located in the center of a residential neighborhood, depending on the circumstances.\textsuperscript{46} Such a shopping center can be "buffered" by more restrictive districts, such as an apartment district or open space, included within the same tract of land; it is also possible to include within this type of area certain design elements, such as walls, fences, and screen plantings, which will make such a use more acceptable or less detrimental to adjacent properties. In \textit{Pierson Trapp Co. v. Peak},\textsuperscript{47} there is a relatively brief discussion of the spot zoning question as it relates to shopping centers. Suffice it to say, however, that now it would be difficult at best to invalidate a rezoning for a shopping center at such an intersection as involved here on the basis that it constituted spot zoning.

In \textit{Franklin Planning & Zoning Comm'n v. Simpson County Lumber Co.},\textsuperscript{48} it was held that bricks, stored on property zoned as residential, were a permitted non-conforming use which was not enlarged by the storage of sawlogs on the property so long as the logs did not impede the natural flow of air or obstruct the view. The basis issue was whether the storage of logs was either an extension or a change in the non-conforming use. Because both bricks and sawlogs are building materials, there was neither.

In \textit{Franklin Co. v. Webster},\textsuperscript{49} the Court held that the authority of the board of zoning adjustments and appeals is absolute; a city ordinance cannot confer power upon the Capital Planning and Zoning Commission to entertain an appeal or grant special zoning permits.

Special or conditional uses are frequently contained within an ordinance and are generally considered to be a "use by right," rather than a variance from the requirements of the ordinance.\textsuperscript{50} Not only are these uses frequently and properly controlled in many communities by the planning commission rather than by the board of adjustment, but there has actually been a recent movement to remove such uses from the jurisdiction of boards, on the theory that a planning commission is in a better position to consider the merit of the proposed use. A prerequisite to the inclusion of such uses in the ordinance,

\textsuperscript{46} YoKLEY, ZONING LAW AND PRACTICE § 8-2, at 361 (3d ed. 1965).
\textsuperscript{47} 340 S.W.2d 456 (Ky. 1960); See also YoKLEY, op. cit. supra note 46, §§ 8-1 through 8-6, at 359-93.
\textsuperscript{48} 394 S.W.2d 593 (Ky. 1965).
\textsuperscript{49} 400 S.W.2d 693 (Ky. 1966).
\textsuperscript{50} YoKLEY, op. cit. supra note 46, § 4-24, at 182.
however, is the establishment of standards to guide the administrative body involved in determining the appropriateness of the proposed use.\(^5\) If anything, the Court should have found that the special use here was invalid because there were no standards contained within the ordinance which would guide the planning commission in making a decision.

The Court held in *Fiscal Court of Jefferson County v. City of Anchorage*\(^5\) that a law relating to the administration of sixth class cities was amended by implication to the extent necessary for consistency with later enactments. The Court said the Legislature was not misapprised of the character of the bill and reaffirmed the policy that disfavors repeals and amendments by implication, except when, as here, legislative intent is clear. The point is now moot, for the zoning authority of fifth and sixth class cities in Jefferson County has been transferred to the fiscal court.\(^5\)

In *Thomas v. Barnett*\(^5\) it was held that, because the county planning and zoning commission's approval of preliminary plats for proposed industrial development was only a recommendation, a property owner had no course for relief from the commission's approval of the plats. Nothing of significance had yet occurred.

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\(^5\) Id. at 172-77.
\(^5\) 393 S.W.2d 608 (Ky. 1965).
\(^5\) KRS § 100.137(2) (1966).
\(^5\) 397 S.W.2d 781 (Ky. 1966).
III. AGENCY

The Court of Appeals made only one significant agency law decision during the 1965-66 term, Decker v. Glasscock Trucking Serv., Inc.\(^1\) Glasscock (the contractor), under pressure to meet a contract deadline, orally contracted with Traylor (the trucker) for the latter to furnish him with trucks and drivers, payment to be made at a stipulated tonnage-mileage rate. Under the terms of this agreement, the trucker paid for the fuel and parts necessary for the maintenance of his trucks and paid the drivers. The contractor told the trucker what to haul, where to haul it, and what routes to follow, and the contractor could terminate the arrangement at will. The plaintiff was injured as a result of the negligent operation of a truck owned by the trucker and driven by his employee. The plaintiff sought to hold the contractor vicariously liable under the doctrine of respondeat superior. The issue was whether the truck driver was the servant of the defendant (the contractor for the hauling of materials to a highway construction site) or was the servant of the independent contractor, who had leased trucks to the defendant. The Court of Appeals ordered a judgment against the contractor on the basis of Tindall v. Perry,\(^2\) which held, on facts slightly less favorable to the plaintiff, that the defendant had such right of control over the conduct of the negligent person that the two must be considered master and servant.

In the Glasscock and Tindall cases, the Court relied solely on the traditional right of control test.\(^3\) However, in other cases involving this issue,\(^4\) the Court has chosen to utilize the American Law Institute test\(^5\) which embodies ten factors\(^6\) to be weighed in light of the facts to determine the relationship existing between the parties. Both the

\(^1\) 397 S.W.2d 773 (Ky. 1965).
\(^2\) 283 S.W.2d 700 (Ky. 1955).
\(^3\) SEAKEY, AGENCY § 84(c) (1964): "The right to control the physical movement of the employee is the most important single element in most of the situations. This does not mean de facto control, which is usually absent, but the right to control." See also, MECHEM, AGENCY §§ 418-15, 429 (4th ed. 1952).
\(^4\) Locust Coal Co. v. Bennett, 325 S.W.2d 322 (Ky. 1959); Sam Horne Motor & Implement Co. v. Gregg, 279 S.W.2d 755 (Ky. 1955).
\(^5\) RESTATEMENT (SECOND), AGENCY § 220 (1957).
\(^6\) Id. at § 220(2) provides:
In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among other, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the local-
traditional test and the American Law Institute test are based on determining the right of control manifested between the parties. However, it is suggested that the multi-factor test is a better choice in all cases, in that it serves to define the relationship with greater precision, thereby allowing the parties to determine their relationship without the need for court action.

In the only other agency decision made in the 1965-66 term, the Court of Appeals reversed a trial court decision involving the loaned servant doctrine because of an error in the manner of instructing the jury.

7 R. E. Gaddie, Inc. v. Evans, 894 S.W.2d 118 (Ky. 1965).
The Court decided six cases dealing with commercial law. Of these, the operative facts of four arose after the effective date of the Uniform Commercial Code. Each Code case will be discussed in some detail because of the relative scarcity of Kentucky case law on the subject. Those cases not decided under the Code will be considered in light of their probable disposition under Code law.

In *Martin v. Ben P. Eubank Lumber Co.*, the Court was given an opportunity to hold that U.C.C. 1-205, which provides that the course of dealing between the parties to a contract and the usage of the trade in which they are engaged may be used to supplement or qualify the terms of their contract, does not entitle a contracting party to take a "fishing expedition" through the other's business records. The fact in issue was the existence or non-existence of a ten per cent discount in the oral sales contract. The plaintiff filed interrogatories which sought disclosure of the names of other persons to whom the defendant had sold materials and the nature of the contracts of sale. The Court of Appeals affirmed the lower court's refusal to require divulgence of this information. The Court was convinced that "ten per cent" is a plain term, one whose existence or non-existence in the oral agreement could be determined without resort to the information sought in the interrogatories.

No authority was cited to substantiate the Court's position, but the decision seems entirely proper in light of the purpose of section 1-205 as it appears from the highly persuasive official comments. Although no cases have been found which decide whether such information is made the proper subject of interrogatories by this section, it would seem that whether any particular allegation of fact comes within the "usage of trade" or "course of dealing" scope of U.C.C. 1-205 must by its very nature be determined largely by the facts of the particular instance.

Another Code case, *Cox Motor Car Co. v. Castle*, involved an automobile dealer's express warranty of a vehicle sold to the plaintiff. The defendant, when he sold a truck to the plaintiff in 1960, expressly warranted the truck "to be free from defects in material and workmanship under normal use and service," but the defendant's liability was limited to replacing any part which should be returned to the dealer.

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2 395 S.W.2d 385 (Ky. 1965).
3 See official comments to Uniform Commercial Code [hereinafter cited as U.C.C.] § 1-205, especially comments 4 and 5.
4 402 S.W.2d 429 (Ky. 1966).
within certain time and mileage limitations and which defendant’s
examination should disclose to be defective. All other warranties
were expressly disclaimed. Within a month the seller brought the
truck back, complaining of a vibration. Defendant’s employee ex-
amined the truck, then told plaintiff that nothing could be done, since
“it was just the nature of the truck.” Twice more within the stated
duration of the warranty the plaintiff complained to the defendant,
and received the same response. Finally the plaintiff sued for breach
of the express warranty.

The Court of Appeals held the defendant liable under the war-
 ranty despite the expiration of the time contained in the warranty
itself. The Court conceded that the defendant was within its right
in disclaiming all implied warranties and in limiting its duties to
replacement of defective parts, but it saw the obvious injustice to the
purchaser in such situations. Looking at the case from the plaintiff’s
standpoint, the Court perceived that the purchaser, having noticed a
vibration in the truck, returned it to the dealer, only to be brushed off
by the dealer’s reply that nothing could be done about it. Under the
express warranty the purchaser had done all he could do except per-
haps to disassemble the vehicle himself, select the defective part(s),
and demand replacement by the seller. The Court was unwilling to
impose such a duty on the purchaser, at least under this particular
warranty.

Again, the decision seems just and sensible, although the Court
was without the guidance of precedent. Moreover, it is in accordance
with the general attitude of the Code toward limitation of warranties
and with the position taken by other courts and writers. Perhaps the
Court strained the interpretation of the particular warranty in Cox,

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5 See U.C.C. §§ 2-316, 2-718, 2-719 and official comments. Read collect-
ively, these unquestionably establish that disclaimers and limitations, though
disfavorably viewed, are permissible provided the party benefited thereby has
dealt with the other in complete candor and good faith.

6 Ibid.

7 Said the Court (at 431):
We do not accept the appellant’s contention that the duty was on the
buyer to point out what parts were defective and to ask replacement of
those specifically. It would not be reasonable to put that duty on the
buyer. Furthermore, the contract clearly contemplated an “examina-
tion” by the seller. It is our opinion that the duty was on the seller,
upon complaint being made of unsatisfactory operation of the truck, to
make an examination designed to disclose the cause. And we think that
when, as here, the seller gives the buyer the “brushoff”, there has been
a breach of warranty. (Emphasis added.)

8 See U.C.C. § 2-316 and comments.

9 See, e.g., Boeing Airplane Co. v. O’Malley, 329 F.2d 585 (8th Cir. 1964);
Armco Steel Corp. v. Ford Const. Co., 237 Ark. 272, 372 S.W.2d 630 (1963);
First Nat’l Bank v. Husted, 57 Ill. App. 2d 227, 205 N.E.2d 780 (1965); Jaeger,
and perhaps the purchaser was less than vigilant in protecting himself, but the inevitable inequality of opportunity to inspect motor vehicles surely warrants imposition of a strict burden of disclaimer on the seller. Undoubtedly, the seller can still restrict his liability to any extent, provided the language of the warranty is sufficiently clear.

10 In another case, the Court overlooked an opportunity to clarify its attitude toward waiver of defenses under the Code. Morgan v. John Deere Co. of Indianapolis held that the purchaser under a conditional sales contract who agreed to “settle all claims of any kind against seller directly with seller and if seller assigns” the note, not to use any such claim as a defense against the assignee, was precluded from asserting against the assignee a claim that the machine sold to him was defective. The Court believed its decision was controlled by Walter J. Hieb Sand and Gravel, Inc. v. Universal C. I. T. Credit Corp. Since the Court ruled summarily on the basis of Hieb, some discussion of Hieb is warranted.

The Court there was faced with a waiver of defenses clause almost identical to the one in Morgan. The clause was attacked as contrary to public policy. The Court rejected this argument in a well-reasoned opinion. Most importantly for our purposes, the Court discussed the validity of the clause under the then enacted but as yet ineffective Uniform Commercial Code. It was pointed out that U.C.C. 9-206(1), with certain exceptions, authorizes such waiver of defense clauses. Since the Court in Morgan solidly endorsed Hieb, the conclusion is inescapable that U.C.C. 9-206(1) will eventually be given full effect by our Court.

The remaining case directly involving the Code arose from a

10 U.C.C. § 2-316(2) clearly allows a seller to disclaim and/or limit implied warranties of fitness and of merchantability if he complies with the disclaimer provisions enunciated therein.

11 It is assumed that the transaction in the Morgan case occurred after the Code became effective, although the opinion does not set out the date. If the case did arise prior to the Code, a statement to that effect should have been inserted in the opinion.

12 384 S.W.2d 453 (Ky. 1965).

13 332 S.W.2d 619 (Ky. 1959).

14 Section 9-206(1) provides:

Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee.

16 The official comments to U.C.C. § 9-206 make it clear that the drafters of the Code, after considering the confusion in the case law on waiver of defenses, intimated to resolve the issue in favor of such waivers. It thus appears that the Hieb decision through Morgan correctly anticipated the impact of the Code. Kentucky law of waiver of defenses therefore seems to be settled. For a similar construction of U.C.C. § 9-206 see First Nat'l Bank v. Husted, 57 Ill. App. 2d 227, 205 N.E.2d 780 (1965).
criminal prosecution for forgery. In *Davis v. Commonwealth* the defendant was indebted to a bank through several separate loans. The bank indicated a willingness to consolidate them into one loan, and for this purpose it furnished defendant with a blank promissory note form upon which the signatures of the defendant, his wife, and his sureties were to be placed. Defendant returned the note completely blank except for his signature, his wife's, and the allegedly forged signature of the sureties. At a later date the remaining blanks were filled in by a bank officer.

One of the points raised by the defendant was that since the note as returned to the bank was incomplete as to date and amount, it had no legal efficacy and, therefore, was not the proper subject of a forgery. In rejecting this defense, the Court relied upon the provision in U.C.C. 3-115 (1) to the effect that an incomplete instrument has legal efficacy after it is completed in accordance with authority given to the one who actually completes it.

The propriety of the *Davis* decision as a criminal law case is not a matter of concern here, but this construction of U.C.C. 3-115(1) is questionable. The chief weakness of the decision is that it assumes that the defendant authorized the bank official to complete the instrument. The comments to the section indicate that some showing of actual authority may be required. At any rate, the future applicability of the decision in contexts other than a forgery situation is speculative.

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16 KRS § 434.130 (1942).
17 399 S.W.2d 711 (Ky. 1966).
18 U.C.C. § 3-115(1) provides:
   When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.
19 Consider this case: A forges the signature of B, a surety, and presents the note to the bank, intending to procure a loan of $1,000. C, a bank officer, mistakenly fills in the blank amount for $10,000. Has A "forged" a note for $1,000 or for $10,000? Under *Davis*, the implication would seem to be that he has forged it for $10,000.
20 There can be a question of fact whether an instrument was completed as authorized or if authority existed. In *Golden Dawn Foods, Inc. v. Calsuta*, 1 Ohio App. 2d 464, 205 N.E.2d 121 (1964), the existence of such a fact question precluded the maker from a directed verdict.
21 Comment 3 shows that the prior section of the Negotiable Instruments Law, which had provided that the signer's delivery of an incomplete instrument in order that the instrument might be completed operated as a prima facie authority to complete it in any amount, was specifically rejected by the drafters of the Code. Authorization in fact, however, is apparently still possible.
In a pre-U.C.C. case, *Gateway Auto Auction, Inc. v. General Motors Acceptance Corp.*, the Court was presented with the question of whether an automobile auction company had the title to certain automobiles necessary to maintain a conversion action against a finance company which repossessed them. It held in the negative. In *Gateway*, the registered owner of the cars was one Downs. An employee of Downs delivered four cars to Gateway. Gateway drew a check payable to Downs, which check was subsequently endorsed and honored. Downs' employee executed separate bills of sale for each car, signing the name of his employer and, below that, his own name. On the same day one Calvin "bought" the cars from Gateway. Calvin gave Gateway his check, and Gateway gave Calvin two documents for each car. One was a bill of sale in which Calvin's name had been inserted as the direct vendee of Downs; the other was a title warranty warranting that title was in Gateway and that it would pass to Calvin when his check was honored at the drawee bank. Calvin took possession of the cars and executed a floor plan mortgage to General Motors Acceptance Corporation (hereinafter called G.M.A.C.). The next day Calvin informed G.M.A.C. that he was "in difficulty," whereupon G.M.A.C. intercepted the check it had made payable to him and took possession of the cars. G.M.A.C. sold the cars to persons having no knowledge of the transaction between Calvin and Gateway. A few days later Calvin's check made payable to Gateway was dishonored. Gateway sued G.M.A.C. for conversion of the automobiles. The trial court granted summary judgment for G.M.A.C. on the ground that Gateway never had title to the cars. The Court of Appeals affirmed on the same ground.

The apparent harshness of *Gateway* is superficial. The loss which the auction company suffered is in reality no more than a consequence of its failure to protect itself. The Court alluded to the fact that Gateway attempted to retain a lien on the automobiles but failed in its attempt. In the last analysis, the Court believed the company can remove the risk of such loss only by effectively taking title to the vehicles.

No Code provision demands a result different from *Gateway*'s. Since title is essential to a conversion suit, the only protection for an auction company is to comply with the necessary steps to take title to its vehicles before it resells them.

The Court does not set forth clearly the arrangement between G.M.A.C. and Calvin. Apparently the floor plan mortgage entailed

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23 898 S.W.2d 498 (Ky. 1966).
some sort of floating lien on Calvin's inventory. Whether G.M.A.C. had perfected a security interest in the automobiles is not stated. Under the Code, G.M.A.C. would be required to file a financing statement to protect its security interest against Gateway, assuming Gateway had been vested with title before its conveyance to Calvin.

The other pre-U.C.C. case, *Louisville Credit Men's Ass'n v. Motors Investment Co.* should also be considered in light of its probable disposition under the Code. *Motors Investment* involved application of the old Negotiable Instruments Law to two distinct legal issues. The suit was principally directed against the ultimate payee of two checks drawn by a decedent, but it was also against the executor of his estate. The plaintiff was the assignee for the benefit of creditors of two defunct companies upon whose accounts he had drawn in order to repay funds which he had embezzled from two other close corporations. One of the checks under attack was a treasurer's check payable to a fictitious payee and the other was a check payable to decedent's attorney. Both were eventually paid to one of the victimized corporations. The plaintiff attacked the effectiveness of both these instruments, its theory being that they were ineffective to insulate from creditor's claims the funds transferred. The Court, in upholding both the instruments, discussed each check separately. In the interest of clarity, this discussion will follow that procedure.

The deceased purchased the treasurer's check with a check drawn on his account in the same bank. It was drawn by a bank officer who had no knowledge that the named payee was fictitious. Plaintiff disputed the effectiveness of this instrument on two grounds. One of these, that the corporation to which it was paid was not a holder in due course, will be discussed below. The second ground was that the

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25 See U.C.C. § 9-205. The official comment states that:
This article expressly validates the floating charge or lien on a shifting stock. It repeals cases which held such arrangements void because the debtor was given unfettered dominion or control over the collateral.
26 U.C.C. § 9-303.
27 U.C.C. § 9-402 describes the formal requirements of financing statements. KRS § 355.9-402(1) deviates from the official version of the Code by imposing slightly more stringent requirements of description.
28 U.C.C. § 9-302. Note that Kentucky chose alternative A for its subsection (3)(b). The practical effect of this selection is that there must be compliance with both the filing requirements of the U.C.C. and the procedures for notation of liens under the motor vehicle statutes requiring registration in the counties. Lincoln Bank and Trust Co. v. Queenan, 344 S.W.2d 388 (Ky. 1961). See Whiteside, *Amending the Uniform Commercial Code*, 51 Ky. L. J. 3 (1962).
29 394 S.W.2d 760 (Ky. 1965).
check was not a negotiable instrument because of the bank officer's ignorance of the fact that the named payee of the treasurer's check was fictitious. Concerning the second ground, the Court of Appeals held that it was the intention and, by implication, the knowledge, of the person who caused the check to be drawn, rather than the intent of the person who actually drew it, which governed applicability of Section 9(3)\textsuperscript{31} of the Negotiable Instruments Law. The treasurer's check was ruled negotiable and hence effective to protect the funds from creditors claiming through companies who had been drawn upon to repay the original embezzlement.

The Uniform Commercial Code does not have a black-letter provision corresponding exactly to section 9(3). Section 3-405 omits the term, "fictitious payee," but still recognizes the situation in its list of circumstances under which an endorsement by a person in the name of a named payee is effective.\textsuperscript{32}

The official comments to section 3-405 show that the words "fictitious or non-existing" were deleted from section 3-405 because the non-existence of the payee was thought to be relevant only as it bears on the intent of the drawer. Under the Code, a black-letter rule for disposition of the "first check" part of Motors Investment does not readily present itself. Section 3-405 is aimed at the situation in which the named payee, rather than the actual drawer, implements fraud on the nominal drawer; 3-405(1)(c) is aimed at the typical "padded payroll" case.\textsuperscript{33} So the official comment indicates, must govern in such a case. This subsection rejects the fictitious payee rule in favor of a test of "whether the signer intends that he shall have no interest in the instrument."\textsuperscript{35} Since the question of whose intent governs in such a case will necessarily arise under 3-405(1)(b), the decision will have continuing efficacy.

The plaintiff attacked the negotiability of the second check, as

\textsuperscript{31} Section 9(3) provides: "[The instrument is payable to bearer] when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable..." However, this case involved an added formal step not found in the customary fictitious payee situation, namely the use of the embezzler's check to purchase the treasurer's check.

\textsuperscript{32} Note that under the Code an instrument so endorsed is negotiable by reason of the endorsement, whereas under the Negotiable Instrument Law an instrument knowingly made payable to a fictitious or nonexistent payee was a bearer instrument. The reason for this deviation is set forth in the comments to U.C.C. § 3-405.

\textsuperscript{33} See comment 4 to U.C.C. § 3-405.

\textsuperscript{34} U.C.C. § 3-405(1)(b) provides that an endorsement by any person in the name of a named payee is effective "if... a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument...."

\textsuperscript{35} See comment 3 to U.C.C. § 3-405.
well as the first, on the basis of Sections 52(4) and 56 of the Negotiable Instruments Law. That is, it asserted that the payee of these checks was not a holder in due course, since it was a corporation whose sole owner had notice of such facts that its taking of the check was an act of bad faith. The Court again rejected the plaintiff's argument, this time by refusing to disturb the trial court's evidentiary findings that the payee took the checks in good faith and without notice of any defect.

Assuming arguendo that the Court had upheld the plaintiff's assertion, the effect of the U.C.C. can be seen by examining section 3-302. Subsection (1)(c) of that section provides that a holder is not a holder in due course if he holds with notice of any defense against, or claim to, the instrument on the part of any person. Since "any person" includes the named payee, it follows that the disposition of the issue under the Code would be virtually the same as under the Negotiable Instruments Law.

Section 52(4) requires as one condition for a holder to be a holder in due course "that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 56 provides:
To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

V. CONDEMNATION

During the last term, the Court of Appeals decided more than 80 cases in the area of eminent domain or, more precisely, condemnation law. Basically attributable to highway extension programs, suburban expansion, urban redevelopment, municipal growth and public authority activities, this deluge of litigation has created many problems in both procedural and substantive law for the Court. For purposes of this review, the cases may be catalogued under four distinct headings. First, the Court decided a large number of cases that dealt solely with the problem of whether the verdict or award of the lower court was excessive. Secondly, the Court was faced with a number of cases that focused upon valuation problems, and thirdly, the Court was called upon to decide a few cases that related to purely procedural problems. The concluding part of this section encompasses the remaining miscellaneous cases.

A. The Excessive Verdict

Case law in condemnation proceedings has taken great strides in relaxing the proof requirements for establishing market value, both in terms of what constitutes market value and the method by which it may be proved. The entire structure of eminent domain proceedings is designed to provide the landowner-condemnee with just compensation, arrived at largely by the condemnee's evidence and not at all subject to strict rules of admissibility. Such a structure partially accounts for the widespread dissatisfaction (hardly confined to the Commonwealth of Kentucky) with condemnation proceedings in general and admissibility problems in particular. In Kentucky, as in other jurisdictions, the rules of evidence are liberal with respect to proof of market value, and throughout all jurisdictions "the courts have never adhered to the strict rules of evidence which ordinarily obtain in other litigation."

During the 1962-63 term, however, the Kentucky Court of Appeals decided the companion cases of Commonwealth, Dept of Highways

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2 See, e.g., General Assembly, Commonwealth of Pennsylvania, H. R. Con. Res. 59 (Serial No. 64) 1959 Sess.
v. Tyree\(^5\) and Commonwealth, Dep't of Highways v. Sherrod,\(^6\) which attempted to establish some procedural and evidentiary guidelines for both trial judges and practicing attorneys. In expressing its dissatisfaction with the excessive verdicts that ordinarily follow when sound evidentiary practices are ignored, the Court enunciated principles designed to obviate the repetition of excessive verdicts. In the Tyree case, for example, the Court engaged in a lengthy but lucid discussion of evidence with probative value vis-à-vis incompetent\(^7\) and irrelevant evidence.\(^8\) In strongly pointing out that objections to incompetent and irrelevant evidence must be made at the trial to preserve the issues for appeal, the Court, in effect, was chastising Commonwealth attorneys for their failure to make such objections. The Court's remarks were well-grounded, for in the area of condemnation, where "evidence makes the case, timely objections to inadmissible evidence are of the essence."\(^9\) The initial significance of the Tyree case, then, was that, where no objection is made to possible incompetent or irrelevant testimony, the testimony is correctly admitted and must be deemed to have probative value; the verdict can be set aside by the Court of Appeals only if it is patently in excess of the evidence's strength to sustain it.\(^10\) In the Sherrod case, the Court directed its attack against a trial judge whose instructions to the jury became so confusing that he himself was unable to understand them. In holding that the instructions were erroneous, the Court restated the law in Kentucky by outlining the type of factual considerations the jury could or could not evaluate. The apparent meaning of the Tyree and Sherrod cases is that the Court was quite dissatisfied with the indifferent practices of trial judges and Commonwealth attorneys, for the rules of evidence were being ignored state-wide. Such practices were resulting in the true measure of damages, viz., the fair market value before and after the taking, being ignored and excessive verdicts being awarded.\(^11\)

\(^5\) 365 S.W.2d 472 (Ky. 1963).
\(^6\) 367 S.W.2d 844 (Ky. 1963).
\(^7\) 365 S.W.2d at 478. As to incompetent evidence, the Court in effect held that if no objection is made to incompetency, then the jury may hear the testimony to the extent that it has probative value.
\(^8\) 365 S.W.2d at 477. As to irrelevant evidence, the Court, in effect, held that if a witness on direct examination bases his valuation on irrelevant considerations, the testimony may be subject to a motion to strike.
\(^9\) 17 Rutland, supra note 1, at 169.
\(^10\) 365 S.W.2d at 476. It is interesting to note that the Court of Appeals ruled against the Commonwealth in Tyree and thereby held that the evidence, which had not been objected to at the trial, had sufficient probative value to sustain the award. Justice Stewart dissented on the grounds that the verdict was \textit{ipso facto} excessive.
\(^11\) There are basically three formulas for computing the true measure of damages. The least attractive rule allows for consequential damages as part of (Continued on next page)
The 1965-66 term revealed that the Court is still dissatisfied. Attorneys have continually failed to make timely objections to incompetent and irrelevant testimony; trial judges have continually allowed juries to consider matters violative of basic evidentiary rules; excessive verdicts have continued to flood the docket of the Court of Appeals. Awards that are below the highest estimate and thus not excessive, awards that are less than the jury could have rendered, awards that indicate an after taking value which is less than the estimate of any witness, and awards that are sound because they are not the result of passion or disregard of the evidence are relegated out of serious consideration simply because they are far outnumbered by the awards that are clearly excessive. In spite of Tyree and Sherrod, the trend in the lower courts is toward the excessive verdict, a trend that the Court of Appeals earlier noted with trepidation. The significant result of this practice is that the Court has taken control of the excessive verdict by seizing upon the "palpably excessive" standard promulgated in the Tyree case.

In the Tyree case the Court stated the "palpably excessive" test, which had been adopted in a number of other jurisdictions, as follows:

If, however, the jury gives the evidence more weight and value than the maximum it is entitled to, the appellate court has the power to set aside the verdict either on the ground of palpable excessiveness or on the ground that it is not sufficiently supported by the evidence.

Because shabby evidentiary practices have continued to produce excessive verdicts, the Court has been compelled to use Tyree and Sherrod.
rod as levers to dislodge excessive awards. It is perhaps ironical that the two cases which were designed to deemphasize the role of the appellate court in condemnation proceedings by resolving evidentiary and procedural problems have resulted in the appellate court's taking a more active role.

In making its present role undeniably clear, the Court struck down one award simply because it was "palpably excessive."\(^{18}\) In *Commonwealth, Dep't of Highways v. Sheffer*,\(^ {19}\) moreover, the Court held that an award for residential property was excessive when the residence was not affected by the taking and emphasized its holding by declaring that the award "shocks the judicial conscience."\(^ {20}\) Furthermore, in *Commonwealth, Dep't of Highways v. Allie*,\(^ {21}\) the Court had to restate one of the most fundamental rules of condemnation law: an award that exceeds the highest estimate of either party is *ipso facto* excessive. In *Allie* the Court also held that damages may not be broken down into categories of damages to the land taken and damages to the remainder.

The present effect of the *Tyree* and *Sherrod* cases, then, is not upon the indifferent practices of trial judges and Commonwealth attorneys; rather, it is upon the function of the Court of Appeals as it relates to the excessive verdict. The Court is now taking active control of condemnation awards. By seizing upon the "palpably excessive" label and determining whether or not the evidence is of sufficient probative value to support the verdict, the Court, in effect, is becoming a *jury* of last resort. While this role is undeniably unfortunate, it will probably continue until trial judges and practicing attorneys accept and apply the rules of evidence that the highest court in the state has set out. Until that time, the Court will be maneuvered into parading a caravan of excessive awards that must be overturned merely because they violate the rudimentary tenets of *Tyree* and *Sherrod*.\(^ {22}\)

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\(^{18}\) Kentucky Util. Co. v. Bruner, 400 S.W.2d 203 (Ky. 1966).

\(^{19}\) 399 S.W.2d 709 (Ky. 1966).

\(^{20}\) Id. at 710.

\(^{21}\) 391 S.W.2d 385 (Ky. 1965).

\(^{22}\) For excessive awards cases during the term, see: Commonwealth, Dep't of Highways v. Lovell, 405 S.W.2d 21 (Ky. 1966), Commonwealth, Dep't of Highways v. Frazier, 404 S.W.2d 457 (Ky. 1966); Commonwealth, Dep't of Highways v. Allen, 403 S.W.2d 277 (Ky. 1966); Commonwealth, Dep't of Highways v. Tabor, 402 S.W.2d 434 (Ky. 1966); Commonwealth, Dep't of Highways v. Quisenberry, 402 S.W.2d 427 (Ky. 1966); Commonwealth, Dep't of Highways v. Creason, 402 S.W.2d 426 (Ky. 1966); Commonwealth, Dep't of Highways v. Gibson, 401 S.W.2d 71 (Ky. 1966); Commonwealth Dep't of Highways v. Hunt, 399 S.W.2d 294 (Ky. 1966); Commonwealth, Dep't of Highways v. Wynn, 398 S.W.2d 798 (Ky. 1965); Commonwealth, Dep't of Highways v. Hayes, 394 S.W.2d 735 (Ky. 1965); Commonwealth, Dep't of Highways v. Bay, 302 S.W.2d 665 (Ky. 1965); Commonwealth, Dep't of Highways v. Rose, 392 S.W.2d 443 (Continued on next page)
On a few occasions, the Court deemed it unnecessary to disturb an award that was reasonably supported by the evidence. In Commonwealth, Dep't of Highways v. Barton, for example, the Court found no violation of Tyree and Sherrod and upheld the award. In the Barton line of cases, the Court merely looked to see if the evidence reasonably supported the verdict. With its application of the reasonableness test, the Court is thus steering away, slightly, from controlling altogether the excessive award. The Barton line is significant only because in these cases the Court found no procedural or evidentiary violations. These were cases in which procedures were properly taken, evidence was properly admitted, the jury properly weighed the probative value, and a reasonable award was made. Query: Is this reasonableness test any different from the "palpably excessive" test? Are they not essentially the same standard that the Court applies in reviewing the reasonableness of an award? If the fundamental procedural and evidentiary pattern is followed, most awards theoretically will be reasonable, and there will be less reason for the Court to operate as a "super-jury." It is when this pattern is not adhered to that the Court must step in.

There is a slight indication, however, that the Court is stepping in too frequently. In Commonwealth, Dep't of Highways v. Merriman, for example, a rather significant dissent was registered. The Court held the award to be excessive, but the dissent pointed out that the frontage of a lot has a higher value than the remainder and that the award was not therefore "obviously excessive." Is the significance of this dissent that there is some unrest regarding the Court's automatic interference with the possibly excessive award? To properly treat this dissent, the Review turns to a case of primary importance, a case in which the dissenting Justice gained two members of the Court for his position in Merriman.

In Commonwealth, Dep't of Highways v. King, the condemnees were awarded $3,000 for a residential strip (7 feet by 70.75 feet)

Footnote continued from preceding page)
(Ky. 1965); Commonwealth, Dep't of Highways v. Dearen, 392 S.W.2d 49 (Ky. 1965); Kentucky Util. Co. v. Jett, 392 S.W.2d 667 (Ky. 1965); Commonwealth, Dep't of Highways v. Holbrook, 390 S.W.2d 897 (Ky. 1965). But see Commonwealth, Dep't of Highways v. Aylor, 399 S.W.2d 723 (Ky. 1966).
23 398 S.W.2d 694 (Ky. 1966).
24 Commonwealth, Dep't of Highways v. Allen, 404 S.W.2d 23 (Ky. 1966); Commonwealth, Dep't of Highways v. Stryker, 403 S.W.2d 26 (Ky. 1966); Commonwealth, Dep't of Highways v. Riley, 402 S.W.2d 840 (Ky. 1966); Commonwealth, Dep't of Highways v. Ballard, 402 S.W.2d 708 (Ky. 1966); Commonwealth, Dep't of Highways v. Armstrong, 400 S.W.2d 512 (Ky. 1966).
25 392 S.W.2d 661 (Ky. 1965).
26 Id. at 662.
27 400 S.W.2d 517 (Ky. 1966).
across the front of the land, taken from a lot containing 21,225 square feet. The before value of the entire lot was fixed by the jury at $22,500. The amount taken then represented 2.3% of the entire lot, yet the amount of the verdict represented 13.3% of the $22,500. The only improvement affected by the taking was a hedge at the front of the lot. In reversing the decision of the lower court, the Court of Appeals held that "the amount of the verdict is palpably excessive" and cited the Tyree case as the controlling authority. The strong dissenting opinion first urged that, in computing the amount of depreciation of residential property caused by moving a street closer to the house, the Court should have the greatest reluctance in substituting its opinion for that of a jury. It also challenged the logic of comparing the square footage of the strip taken with the remaining area. The dissent stands for the propositions that (1) in cases where the street is moved closer to the house, the award is "a matter of pure guesswork" for which the jury's estimate is about as valid as the Court's and (2) the front part of a lot may have higher value than the back. The significance of the King dissent is clearly that three members of the Court have decided that the "palpably excessive" test of Tyree and Sherrod cannot be rigidly applied in all appeals which at first blush indicate excessive verdicts. Secondly, and more importantly, the dissent is trying to provide the court with further guidelines in the valuation of property taken. At least three members of the Court, then, believe that it is error for the Court to superimpose its judgment above the jury's in matters that, narrowly, involve land taken from the front of a lot or in matters that, broadly, involve "guesswork." In spite of the persuasiveness of this dissent, however, the evidentiary rules of Tyree and Sherrod are law in Kentucky, and the "palpably excessive" test remains the guide for their application.

The rules of evidence in condemnation proceedings have remained so undefined and so liberal that many jurisdictions have condoned the fact that the trial judge has a wide latitude in the exercise of his discretion, and excessive verdicts have thereby abounded in most of these jurisdictions. In Michigan, for example, construction of a constitutional provision has pointed to the jury as the sole arbiter of both law and fact, and reversal for errors in the procedure is not granted by the appellate court unless the jury proceeds on a wrong theory or basis to determine the question of necessity or damages, or

28 Id. at 519.
29 Ibid.
unless something out of the ordinary occurs in the proceeding which has obviously influenced the jury to a wrong conclusion.\textsuperscript{32} In Tyree and Sherrod, however, the Kentucky Court of Appeals sought to define and somewhat restrict the rules of evidence to avert an avalanche of excessive verdicts. When the Court's evidentiary guidelines were ignored, the Court unfortunately had to interfere and usurp the function of the jury. Such states as Texas, Maryland, Pennsylvania, North Carolina, Wisconsin and Kansas,\textsuperscript{32A} to mention only a few, have done by statute what they were unable to do by case law precedent. Perhaps the Kentucky Court has developed the law to the point where legislative statement of the rules might be justified in the interest of clarity and litigation elimination. At least one legal scholar has looked upon the legislative role as essential, in stating as follows:

There has been very little legislative activity with respect to the rules of evidence pertaining to condemnation cases. An exception to the general rule was the Pennsylvania revision bill introduced in 1963. It attempted to set forth in some detail the rules of evidence which frequently are in issue in condemnation proceedings. The bill contained rules with regard to jury view, with regard to qualifications of expert valuation witnesses, and with regard to the permissible testimony of such witnesses.\textsuperscript{33}

Another legal scholar has gone even further in his plea that the legislature step in and overhaul the present condemnation structure:

Patching up the old system where it has worn thin is unlikely to produce a mechanism capable of fulfilling our present needs. There should be a complete overhauling of the procedure comparable to the great procedural reforms recently accomplished in many jurisdictions with respect to other civil actions. The promulgation of Federal Rule 71A should show the way.\textsuperscript{34}

Although it is perhaps essential for the legislature to assist the Kentucky Court in its struggle to hand down evidentiary and procedural guidelines and to reduce the frequency of the excessive verdict, such assistance will hardly produce an immediate or complete solution. (For further discussion of the possible effects of codification, see section B, infra.) In spite of statutory guidance, "opinion in land damage cases is often the most conjectural, unreliable and lowest kind of evidence ever allowed in a Court of Justice. . ."\textsuperscript{35}

\textsuperscript{32A}Helstad, Recent Trends in Highway Condemnation Law, 1964 WASH. U.L.Q. 58.
\textsuperscript{33}Helstad, supra note 32 A at 70.
\textsuperscript{34}Wasserman, Procedure in Eminent Domain, MERCER L. REV. 245, 287 (1960).
The above suggestions are not to be read as relieving the Kentucky Court of its responsibility to review all cases in which possible excessive verdicts were rendered. Because of the unreliable nature of the evidence in condemnation proceedings, the "palpably excessive" test of Tyree and Sherrod will continue to be an effective means by which the Court and interfere and strike down those excessive verdicts in which the proper procedural and evidentiary guidelines have not been adhered to. In the final analysis then, the "palpably excessive" standard is not merely a chastisement of the trial judges and Commonwealth attorneys; it is also the only way in which the Court can check the unreasonable awards of the jury although the proceedings may be otherwise proper. For this reason, the reasonable test in the Barton line of cases and the "palpably excessive" test in the Tyree and Sherrod case are essentially the same approach that the Court adopts in reviewing the reasonableness of an award in light of all the evidence whether properly or improperly admitted. Because of this fact a necessary step for the solution devolves upon the trial judges and Commonwealth attorneys themselves who must lend more attention to the opinions handed down by the Court of Appeals and any statutory guidance that may be forthcoming. In the final analysis, then, the significance of the excessive verdict problem is not simply that the Commonwealth is overrun with indifferent attitudes toward evidentiary and procedural practices in the area of condemnation law; but, rather, that the docket of the Court of Appeals is running over with evidentiary and procedural cases that should have been properly treated by the lower courts.36

B. Valuation and the Admissibility of Evidence

The problems of valuation and admissibility of evidence are so interwoven that it is presumptuous and foolhardy to attempt to separate the two. The following cases present the types of practices that often lead to the excessive verdicts which were analyzed in section A above; however, these cases are segregated from the above section not only because they deal with problems that are peculiar on their particular facts but also because they did not lead to "palpably excessive" verdicts.

The basic problem in the valuation of the before and after val-
In aiming at just compensation\(^{37}\) stems from the fact that there is no universally accepted definition of market value. Courts tend to overgeneralize, and it is such overgeneralization that, according to one legal scholar, leads to many errors and misunderstandings between the trial and appellate courts:

Overgeneralization, of course, is a vice which results in many errors. The principal source of error of the "market value" concept lies in the too-literal application of the traditional definition of market value as the amount of money which a purchaser willing, but not obligated, to buy the property would pay to an owner, willing but not obligated, to sell it, taking into consideration all uses to which the land is adapted and may, in reason, be applied. This implies that whatever a willing seller and a willing buyer would consider in fixing the price is entitled to consideration in determining the just compensation. But this is not true in the literal sense. There are many factors which, though they undoubtedly have a real and actual impact upon value and, therefore, are considered by real or actual buyers and sellers, are not legally cognizable and must, therefore, be excluded from consideration. Perhaps the error does not lie in the definition, but in a common misconception of the definition. It has been held in New Jersey that buyers referred to in the definition are purely hypothetical, not actual and existing purchasers.\(^{39}\)

While the Kentucky Court of Appeals, along with most of the other courts, is laboring under the hypothetical willing buyer-willing seller concept in the valuation process, an analysis of the following cases clearly indicates that the Court has, more importantly, resolutely adhered to the spirit of Mr. Justice Holmes' unchallenged precept in the valuation process: "The question is, what has the owner lost, not what has the taker gained?"\(^{40}\)

During the last term, the Court was faced with one case that required a differentiation in the valuation of mineral rights and surface. In \textit{Commonwealth, Dep't of Highways v. Chapman},\(^{41}\) the condemnees were comprised of two sets of heirs, one owning the mineral rights and the other owning the surface. In holding that a separation of mineral and surface value was warranted to avoid a multiplicity of suits, the Court distinguished the well-established case of \textit{Commonwealth, Dep't of Highways v. Gearheart},\(^{42}\) which broadly held that there should be no such separation of mineral and surface values. As the Court in \textit{Gearheart} pointed out, there had been no sev-

\(^{37}\) See note 11, \textit{supra}.

\(^{38}\) "Just compensation, as the term implies, is compensation that is just to the public as well as to the owner of the property taken." See Sackman, \textit{supra} note 3, at 190.

\(^{39}\) Id. at 191.

\(^{40}\) Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

\(^{41}\) 391 S.W.2d 367 (Ky. 1965).

\(^{42}\) 383 S.W.2d 922 (Ky. 1964).
erance of the mineral rights, for a single individual owned both the mineral rights and the surface. The interesting aspect of the Gearheart case, however, is the procedure the Court used in the valuation of the property and the apportionment of the interests. There the Court cited Chicago, B. & Q. R. Co. v. F. Reisch & Bros., in which the jury made a valuation of the fair market value of the entire property and then made the apportionment. In the Chapman case, on the other hand, there is no indication that a separate evaluation of the entire property was made. It seems that the Court allowed a separate evaluation of the two interests to be substituted for the evaluation of the fair market value of the entire property, a necessary step in the Reisch case which the court in Chapman never made. The procedure of the Gearheart case is correct, for if the fair market value of the entire property is never made, the separate valuation of the two interests may well exceed the fair market value of the entire property. The apportionments in such a case would be a fortiori excessive.

Two interesting cases came before the Court concerning land use, land change, and the admissibility of evidence. In Commonwealth, Dep't of Highways v. Rogers, a pre-Sherrod decision, the Court was confronted with the primary problem of whether to consider the values of both parcels of a tract of land that was devoted to two different uses when the taking did injury to only one of the parcels. On the front of condemnee's land was a residence and a sausage plant was to the rear. The Commonwealth took ten acres adjacent to and to the rear of the sausage plant, and the taking necessitated the removal of various improvements used in conjunction with the plant. Condemnee's witnesses were allowed to testify that the operation of the sausage plant would be seriously impaired as a result of the taking. There was also evidence that in a subsequent sale of the land the presence of the sausage plant would diminish the value of the residence. The problem is one of first impression in Kentucky. In reversing, the Court in Rogers held that whenever a landowner devotes a tract of land to two different uses, the tract is to be treated as two separate parcels, and as the taking affects only one of the parcels, only the difference in value of that parcel (viz., the sausage plant area) should be valued. In reasoning its way toward a new rule in Kentucky, the Court is certainly on firm ground in finding that one can-

44 399 S.W.2d 706 (Ky. 1966).
45 But see Commonwealth Dep't of Highways v. Slucher, 371 S.W.2d 851 (Ky. 1963).
46 The rule apparently had its origin in Sharp v. United States, 191 U.S. 355 (1903).
not recover for indirect injury to separate parcels of land which he may own in the same neighborhood.\textsuperscript{47} The real problem here is to determine what constitutes a single or separate parcel. The Court was assuredly correct in finding that a sausage plant is a use altogether separate from a residence. By divorcing the sausage plant parcel from the residence, the landowner, in effect, is holding out his land as displaying two separate activities. Thus damage to one does not injure the other. To allow the landowner to claim both damage to the sausage plant parcel and damage to the entire tract's residential use would be a duplication of damages in that he would be receiving damages for the land in relation to that for which it was used (i.e., the sausage plant) and also for the use to which the land would have been devoted had not the higher valued plant been situated upon it. The rule of Rogers, incidentally, has counterparts in a majority of jurisdictions.\textsuperscript{48}

In \textit{Chitwood v. Commonwealth, Dep't of Highways},\textsuperscript{49} the Court found an altogether different problem of land use. On appeal the condemnees argued among other things that it was error for the trial Court to permit appraisal witnesses to consider the prospect of rezoning in determining the after value. The evidence indicated that after the construction of the new interstate highway the land adjacent to the old highway would probably be rezoned for commercial use. The Court held that it was permissible for appraisal witnesses to consider the effect that a probable zone change would have on the fair market value of the land although they could not testify as to what the property would be worth in the event of such rezoning, for at the time of the sale, the rezoning had not occurred. The rule has a substantial basis in the law of other jurisdictions.\textsuperscript{50} The significance of the \textit{Chitwood} case is: (1) there must be reasonable evidence on the probability of such a change, and (2) the witnesses can only consider the effect of such a change on the price that a willing buyer would pay for the land; they cannot \textit{testify} as to what the property would be worth in the event of the change.

In the case of \textit{Commonwealth, Dep't of Highways v. Arnett},\textsuperscript{51} the Court was called upon to determine whether the condemnee's witnesses could evaluate the damages done to the farm as a single unit without

\textsuperscript{47} 27 AM. Jur. 2d Eminent Domain § 315 (1966).
\textsuperscript{48} See, \textit{e.g.}, Cameron v. Chicago M. & St. P. Ry., 51 Minn. 153, 53 N.W. 199 (1892).
\textsuperscript{49} 391 S.W.2d 381 (Ky. 1965).
\textsuperscript{50} See, 29 C.J.S. Eminent Domain § 273(2) (1965); 53 ILL. Bus. J. 956 (1965).
\textsuperscript{51} 401 S.W.2d 762 (Ky. 1966).
regard to separate parcel value when the Commonwealth did not introduce evidence as to the separate parcels. In the absence of Commonwealth testimony to the contrary, the Court correctly assumed that the highest value of the farm was as a single unit and held that the condemnee's witnesses may value the segregated farm as a single unit without considering separate parcel value. This identical situation arose in a later case, Commonwealth, Dep't of Highways v. Sea,\textsuperscript{52} which reaffirmed the Arnett rule. In the Sea case, the Court said that if the opinion conflicted with Commonwealth, Dep't of Highways v. Burns,\textsuperscript{53} the Burns case was modified. Burns had held that where a farm has been severed into separate parcels, the after value should be based solely on what exists after the taking without regard to what existed before the taking, and the question is not how much did the taking damage the original farm but what was the value of the farm before the taking and what is the value of the parcels that remain. It is submitted that the Arnett and Sea cases do not conflict with Burns. The Court did not want Burns to be interpreted to mean that the appraisal witnesses had to use the sum of the values of the separate parcels or even mention such sum if the highest value was that of the farm as a single unit. The highest value of the farm as a unit or the value of the separate parcels could be used.

In Commonwealth, Dep't of Highways v. Redmon,\textsuperscript{54} severance of a farm gave rise to an issue somewhat different from that in Arnett and Sea: is it permissible to add to the full value of the land taken the damages done by the reduction in size of the farm? The Court held that it was permissible, but the case is ultimately noteworthy because it was distinguished from Commonwealth, Dep't of Highways v. Raybourne,\textsuperscript{55} in which such damages were not allowed but in which there was insufficient evidence of damages done to the remainder.\textsuperscript{56}

A large volume of cases dealt with minor evidentiary problems that frequently crop up in the valuation of the before and after value. The Court on one occasion outlined five bases for finding evidence inadmissible\textsuperscript{57} because it endangers the valuation process. It was not error for the landowner to estimate the value of the property by using a monthly rental basis in excess of the rent the property was cur-

\textsuperscript{52} 402 S.W.2d 842 (Ky. 1966).
\textsuperscript{53} 394 S.W.2d 923 (Ky. 1965).
\textsuperscript{54} 403 S.W.2d 279 (Ky. 1966).
\textsuperscript{55} 364 S.W.2d 814 (Ky. 1963).
\textsuperscript{56} Commonwealth, Dep't of Highways v. Raybourne, supra, note 55, was followed by Commonwealth, Dep't of Highways v. Scott, 385 S.W.2d 330 (Ky. 1964), but the Scott case is also distinguishable from Commonwealth, Dep't of Highways v. Redmon, 403 S.W.2d 279 (Ky. 1960).
\textsuperscript{57} Commonwealth, Dep't of Highways v. Martin, 392 S.W.2d 64 (Ky. 1965).
rently drawing when it was shown that the property had recently drawn the estimated amount. Even though the lot has not been developed for residential purposes, the condemnee may introduce evidence as to the per lot value of the land. Testimony concerning noise from the new highway is admissible, but negotiations between the Highway Department and the landowners regarding an underpass desired by the landowners were inadmissible. Detailed itemization of damages to a farm is not allowed. It is error for the Court to not strike testimony on cross-examination which shows that an appraisal witness had figured the worth of coal and timber in determining the value of the land, and in a closing argument the condemnee’s counsel may not portray the condemnee as a poor person unwilling to sell. One case dealt with evidence of a lease, and one case dealt with evidence of an option given to an owner for the purchase of the farm. Two cases dealt primarily with possible evidentiary errors that were not prejudicial. Finally, a well-established rule of evidence was reaffirmed: the commissioner’s report is incompetent on the trial of the case to the jury. The latter case also held that where the acquisition is necessary to an overall plan, it is incumbent on the condemnee to prove that KRS 99.330–99.590 is arbitrary as to the particular taking.

The final series of cases directly relating to the area of valuation and evidence is quite important because it concerns appraisal by expert witnesses. Eight cases generally related to the qualifications of appraisal witnesses. The Court reaffirmed a very important rule: app-

58 Commonwealth, Dep’t of Highways v. Whipple, 392 S.W.2d 81 (Ky. 1965).
59 Commonwealth, Dep’t of Highways v. Ochsner, 393 S.W.2d 446 (Ky. 1965).
60 Commonwealth, Dep’t of Highways v. Carson, 398 S.W.2d 706 (Ky. 1966).
61 Commonwealth, Dep’t of Highways v. Hopson, 396 S.W.2d 805 (Ky. 1965).
62 Commonwealth, Dep’t of Highways v. Taylor, 400 S.W.2d 688 (Ky. 1966); Commonwealth, Dep’t of Highways v. Dairs, 400 S.W.2d 515 (1966). But see Commonwealth, Dep’t of Highways v. Atteberry, 402 S.W.2d 89 (Ky. 1966).
63 Commonwealth, Dep’t of Highways v. Thornbury, 399 S.W.2d 728 (Ky. 1966).
64 East Kentucky Rural Elec. Coop. v. Price, 398 S.W.2d 705 (Ky. 1965).
65 Commonwealth, Dep’t of Highways v. Swift, 404 S.W.2d 467 (Ky. 1966); Commonwealth, Dep’t of Highways v. Hendricks, 400 S.W.2d 676 (Ky. 1966).
66 Dinwiddie v. Urban Renewal & Community Dev. Agency of Louisville, 393 S.W.2d 872 (Ky. 1965).
67 See Commonwealth, Dep’t of Highways v. Musick, 400 S.W.2d 513 (Ky. 1966); Commonwealth, Dep’t of Highways v. Darnell, 400 S.W.2d 230 (Ky. 1966); Commonwealth, Dep’t of Highways v. Givens Bros., Inc., 398 S.W.2d 867 (Ky. 1966); Commonwealth, Dep’t of Highways v. Picklesimer, 397 S.W.2d 159 (Ky. 1965); Napier v. Commonwealth, Dep’t of Highways, 397 S.W.2d 45 (Ky. 1965); Commonwealth, Dep’t of Highways v. Sanders, 396 S.W.2d 781 (Ky. 1965); Commonwealth, Dep’t of Highways v. Staton, 396 S.W.2d 766 (Ky. (Continued on next page)
praisal witnesses without experience in the science of real estate but
with knowledge of the land sought and the sale of land in the com-
munity are qualified to give testimony. The rule that a landowner
who fails to qualify as an expert on land value should not be permit-
ted to testify was also reaffirmed. On two occasions, the Court held
that the testimony of qualified expert witnesses which indicates no
grounds for their value estimates may nonetheless be admitted. As
these cases readily indicate, the Court leans toward allowing the expert
witness to give any testimony which may reasonably contribute to a
determination of the reasonable market value. The attitude of the
Kentucky Court assuredly cannot be subjected to the volley delivered
on the Arkansas appellate court in 1958 regarding its liberal attitude
toward expert testimony.

Despite the fact that the Court's attitude toward expert witnesses
in particular and the entire area of valuation in general has been
clearly established, cases presenting nearly identical evidentiary prob-
lems continue to flood the appellate docket. Because of the lack-
daisical attitudes in lower courts toward the Court's procedural and
evidentiary guidelines, it is perhaps time for the legislative assistance
alluded to in Part A of this section. The Court has gone about as far
as it can in developing the law of condemnation; the legislature should
codify the law into one comprehensive plan, perhaps modelled after
the law of one of the jurisdictions referred to in the above section or,
more effectively, after Federal Rule 71A. Without this assistance the
Court's docket will continue to overflow with the selfsame cases, and
the Court's attention will continue to be channelled away from mat-
ters of substantive importance.

(Footnote continued from preceding page)
1965); Commonwealth, Dep't of Highways v. Harvey, 396 S.W.2d 311 (Ky.
1965).
68 Commonwealth, Dep't of Highways v. Musick, 400 S.W.2d 513 (Ky. 1968).
69 Commonwealth, Dep't of Highways v. Sanders, 396 S.W.2d 761 (Ky.
1965).
70 Commonwealth, Dep't of Highways v. Darnell, 400 S.W.2d 230 (Ky.
1966); Commonwealth, Dep't of Highways v. Givens Bros., Inc., 398 S.W.2d
867 (Ky. 1966).
71 Rutland, Jr., Eminent Domain Litigation in Texas, BAYLOR L. REV., 168,
72 Winner, Rules of Evidence in Eminent Domain Cases, 13 Ark. L. Rev.
10, 25 (1958-59) states:
It is difficult to perceive why testimony which experience has taught is
generally found to be safely relied upon by men in their important
business affairs outside, should be rejected inside the court house. . . .
We do not mean to say, of course, that an expert witness should be al-
lowed to roam at large in realms of fancy and testify at length about
hypothetical developments and mythical incomes to be realized there-
from. When this is attempted it should be firmly suppressed because of
its tendency to mislead and confuse and the waste of time involved.
C. Procedure

Most of the procedural problems this year related to the construction of statutes or civil rules. Civil Rule 60.02, for example, was interpreted in one case, and Rule 1.260(c)(3) was interpreted in another. Finally, under the Civil Rules, one case dealt with an order's omission to recite the reason for delay under Civil Rule 54.02. One case held that whenever the condemnee participates in the jury selection, the jury's impartiality is ipso facto suspect under KRS 29.055(1). One case dealt with the allotted time for an appeal under KRS 177.087(2).

Two major cases dealt with a problem in statutory interpretation and lend themselves to a meaningful juxtaposition. In Commonwealth, Dept of Highways v. Johnson, condemning filed exceptions to the award of the county court commissioners, but the condemnees did not. At the trial on the exceptions by the circuit court, it was revealed that the county court commissioners had mistaken the boundaries. The circuit court then directed the commissioners to make a new report. The Court held that where one party fails to appeal, the award is final as to that party and the only question to be decided at the de novo trial is whether the judgment is excessive. This holding, of course, does not imply that the condemnee may not introduce evidence to show that the judgment was not excessive; it only says that he may not introduce evidence to show that the judgment is inadequate. In Maxwell v. Commonwealth, Dep't of Highways, on the other hand, when the condemnees appealed to the circuit court on the award of the county court commissioners, the condemnor was allowed to introduce evidence as to the value of the land at the new trial even though the condemnor took no appeal. The Court held that where the condemnor does not appeal the commissioners' report, the failure to deny does not relieve the other party of proving his allegations concerning the amount of damage, and a party may not be deprived of introducing proof on a triable issue of unliquidated damages. The opinion means, then, that the condemnor may introduce evidence to check the condemnee, but he may not introduce evidence

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73 Commonwealth, Dep't of Highways v. Reynolds, 398 S.W.2d 703 (Ky. 1966).
74 Commonwealth, Dep't of Highways v. Ketchersid, 396 S.W.2d 47 (Ky. 1965).
75 Commonwealth, Dep't of Highways v. Garland, 394 S.W.2d 450 (Ky. 1965).
76 Stillpass v. Kenton County Airport Bd., Inc., 403 S.W.2d 46 (Ky. 1966).
77 Burchett v. Commonwealth, Dep't of Highways, 394 S.W.2d 741 (Ky. 1965).
78 403 S.W.2d 691 (Ky. 1966).
79 404 S.W.2d 9 (Ky. 1966).
to show that the original judgment was excessive. The *Johnson* and *Maxwell* cases, then, although containing reverse factual situations, are quite compatible.

**D. Miscellaneous**

The cases in this section represent either restatements or reaffirmations of existing law, which may be loosely catalogued under four headings: damages, evidence, the right to condemn, and negligence.

1. **Damages.**—There were four cases which dealt specifically with non-compensable items. Although in *Commonwealth, Dep't of Highways v. Taylor County Bank* the Court found that interference from a reasonable construction operation with a temporary easement was a non-compensable item, nominal damages were awarded. It seems questionable to award nominal damages to vindicate a right which the Court does not actually recognize. In *Chain Belt Company v. Commonwealth, Dep't of Highways*, costs of relocating business and equipment were non-compensable because they are not only too speculative but also because the incidental cost to the owner does not relate to the difference in before and after values. In the event the county clerk refuses to pay the condemnee, he is not allowed interest when he fails to notify the Highway Department of his difficulty. It is proper to compensate as an owner of land one who under an option to purchase has made downpayments and monthly payments thereafter.

2. **Evidence.**—While evidence of inconvenience is inadmissible because inconvenience is a non-compensable item, evidence of farming back and forth across the highway was held admissible. In *Commonwealth, Dep't of Highways v. Shepherd*, the Court held that when a qualified witness gives testimony of sufficient probative value to support the verdict as well as testimony relating to non-compensable items, the award should not be overturned. Reaffirmations of the existing law in the area of change in access were made, and reaffirmations were also declared in the area of comparable sales.

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80 394 S.W.2d 581 (Ky. 1965).
81 Compare Note, 4 Houston L. Rev. 120 (1966).
82 391 S.W.2d 357 (Ky. 1965).
83 Commonwealth, Dep't of Highways v. Citizens Ice & Fuel Co., 394 S.W.2d 903 (Ky. 1965).
84 Commonwealth, Dep't of Highways v. Devillez, 400 S.W.2d 520 (Ky. 1966).
85 Commonwealth, Dep't of Highways v. Teater, 397 S.W.2d 137 (Ky. 1965).
86 392 S.W.2d 58 (Ky. 1965).
87 Commonwealth, Dep’t of Highways v. Dotson, 405 S.W.2d 30 (Ky. 1966); Commonwealth, Dep’t of Highways v. Hopson, 397 S.W.2d 167 (Ky. 1965).
(Continued on next page)
An interesting case came before the Court relating to the evidence that is contingent upon the jury's right to a view of the property. *Commonwealth, Dept of Highways v. Hackworth* held that it was not error to allow the jury to view a house from the outside after it has been condemned by the Commonwealth and purchased and re-located by the condemnee. To Nichols, "a view . . . is almost if not absolutely essential to an intelligent understanding of the case by [the jury]." The rule in Kentucky, however, is that observations of the jury while on the view are not evidence, and the Court in *Hackworth* follows this precedent. But in light of other jurisdictions this rule appears incorrect. In the final analysis, the *Hackworth* case is perhaps primarily significant because dictum in the case indicates that the trial court may in the exercise of judicial discretion refuse a view where the premises have been relocated. This dictum indicates a deviation from the general rule.

3. **Right to Condemn.**—KRS 96.350(1) and KRS 106.010 were construed, and under these statutes a sixth class city was found to have the right to condemn land for a reservoir.

4. **Negligence.**—There were two cases in which property was negligently damaged by an employee of the state and an independent contractor for the state, and the Court recognized the landowner's cause of action against the state. But in *Commonwealth, Dept of Highways v. Gisborne*, the Court held that when property is damaged for a public purpose through the negligence of a state employee, the remedy of the injured party is not through the Board of Claims. The Court additionally held that in such a situation the Commonwealth is not allowed a deed to the damaged property.

(Footnote continued from preceding page)

Commonwealth, Dep't of Highways v. Adkins, 396 S.W.2d 768 (Ky. 1965); Commonwealth, Dep't of Highways v. Callihan, 391 S.W.2d 374 (Ky. 1965).

88 Mengel Properties v. City of Louisville, 400 S.W.2d 690 (Ky. 1966); Commonwealth, Dep't of Highways v. Cottrell, 400 S.W.2d 228 (Ky. 1966); Commonwealth, Dep't of Highways v. Burton, 398 S.W.2d 689 (Ky. 1966); Commonwealth, Dep't of Highways v. Calvert, 395 S.W.2d 788 (Ky. 1965); Commonwealth, Dep't of Highways v. Brown, 393 S.W.2d 50 (Ky. 1965); Commonwealth, Dep't of Highways v. Bond, 391 S.W.2d 693 (Ky. 1965).

89 400 S.W.2d 217 (Ky. 1966).

90 5 Nichols, EMINENT DOMAIN § 18.3 (1962).

91 Pierson v. Commonwealth, Dep't of Highways, 350 S.W.2d 487 (Ky. 1961).


93 Embry v. City of Caneyville, 397 S.W.2d 141 (Ky. 1965).

94 Commonwealth, Dep't of Highways v. Cochrane, 397 S.W.2d 155 (Ky. 1965); Commonwealth, Dep't of Highways v. Gisborne, 391 S.W.2d 714 (Ky. 1965).

95 391 S.W.2d 714 (Ky. 1965).

96 KRS §§ 44.070—.110 (1946).
VI. CONSTITUTIONAL LAW

A. Privilege Against Self-Incrimination

An important case decided last term was *Hovious v. Riley*, a civil action to recover damages from an automobile accident. The trial court permitted a state trooper to comment on defendant's refusal to submit to a blood test designed to ascertain the degree of intoxication. KRS § 189.520(6) provides that no one may be compelled to take a blood test, but that comment on the refusal is permissible. In voiding the comment section, the Court of Appeals held that it was repugnant to both the fifth amendment and to Kentucky's self-incrimination clause, section 11 of the state constitution.

The opinion fails to discuss directly whether refusal to take a blood test is within the scope of the self-incrimination privileges. After stating (1) that Section 11 of the Kentucky Constitution provides only that a defendant "cannot be compelled to give evidence against himself," (2) that the Legislature and the Court have strengthened this right by not permitting comment on defendant's refusal to testify in a criminal prosecution, and (3) that section 11 applies equally to civil as well as criminal suits, the Court concluded that section 11 prohibits comment on the refusal to take a blood test in a civil case. With respect to the fifth amendment, the Court first asserted that the fifth amendment applies to the states; it then relied heavily upon *Griffin v. California*, where the Supreme Court invalidated the section of the California Constitution which permitted comment on the defendant's refusal to testify.

The Court apparently assumed that the right to refuse to take a blood test is protected by the fifth amendment; otherwise it would be reaching the absurd conclusion that comment alone on an alleged privilege not protected by the constitution is unconstitutional. It is therefore reasonable to infer from the opinion that the Kentucky Court believed that refusal to give a blood sample is within the self-incrimination privileges. Moreover, *Hovious* is particularly significant

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1 403 S.W.2d 17 (1966).
2 KRS § 421.225 (1962).
3 Adams v. Commonwealth, 264 S.W.2d 283 (Ky. 1954).
4 Akers v. Fuller, 312 Ky. 502, 228 S.W.2d 29 (1950); Kindt v. Murphy, Judge, 312 Ky. 395, 227 S.W.2d 895 (1950); McCarthy v. Arndstein, 266 U.S. 34 (1924).
7 It is significant to note that there is no disagreement as to whether the defendant's right to refuse to testify is within the scope of the fifth amendment privilege.
in that it not only extended the scope of the privilege but also applied this extension to a civil case.

*Hovious* places Kentucky among a distinct minority of states which view refusal to submit to a blood test as within the state privilege against self-incrimination. Only three other jurisdictions follow this rule, although a small number of additional state courts have a similar policy against admission of evidence obtained without the defendant's consent for identification purposes. Evidence of a blood test is admissible in twenty-eight states by statute and in six other states by judicial decision.

At the time the Court of Appeals was deciding *Hovious*, the Supreme Court had before it the question whether admission of the result of the blood test taken over a defendant's objection violates the federal constitution. Perhaps the Kentucky Court, in light of recent Supreme Court decisions enlarging the scope of the fifth amendment, expected that the Supreme Court would support *Hovious* by overruling *Breithaupt v. Abram*, a 1957 Supreme Court case, which found no constitutional violation in the admission of evidence from a blood test taken without the defendant's consent. However, subsequent to *Hovious*, the Supreme Court did not overrule *Breithaupt*, but instead reaffirmed its prior position. Four members of the Court dissented from this 1966 decision, *Schmerber v. California*, and three of them viewed the practice as a violation of the fifth amendment.

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9 See 8 Wigmore, Evidence § 2265 (McNaughten rev. 1961). These decisions should be examined to determine if they turned on self-incrimination, fourteenth amendment due process, or illegal search and seizure.
11 352 U.S. 437 n.3 lists cases in the following states: California, Colorado, Florida, Iowa, New Mexico, and Oklahoma.
13 384 U.S. 757 (1966). The *Schmerber* case illustrates the approaches of the Justices. At 773, 778, and 779 Justices Black, Douglas, and Fortas, respectively, expressed dissenting opinions on the basic premise that compelling the defendant to submit to a blood test violates the fifth amendment's self-incrimination doctrine. Justice Douglas added that it is further a violation of the "zone of privacy" surrounding the first eight amendments of the federal constitution. Justice Fortas would add that such compulsion is violative of the fourteenth amendment because it "shocks the conscience"; Chief Justice Warren joined Fortas in his ap-
parently no other state court has relied on the fifth amendment to exclude evidence secured in this manner.

Hovious is particularly important because the Court extended the scope of the privilege against self-incrimination beyond its classical limitation. Traditionally, this privilege has applied only to evidence obtained through testimonial compulsion. The policy for such limitation is twofold. First, the historical purpose of the privilege was to protect individuals from the atrocities of the inquisition, wherein an examinee was compelled to incriminate himself by words from his own lips. Second, many authorities and government officials now believe that unless the privilege is limited law enforcement officers cannot adequately protect the public from crime. Proponents of a broader privilege argue that the historical basis for limitation is anachronistic and that extension would not seriously hinder law enforcement. Apparently implicitly endorsing the latter view, the Court of Appeals seems to have equated lack of consent with compulsion and extended the scope of self-incrimination to include at least this type of non-testimonial evidence which has been taken without the defendant’s consent.

It is submitted that the Court has adopted a wise policy. The historical justification for distinguishing between testimonial and non-testimonial compulsion is outdated, since the effect of permitting one’s body or parts of one’s body to be used as evidence over his objection can be just as incriminating as if he incriminated himself through speech. The decision to apply the privilege to all or certain kinds of non-testimonial evidence should depend solely upon thoroughly documented analysis of whether its application excessively hinders the ability of law enforcement officials to protect the public from crime. Consequently, the Court of Appeals is correct in impliedly placing the burden of proof on the state to show why it is necessary to deprive an individual of a personal right.

Although the Court of Appeals failed to discuss the policy con-

(Footnote continued from preceding page)

proach with respect to the fourteenth amendment only (at 772). The majority opinion viewed the “shock the conscience” question as relative to the due process clause of the fourteenth amendment and held that such compulsion did not violate due process.

15 Schmerber v. California, 384 U.S. 757 (1966); 8 Wigmore, op. cit. supra note 9, at § 2263.
16 8 Wigmore, op. cit. supra note 9, at § 2263.
17 Id. at § 2251.
18 In Schmerber, 384 U.S. at 773, Black, J., dissenting, stated: “To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat.”
considerations concerning the specific question of whether the refusal to take a blood test is within the privilege when the defendant has been in a car accident, other courts have viewed the dispositive question as turning upon a choice between two conflicting values: the public's interest in highway safety, balanced against the private interest in maintaining the sanctity of the person's body. In Breithaupt the majority based its decision upholding admissibility in part on the opinion that drivers under the influence of liquor cause many highway accidents and that a driver's knowledge that he can be compelled to take a blood test can be an effective deterrent to excessive drinking before driving. Most state jurisdictions also seem reluctant to exclude such evidence because of their belief in the effectiveness of the practice as a deterrent. Chief Justice Warren, on the other hand, argued in a strong and persuasive dissent in Breithaupt that the right of the individual to protect his body from invasion is more important than the regulation of conduct on the highway through evidentiary rules. Although KRS § 189.520(6) granted only partial protection from involuntary blood tests, the Court of Appeals in Hovious brought Kentucky into full agreement with Chief Justice Warren's position. In this respect Hovious is a wise decision and should be upheld until proponents of highway safety show by actual data that their deterrent argument has enough merit to outweigh the individual's interest in maintaining the sanctity of his body.

The Court of Appeals took for granted the well-accepted rule that the privilege against self-incrimination applies to civil as well as criminal cases. In light of the increased frequency and expense of personal injury actions, the Court should re-evaluate the application of the privilege in civil cases. It may strongly be argued that a plaintiff in a personal injury action should not bear the cost of damages caused by the defendant's negligence just because the defendant refused to testify under the shield of the self-incrimination privilege. After all, in many cases, the party being protected is the insurance company, the party who can better spread the burden of loss.

Particularly in criminal law, Hovious raises many important questions which should be answered soon. For example, does the Kentucky Court now mean that all non-testimonial evidence obtained without the defendant's consent from any criminal identification test, such as fingerprinting, is inadmissible because of the expanded scope given

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19 352 U.S. at 439.
20 Id. See also footnote 10, supra.
21 352 U.S. at 440.
22 § Wigmore, op. cit. supra note 9, at § 2252. See footnote 4, supra.
23 § Wigmore, op. cit. supra note 9, at § 2252.
the privilege against self-incrimination in Hovious? Is evidence taken from an unconscious defendant, who cannot actually consent or object, admissible? If the defendant is unaware of his right not to submit to a blood test, must he be informed of this right and intelligently waive it before any evidence secured from the test is admissible? Finally, but probably most importantly, the Court of Appeals at the first opportunity should make explicit its reasons for concluding that evidence of a blood sample obtained against the defendant's objection—which is non-testimonial evidence—is within the privilege against self-incrimination.

**B. Police Power**

"Police Power" is defined as the state's proper exercise of its power to prefer the public's interest in welfare, safety, convenience and good morals over the rights of the individual.\(^{24}\) For the exercise of this power to be proper it must satisfy both federal and state constitutional limitations. It must not deny equal protection, or take property without due process or just compensation in violation of the fourteenth amendment.\(^{25}\) Although the Kentucky Constitution does not have a due process clause as such, the state's exercise of power in the public interest cannot be "arbitrary" under Section 2.\(^{26}\) The test for finding a violation under either constitution is ultimately one of reasonableness,\(^{27}\) and the Court has eliminated much of the potential verbal confusion by stating that an allegation of a violation of the fourteenth amendment is another way of arguing that an exercise of power is arbitrary under Section 2 of the Kentucky Constitution.\(^{28}\) Two cases decided by the Court of Appeals during the past term illustrate its approach. In *Puckett v. City of Muldraugh*,\(^{29}\) the Court was faced with the question of whether a city can, by appropriate ordinance,\(^{30}\) impose

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\(^{24}\) Moore v. Ward, 377 S.W.2d 881 (Ky. 1964).

\(^{25}\) Moore v. Ward, 377 S.W.2d at 887. In *Pritchett v. Marshall*, 375 S.W.2d 253 (Ky. 1964) it was unreasonable for an administrative agency to exceed the bounds of its authorization. In *Turner v. Peters*, 327 S.W.2d 958 (Ky. 1959) an ordinance which did not prescribe any standards was unreasonable. In *Schneider v. Wink*, 350 S.W.2d 504 (Ky. 1961) the ordinance set up some standards, but the standards were too vague, making the whole ordinance unreasonable.

\(^{26}\) Moore v. Ward, 377 S.W.2d at 885; *Pritchett v. Marshall*, 375 S.W.2d at 253 (Ky. 1964).

\(^{27}\) Moore v. Ward, 377 S.W.2d 252 (Ky. 1966).

\(^{28}\) The city of Muldraugh passed an ordinance that made the owner of rental property liable for water consumed by his tenant except when the tenant had paid a $100 deposit.
liability for tenants' water bills upon the owner of rental property. Appellant argued that such action is both a taking of property without just compensation prohibited by the fourteenth amendment of the federal constitution and an arbitrary exercise of power in derogation of Section 2 of the Kentucky Constitution.

In meeting the first argument, the majority relied on state cases holding that state legislation making landlords liable for tenants' water bills is not void as violative of the federal constitution. The majority reasoned that, since a legislature can exercise this power, a city which has received a proper delegation of the state's police power can also make the landlord liable for his tenants' water bills. It held that an ordinance such as the one passed by the city of Muldraugh does not violate the fourteenth amendment.

The majority went on to hold that the ordinance was not arbitrary or unreasonable and thus not violative of Section 2 of the Kentucky Constitution. It relied on a recent Kentucky case upholding liability for garbage collection costs and classified the landlord as a consumer of the water service. It felt that the landlord was not being required to pay the debt of another since he, as well as his tenants, was benefited by having water supplied to his property. The majority also felt that "if [the landlord] requests this service or accepts it, he impliedly agrees to pay the service charge . . ." when an ordinance so provides.

Judge Hill in his dissent discussed one of the most confusing aspects of the police power cases, the nature of the Court's role in reviewing the acts of the Legislature. The dissent, advocating the approach which was popular three decades earlier, suggested that it is the Court's function to determine whether the city has based its action on the most reasonable means available to control the problem. The majority of the Court, however, adheres to the policy expressed in Moore v. Ward, a 1964 decision. This policy, which is followed by the majority of state courts and by the Supreme Court, states that it is not the function of the Court to judge the Legislature's wisdom in determining what factors are important before enacting a statute,

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32 KRS § 106.210 (1954) grants local water districts and the municipality the power to do all acts necessary and convenient for the operation and maintenance of water plants and for the sale and distribution of water.
33 Cassidy v. City of Bowling Green, 368 S.W.2d 318 (Ky. 1963).
34 408 S.W.2d at 255.
35 877 S.W.2d 881 (Ky. 1994).
and that the Court will interfere only if the statute does not have a “reasonable relationship to a legitimate public purpose.” 38 (Emphasis added.) Consistent with the latter approach to the judicial review function, the Court upheld the Muldraugh ordinance on the basis of its conclusion that the classification of the owner as a consumer was a reasonable means of collecting delinquent water bills.

Muldraugh is significant precedent for Kentucky cities with similar ordinances, and it may well encourage more communities to adopt similar approaches to aid water companies and other public utilities. The proper recourse for the many rental property owners in the state is direct appeal to the state or city legislative body. In light of the Court’s refusal to sit as a super-legislature, landlords can expect little comfort from the bench.

A case decided last term illustrates one type of limitation on the considerable discretion allowed legislative bodies under the reasonableness standard of judicial review. In Bruner v. City of Danville, 39 the Court of Appeals voided an ordinance which authorized the city’s governing body to issue licenses to conduct public dances, but did not prescribe any standards with which applicants could comply. The trial court, in upholding the ordinance, had relied on a state statute 40 which provides in part that the city can prohibit amusements within the surrounding community. In rejecting this argument, the Court of Appeals reasoned that any authority which the state granted a city was subject to the same limitation of reasonableness applicable to the exercise of police power. The grant by the city to the governing body thus fell under the rule that a delegation of power without specification of standards for its exercise is arbitrary and unreasonable. 41 In fact, even though an ordinance prescribes standards, the Court may still find it unreasonable where the standards are too vague. 42

Although both Muldraugh and Bruner raised collateral questions of proper delegation of the state’s police power, the Court was directly confronted with the problem of the state’s abdication of its police power in Ward v. Louisville & N. R.R. Co. 43 In this case the Court reiterated the well-settled rule that a state agency may contract with

38 377 S.W.2d at 887.
39 394 S.W.2d 939 (Ky. 1965).
40 KRS § 85.150(5) (1942) grants the city power to pass an ordinance to “License, tax, regulate, prohibit, or suppress theatrical and other exhibitions, shows and amusements, within the city and within one mile of the city limits.”
41 Turner v. Peters, 327 S.W.2d 958 (Ky. 1959).
42 Schneider v. Wink, 350 S.W.2d 504 (Ky. 1961).
43 405 S.W.2d 98 (Ky. 1966) (state highway department contracted with the railroad company to pay the expenses for providing safety devices at eleven intersections of highway and track).
private persons to perform the state's police power functions.44 The Court of Appeals also decided a routine case concerning procedural due process in notice of service.45

C. Maximum Constitutional Limitation on Salaries

Section 24646 of the Kentucky Constitution prescribes the maximum compensation for a public officer or employee, with certain exceptions,47 not pertinent here, as $7,200 per year. For seven decades the Court of Appeals had heard arguments that the dollar limitation was too prohibitive and should be changed by judicial interpretation.48 Finally, in Matthews v. Allen49 decided in 1962, the Court adopted the "elastic dollar" theory in holding that the Legislature can constitutionally compensate circuit judges50 above the $7,200 limit by equating their current salaries with consumer price index, using 1949, the date Section 246 was amended, as the base year. The decision was justified on two theories. First, Section 246 does not fix the compensation; it merely puts a limit on the "dollars" that can be paid, without stating whether they are "dollars" of 1949 purchasing power or "dollars" of current value. Second, Section 13351 of the Kentucky Constitution specifically provides that circuit judges should receive adequate compensation for their services.

44 See Bond Bros. v. Louisville & Jefferson County Met. Sewer Dep't, 307 Ky. 689, 211 S.W.2d 867 (1948); City of Louisville v. Weible, 84 Ky. 290, 1 S.W. 605 (1886).
45 McCaughey v. Keath, 392 S.W.2d 445 (Ky. 1965).
46 Section 246 provides:
No public officer or employee, except the governor, shall receive as compensation per annum for official services, exclusive of the compensation of legally authorized deputies and assistant which shall be fixed and provided by law, but inclusive of allowance for living expenses, if any, as may be fixed and provided for by law, any amount in excess of the following sums . . . . all other public officers, Seven Thousand Two Hundred Dollars ($7,200).
47 The exceptions listed in Section 246 are Governor, Mayor of any first class city, Judges and Commissioners of the Court of Appeals, and Circuit Judges.
48 See Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577 (1948) (a statute providing for expenses of Court of Appeals Judges is not violative of Section 246). Annot., 5 A.L.R.2d 1154, 1157 (1948) lists all the salary cases brought before the Court until 1948. These cases reveal that the Court has permitted circumvention of the constitution with respect to employees under the proscription, "excluding legitimate expenses." The limit was raised to $7,200 by constitutional amendment in 1949, but subsequent attempts at amendment failed.
49 360 S.W.2d 135 (Ky. 1962).
50 Through dictum the Court in this case indicated that all constitutional officers should receive adequate compensation.
51 Section 133 provides:
The Judges of the Circuit Court shall, at stated times, receive for their services an adequate compensation to be fixed by law, which shall be equal and uniform throughout the State, so far as the same shall be paid out of the State Treasury.
The *Allen* case left open the question of whether all other constitutional officers may be adequately compensated even though there is no specific constitutional provision parallel to Section 133 supporting such action by the Legislature. In *Commonwealth v. Hesch*, \(^{53}\) decided last year, the Court answered in the affirmative.

The "elastic dollar" theory was further refined in *Meade County v. Neafus*. \(^{53}\) Here, the issue was whether circuit courts are constitutionally authorized to grant salary increases to constitutional officers. The Court of Appeals held that since Section 106 \(^{54}\) of the Kentucky Constitution prohibits courts from adjusting or fixing salaries, such adjustments depend exclusively upon the authorization of the Legislature. The real significance of this decision is that the Court has developed a practical approach to compensating public officials within the context of the rising cost of living, but has still provided reasonable restraints by allowing only the Legislature to make such changes within the range of increased living costs. This compromise at least maintains the spirit of section 246.

Research indicates that no other state has judicially altered the maximum compensation limitation in its constitution by the "elastic dollar" method. \(^{55}\) Such loose construction of the constitution is illustrative of the Court's concern for the practical results of its decisions. The value of this approach may be determined by weighing the necessity of maintaining a high level of personnel in constitutional offices through adequate compensation against the undesirability of allowing the Court to circumvent the bold letter of the constitution, when he people have refused to amend it. Strict construction might force the constitutional revision sorely needed but often defeated.

D. Constitutional Revision in Kentucky—The 1966 Approach

*Gatewood v. Matthews* \(^{4}\) confronted the Court of Appeals with fundamental questions regarding the political theories underlying state government. Petitioner Gatewood, individually and on behalf of the

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\(^{52}\) 395 S.W.2d 362 (Ky. 1965). In this case the constitutionality of Senate Bill 84 (KRS Chapter 109 (1964)) which set a maximum compensation limit of $9,600 on the salaries of county clerks, sheriffs, circuit clerks, county judges, and county jailers was upheld. The dissent advocated limiting the application of *Matthews v. Allen* to circuit judges.

\(^{53}\) 395 S.W.2d 573 (Ky. 1965).

\(^{54}\) Section 106 provides: "The fees of county officers shall be regulated by law." The Court's only function is to construe the Legislature's acts.

\(^{55}\) The research on this concept consisted of the following: (1) *American Law Reports* (2) *American Jurisprudence* (3) *Corpus Juris Secundum* (4) *Index to Legal Periodicals* (5) Shepardizing of the *Allen, Neafus, and Hesch* cases through September, 1966 (6) Cases cited in the text of each of these decisions (7) *Kentucky Law Journal* (8) *General Digest* through 1966.

\(^{1}\) 403 S.W.2d 716 (Ky. 1966).
citizens of Kentucky, sought an injunction to prevent a newly proposed constitution from being presented directly to the people Kentucky in the coming election of November 8, 1966. The Court, in July, 1966, rejected Gatewood's claim and upheld the constitutionality of the proposed method of submission, but in the November election the voters by a margin of almost four to one refused to adopt the proposed constitution. The method of constitutional revision and the Court's approval of it warrant special attention because, despite the present mootness of the particular 1966 questions, the Gatewood case not only has significant value as precedent but also focuses on a major contemporary problem facing Kentucky and other states: the creation of effective, legitimate procedures to bring about total constitutional revision.

Gatewood contended that the procedure for revision authorized by the Kentucky General Assembly in Senate Bill 161 violated Section 258 of the Kentucky Constitution. This section of the constitution provides for a four-step revision procedure: (1) the Legislature by a two-thirds vote in two successive sessions must authorize the taking of the sense of the people as to whether to call a constitutional convention; (2) upon such legislative approval, the people must vote on this question of calling a constitutional convention at the next general election; (3) if the popular vote is affirmative, the people elect delegates to the convention in the following general election; and (4) the delegates then convene a constitutional convention and promulgate a document which will be binding on the people and the government. It should be noted that there is no provision in the constitution which requires submission of the final draft to the people for their approval or rejection; however, in 1947 the Court of Appeals held in Gaines v. O'Connell that the people could restrict the convention delegates by requiring them to submit the finished document to the people at an election. Senate Bill 161 significantly shortened the procedure for revision. For the four steps outlined in section 258, it substituted the promulgation of a constitution by government-appointed delegates and popular ratification of the finished document produced by the convention.

Gatewood, relying on precedent, alleged that Senate Bill 161

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2 Louisville Courier-Journal, Nov. 9, 1966, § A, p. 1, col. 6. This article reveals that 510,099 votes were cast against adoption of the new constitution and 140,210 votes in favor of its adoption.
4 305 Ky. 397, 204 S.W.2d 425 (1947).
5 403 S.W.2d at 718. The following is a list of the cases which the Court viewed from the standpoint of whether the procedure strictly complied with (Continued on next page)
should be invalidated because the procedure provided therein did not strictly comply with section 258. However, the Court of Appeals characterized the principal issue as "Whether by the terms of Sections 256 and 258 of the Constitution the people have imposed upon themselves exclusive modes of amending or revising their Constitution."  

(Emphasis added.) After stating that this was a question of first impression in Kentucky, the Court held, with one judge dissenting, 7 that other modes of revision are constitutionally permissible. While the Court of Appeals cited a Rhode Island 6 and a Georgia 9 case as precedent, the Georgia case is the only case to support the Court's approach to characterization of the issue. 10

The basic premise underlying the Court's decision is that Section 4 of the Bill of Rights of the Kentucky Constitution, guaranteeing the inalienable rights of the people, gives to each generation the right to change its form of government, notwithstanding restrictions on constitutional revision imposed by drafters of the existing constitution. Since Section 4 of the Bill of Rights provides that "at all times the people have an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may deem proper,"11 (emphasis added) the Court viewed it as taking precedence over section 258, which does not expressly prohibit other modes of revision. Moreover, section 26 of the constitution provides "that everything in this Bill of Rights is excepted out of the general powers of government and shall forever remain inviolate. . . ."12

Secondly, the Court of Appeals reasoned that the people are, in fact, exercising their inalienable right to change their form of government even when their only participation in revision is through ratification of the finished document. 13 The Court of Appeals concluded its

(Footnote continued from preceding page)

revision and amendment sections of the Kentucky Constitution: Harrod v. Hatcher, 281 Ky. 712, 137 S.W.2d 405 (1940), Arnett v. Sullivan, 279 Ky. 720, 132 S.W.2d 76 (1939), McCreary v. Speer, 156 Ky. 783, 162 S.W.2d 99 (1914).  6 403 S.W.2d at 718.  7 Id. at 722 (Hill, J., dissenting).  8 In re Opinion to the Governor of Rhode Island, 55 R.I. 56, 178 A. 433 (1935).  9 Wheeler v. Board of Trustees, 200 Ga. 323, 37 S.E.2d 322 (1946).  10 "No case identical in its facts with the case now under consideration has been called to our attention, and we have found none." Id. at 328.  11 Ky. Const. § 4.  12 Ky. Const. § 26.  13 The Court buttressed this theory by relying again on the Georgia and Rhode Island cases. While the Georgia court did rely solely on its constitution's "right of revolution" clause, the Rhode Island constitution expressly enabled the Legislature to adopt a mode of revision different from the one provided for in the revision section. The Rhode Island court cited section 1 of article 4 which provides: "The general assembly shall pass all laws necessary to carry this (Continued on next page)
reasoning on this point by noting that both the 1850 and the 1891 Kentucky Constitutions were ratified by popular vote and then by citing two comparatively recent Kentucky cases which discussed ratification in favorable terms.\textsuperscript{14}

A final basis for the Court's decision was its view that the direct-vote provision \textit{substantially complied} with the spirit of section 258. The Court indicated that the purpose of the four step revision procedure in section 258 was to give the people fair notice that the constitution was being revised and an opportunity to participate in the process of revision. Apparently it concluded that the procedural safeguards of section 258 may be satisfied by other modes of revision so long as the people are provided with "due and proper notice and [an] opportunity to acquaint themselves with any revision, and [to] make their choice directly by a free and popular election. . . ."\textsuperscript{15} In the opinion of the Court, the notice requirement is satisfied because "News and information is disseminated faster and more efficiently than was anticipated when the Constitution was drafted,"\textsuperscript{16} and the popular participation requirement is met because the people are able to vote directly for or against the final form of the proposed document.

Despite the significance of the case, the Court's opinion represents incomplete and superficial judicial analysis which fails to reach and resolve the basic problems. The Court correctly held that the method of revision specified in the constitution does not preclude alternate modes of popular reformation of government. That each generation has the right to determine its own form of government has been beyond dispute in American political and legal theory since 1776. But this is the easy question to answer. The difficult but crucial legal problems which were not answered involve the conditions which must be met before the section 4 right becomes operative and is properly exercised. This issue is central to the case because surely the Court, by its decision, did not mean that section 4 will automatically legitimate any revision procedure for any party who invokes it. To determine whether an alternate method of revision is constitutional, it is submitted that a judicial body must thoroughly consider several matters, which were either ignored or inadequately considered by the Court of Appeals in

\textsuperscript{14} 403 S.W.2d at 719 cites the following cases: Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960) and Gaines v. O'Connell, 305 Ky. 397, 204 SAV.2d 425 (1947).
\textsuperscript{15} 403 S.W.2d at 721.
\textsuperscript{16} Ibid.
Gatewood: first, whether there is necessity or justification for the appeal to inalienable rights to prevail over positive law; second, whether the parties seeking to revise the government through this means constitute the "people" exercising their inalienable right; and third, whether the alternate method of revision advocated satisfies the requirements of procedural due process, so as to give the people sufficient notice and opportunity to participate in the process of revision.

Measured by these criteria, the Court in Gatewood, first of all, paid inadequate respect to the existing legal system by readily approving a means of revision quite at variance with the detailed constitutional procedure, without specifically establishing that change could not reasonably be achieved within the existing framework. The inalienable, or natural, right of man to reform his government must be seen in its relationship to our positivist legal order, which places great value upon precedent, stability, and order. Our society is grounded on a belief that changes in the form as well as the policy of government should take place in a lawful manner and through our legal institutions. Moreover, the inalienable right of the people embodied in section 4 has never been viewed as being contrary to this principle, but rather as a safety value which is used when the people need to exercise it to protect valued rights and procedures from a despotic government or unjustified restrictions of the past. If any constitution or law is to retain the respect of the people, the courts and other branches of government must strictly adhere to it, except where circumstances are shown to justify loose construction or circumvention.

Thus the point is not that section 258 provides exclusive modes of revision, but rather that section 258 does set forth definite procedure for revision and the Court of Appeals should require proof of the necessity or justification for circumventing this procedure. Constitutional revision through a constitutional assembly, under the procedure of section 258, could have been achieved by 1969. Yet there was no proof that great burden or expense would fall upon the citizens of Kentucky if the constitution was not revised in 1966 but in 1969. Moreover, neither was there a showing that the procedure of section 258 made revision of the constitution unreasonably difficult; in fact, the increasing popular support for revision in each of the three prior efforts at major overhaul of the document seem to refute the

17 The proposal for an unlimited convention could have been resorted by the 1966 Legislature and the sense of the people taken in 1967. In 1968 the people could have elected delegates to a convention. This convention, using the Constitution Revision Assembly's document as a draft, could probably have presented a revised constitution to the people by the 1969 general election, using the procedure allowed by Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947).
charge that the 1966 approach was necessary to break the control of the "hand from the grave" over the present.\textsuperscript{18} It is incongruous for the Court to reaffirm daily its commitment to precedent and law, and normally to depart from precedent only after explanations of why the former law is no longer workable, and then to permit circumvention of the most fundamental law of the state without requiring and discussing a justification for such departure.

The second criterion which the Court failed to satisfy was whether the parties promoting a new mode of revision under section 4 could properly utilize the benefits of this provision. In other words, it would seem that such moving parties have the important burden of proving that they in fact legitimately represent the people. State government officials, and primarily the Governor, were mainly responsible for initiation and direction of the revision movement. Under a statute sponsored by the Governor and enacted by the 1964 General Assembly, the members of the Constitution Revision Assembly were selected in 1964 by the Governor, the Speaker of the House of Representatives, the Lieutenant Governor, and the Chief Justice of the Court of Appeals. The Revision Assembly consisted of the seven former elected governors of Kentucky, one delegate from each of the thirty-eight state senatorial districts and five members selected from the state-at-large; an attempt was made to appoint members from both political parties.

The method by which the delegates were selected presents a serious problem because the Kentucky Constitution does not give state government leaders the authority to name constitutional convention delegates, but instead specifically reserves this power to the people, who also retain the power to decide in a general election whether to call such an assembly. The Court of Appeals' believed that the people were adequately participating in the revision, as required by section 4, because modern communications had given them due notice of the proposed document as it was being formulated and they were to have the opportunity to reject or accept the final draft. This reasoning of the Court has been supported further by the argument that the mass of people cannot exercise revision themselves and, therefore, assuming circumvention is justified, the Governor and the Legislature can legitimately appoint a constitutional convention and

\textsuperscript{18} In 1931 and 1947 calls for an unlimited convention were rejected by the voters, and in 1960 a call for a limited convention, restricted both as to the number of subjects—twelve—and by the condition that the final draft would be submitted to the people for approval, was also rejected; with each election the percentage of voters voting in favor of revision increased. In 1960 the vote was 342,501 against and 324,577 for, which is equivalent to 48.65% of the voters favoring the limited convention. See Oberst and Wells, \textit{Constitutional Reform in Kentucky—The 1966 Proposal}, 55 Ky. L.J. 50, 53-54 (1966).
propose a revised constitution in disregard of revision procedures in the existing constitution, so long as the people can approve or disapprove the final document in an election.\textsuperscript{19}

There are obvious shortcomings in the 1966 procedure which are not adequately dealt with by these justifications. To begin with, in what sense was the Constitutional Revision Assembly truly representative? Contrary to the American tradition of political representation and the procedure outlined in the Kentucky Constitution, the people of each senatorial district did not elect a delegate to the convention. Instead of the usual process whereby the elected representative makes the political decision after receiving advice from experts on his staff or elsewhere, interested pressure groups, and constituents, the 1966 approach to revision gave the power of decision to appointed experts or leaders who were not agents of the people elected to represent the interests of each community. Moreover, there were important factual questions regarding the extent to which the appointed delegates actually had significant contact and communication with the communities they were supposed to represent.

Especially in the absence of proof of necessity or justification for circumventing section 258, section 4 does not give government officials, like any other minority, authority to set up procedures by which the governmental officials appoint “representatives” of the people, rather than to set up procedures by which these representatives would be elected and more directly responsive to the will of the people. Because of the concentration of power in contemporary government, the people need special protection against public officials who, without popular authority, seek to bring about changes in the form of government. The 1966 procedure for revision could too easily allow those in power to impose their own values by appointing the delegates to the convention and then using public money and public employees to help convince the people that they should adopt the document drafted under these circumstances.

Finally, regarding the third criterion, the Court did not realistically consider whether the 1966 mode of revision adequately insured the right of the people to have notice of, and participate in, revision. KRS. 7.170,\textsuperscript{20} which originally created the Constitutional Revision Assembly in 1964, did not state that the Assembly's draft would be submitted directly to the people. In fact, there was no decision to use direct submission until the Constitutional Revision Assembly had completed its final draft; until then, it is apparent that the general

\textsuperscript{19} Oberst and Wells, supra note 18, at 64-65.
\textsuperscript{20} KRS § 7.170 (1960).
assumption was that this final draft would be submitted to a convention of delegates elected by the people, consistent with Section 253 revision procedure. Moreover, one poll stated that, while the Assembly was doing its work, forty percent of the people did not know the constitution was being revised. Moreover, although statewide newspapers reported Assembly meetings, the proposed document, and the pre-election discussions, the debates of the constitutional convention were never made available to the people. In addition, although many public debates discussed the merits of the 1966 constitution after the Court decision in July and before the November election, there was much confusion as to the meaning and consequences of important provisions. This uncertainty as to the scope of the document undoubtedly was an important factor contributing to its defeat. Thus, subsequent events strongly challenge the significance of part of the Court’s rationale in upholding the 1966 approach—its notion that “News and information is disseminated faster and more efficiently than was anticipated when the Constitution was drafted.” Progress in communication does not mean that the news and information will be disseminated in a fair and unbiased manner and in a manner which people can understand.

In other cases where a court has upheld a mode of revision different from the one specifically provided for in the constitution, including the aforementioned Rhode Island and Georgia cases, the alternate mode of revision actually increased the participation of the people. However, the Gatewood decision approves the acts of the Governor and General Assembly initiating the process of revision and appointing the revisers, thereby leaving the people only the opportunity to determine whether or not to accept the finished product. This appointed assembly-direct submission procedure permits the people to participate only in a negative sense, i.e., the people have the power to veto the proposed constitution at the polls, but they do not

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22 Hoar, CONSTITUTIONAL CONVENTIONS 39-40 (1917).
23 In re Opinion to the Governor of Rhode Island, 55 R.I. 56, 178 Atl. 433 (1935) the court held that the Legislature could call a constitutional convention even though the constitution expressly provided that the Legislature should draft the document. In Wheeler v. Board of Trustees, 200 Ga. 323, 37 S.E.2d 322 (1946), the court held constitutional a mode of revision which permitted the people to ratify or reject the final document even though the Georgia Constitution provided that after the Legislature voted twice to call a convention, the Legislature must call one which is representative of the people. Note that the provision does not authorize the people to elect delegates to the convention. Thus, by the Legislature allowing the people to vote on the final document, the people participated to a greater degree than under the expressed mode of revision in the constitution.
have a voice through elected representatives in determining what provisions will be in the proposed document. Especially when the Gaines\textsuperscript{24} decision is added to section 258, thus giving the people the right to vote on the convention's final draft, the 1966 approach reduces the participation of the people in the actual process of revision. Yet the Court of Appeals ignored these considerations in drawing its conclusion that the 1966 approach safeguarded the right of the people to participate in the reform of their government.

There remains only the need to put this discussion of the legality of alternate modes of revision back into the larger context of judicial decision-making in society. What then would be the significance of the decision, even if the Court had considered carefully these three important matters which it failed to do in Gatewood? Such a decision would only mean that the proposed method of revision is legal; it would say nothing about the wisdom or desirability of such an approach. From the viewpoint of political or governmental theory, the merits of any particular method of revision upheld by the Court are part of the issue before the people as they decide whether to change the constitution. Certainly, whenever constitutional revision is sought through a method based on natural law, both the content and the procedure of revision are important political decisions for the voter to make in his attempt to evaluate the proposed change.

In short, there can be methods of constitutional revision which are legal or constitutional, even though contrary to the procedure for revision spelled out in a state's constitution. However, the Court, through close and careful consideration must determine whether, under the circumstances, a particular proposed method qualifies. The Gatewood decision lacks this kind of judicial analysis, which is called for by litigation raising such significant legal and political questions. Finally, it also fails to establish guidelines for similar attempts at constitutional revision in the future, so as to assure that all modern systems of communication and resources of the state are used in good faith to truly effectuate the will of the people.

\textsuperscript{24} Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947). See also text at note 4.
VII. CONTRACTS

The Court was relatively inactive in the area of contract law during its 1965-66 term. Only two cases can be said to have been significant; the remainder involve, to a greater or lesser degree, rather routine application of established principles of contract law.

In the first significant case, *Brown v. Noland Co.*,¹ the court upheld an executory accord in favor of an injured plaintiff against an insurance company where the company offer was made before and accepted after the statute of limitations had run. The plaintiff was injured by the allegedly negligent driving of the defendant's insured. Suit was filed more than one year after the date of the injury. The defendant pleaded the one year statute of limitations. In response, the plaintiff pleaded estoppel to the defense of the statute and, in the alternative, alleged that the defendant was liable in contract because of an accord entered into by the parties. In support of its second assertion, the plaintiff alleged that in June of 1963 an adjuster for the insurer made a firm offer to settle with the plaintiff. It was alleged that no mention was made of the statute of limitations (which ran on August 23, 1963), that no time limit was set for acceptance of the firm offer, that plaintiff accepted the offer on November 23, 1963, and that shortly thereafter the insurer repudiated the offer. The trial court sustained both the insurer's and the insured's motions to dismiss on the pleadings.

The Court of Appeals affirmed the dismissal as to the insured, rejecting the plea of estoppel on the ground that the claim was purely one in tort and that sufficient facts to support an estoppel had not been pleaded.² Turning to the claim against the insurer, the Court saw it as purely contractual.³ The issue thus became one of whether

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¹ 403 S.W.2d 33 (Ky. 1966). In another case, *Gill v. Cook*, 399 S.W.2d 304 (Ky. 1966), the Court held that mere receipt of a check from the defendant's insurer, which check recited that it was in full settlement of the claim against the insured, did not constitute acceptance of the offered settlement. The propriety of the decision is beyond question. See Annot., 53 A.L.R.2d 753 (1957).

² Citing *Cuppy v. General Acc. Fire and Life Assur. Corp.*, 378 S.W.2d 629 (Ky. 1964); *Burke v. Blair*, 349 S.W.2d 836 (Ky. 1961); *Pospisil v. Miller*, 343 S.W.2d 392 (Ky. 1961). The disposition of this issue seems to have been correctly made under the authority of these cases. For a more complete discussion of the issue, see 54 Ky. L. J 799 (1966).

³ The Court cited 1 Am. Jur. 2d Accord and Satisfaction § 52 (1964): An accord is as much a contract as any other agreement, and an action may be maintained against the party in default for the breach of nonperformance of an accord under the ordinary principles of the law of contracts. In the absence of statute, if the debtor breaks a contract which is an accord to be satisfied by a future stated performance, the creditor has alternative remedies; he can enforce either the original duty or the accord. 403 S.W.2d at 35.
a mere "accord," without "satisfaction," imposed upon the parties to the accord a contractual liability separate from any tort liability springing from the original claim, and therefore was not barred by the statute of limitations. By holding in the affirmative on this issue the Court expressly overruled two Kentucky cases which had entrenched the contrary rule in Kentucky law for almost a century and a half. In their place it substituted the rule promulgated by the American Law Institute.

Simply stated, the Court reasoned that an "accord" was alone sufficient to impose a contractual obligation on the insurer and that this obligation, being totally unrelated to the insured's tort liability, was not barred by the statute of limitations. The Court's last step was to hold that whether the plaintiff accepted the firm offer within a reasonable time, and thereby bound the insurer to an accord agreement, was a question of fact to be determined in further proceedings below.

The decision in Brown is a good one. The old line of Kentucky cases reflected a notion which formerly enjoyed the approval of many courts, namely the belief that an accord was not a bar to the original debt and therefore was not a binding contract. This was a result of the courts' unwillingness to recognize as enforcible the "promise for a promise" now generally recognized as an enforcible bilateral contract. With the emergence of the bilateral contract concept, the theoretical basis for refusing to give full force to an executory accord disappeared. Moreover, in Brown the accord was not executory after the tort claim against the insured was barred by the statute—at that point the insurer's promise, to pay a certain amount of money, remained executory but the plaintiff's promise, to refrain from pro-

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4 1 AM. JUR. 2d Accord and Satisfaction § 1 (1964) provides:
[A]n accord is an agreement by one party to give or perform and by the other party to accept, in settlement or satisfaction of an existing or matured claim, something other than that which is claimed to be due, and the satisfaction is the execution or performance of the agreement, or the actual giving and taking of some agreed thing. The accord is the agreement and the satisfaction is the execution or performance of such agreement. When an accord is followed by a satisfaction it is a bar to the assertion of the original claim, but until so followed, it has no effect.

5 Ibid.

6 Whayne Supply Co. v. Gregory, 291 S.W.2d 835 (1956); Elliott v. Dazey, 19 Ky. (3 T.B. Mon.) 263 (1826).

7 RESTATEMENT, CONTRACTS § 417 (1932). This rule was said to have been recognized, though not adopted, in Barrett v. Clark, 226 Ky. 109, 9 S.W.2d 1091 (1928).

8 Citing RESTATEMENT, CONTRACTS § 417 (1932).

9 6 CORBIN, CONTRACTS § 1271 (1962).

10 6 CORBIN, CONTRACTS § 1271 (1962); 6 WILLISTON, CONTRACTS §§ 1839-40 (1938).

11 Ibid.
securing his tort claim, was usurped by the running of the statute.\textsuperscript{12} It is submitted that the accord thereby became unilateral and even under the old rule would have been enforcible. But regardless of the theoretical propriety of Brown, it clearly aligns Kentucky with the position taken by the majority of courts\textsuperscript{13} and by the leading scholars.\textsuperscript{14}

Speaking in more practical terms, the rule of Brown will play a welcome role in providing the public with some degree of protection from unconscionable conduct on the part of insurance companies which would induce an unknowing plaintiff to forestall prosecution of his claim until the claim is barred by the statute of limitations. Of course, the rule should operate to the advantage of insurers who deal with the public in an above-board manner by making this tactic unavailable to their competitors and by establishing better public relations for the industry.

The second significant case in the general area of contracts involved the effect of an obligor's discharge in bankruptcy. In \textit{Local Industrial Fin. Co. v. McDougale},\textsuperscript{15} a case of first impression, the defendant was the obligor on a debt owed to the plaintiff. Shortly before he was awarded a discharge in bankruptcy, the defendant, by means of a financial statement, procured a new loan as well as a renewal of the existing loan. The plaintiff sought to recover both the "new money" and the "old money." The trial court allowed recovery of the new, but denied recovery of the old. On appeal the parties consented to limit the issue to the effect of the defendant's discharge in bankruptcy.

The defendant admitted that the financial statement which he furnished the plaintiff was false and was intended to deceive the plaintiff, and that the plaintiff had made the new loan and extended the old loan in reliance thereon. The only issue before the Court was whether the trial court properly limited the effect of the Celler amendment of the Bankruptcy Act\textsuperscript{16} to the "new" money. It held, in

\textsuperscript{12} It is interesting to note that the Court recognized seventy years ago that a promise to forebear bringing suit, when made in return for a promise of continued employment, could become the basis of a suit for breach of contract after the suit was barred by the statute of limitations. See Hopperton v. Louisville & N.R.R., 34 S.W. 895 (1896) (dictum).

\textsuperscript{13} See 1 Am. Jur. 2d Accord and Satisfaction § 1 (1964).

\textsuperscript{14} See 6 Corbin, Contracts § 1271 (1962); Restatement, Contracts § 417 (1932).

\textsuperscript{15} 404 S.W.2d 789 (Ky. 1966).

\textsuperscript{16} The pertinent provision of the Bankruptcy Act is Section 17(a)(2) as amended in 1960 by 11 U.S.C.A. § 35:

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts ... except such as ... (2) all liabilities for obtaining
reversing, that the amendment applies to the old money as well as to the new.

The Court noted that the same section of the Act prior to its amendment in 1960 had been given a liberal construction by Kentucky. It then cited two statutes which demonstrate the disfavor which Kentucky law expresses toward perpetrators of fraud. Next, going from generalities to particulars, the Court cited a line of non-Kentucky cases which held, under the old wording of the section, that the creditor could collect both the old money and the new money. Finally, the Court expressed its belief that the amendment of the section in itself supported the decision in McDougale, since the amended section deals expressly with false statements used to induce loans of extensions of prior loans. On the basis of its liberal position under the original section, and in light of what it considered a liberalizing amendment by Congress, the Court felt compelled to adopt what it deemed to be the majority view and hold the discharge ineffective to release any part of the defendant's indebtedness.

The soundness of McDougale is apparent. While the Court was a little over-defensive in justifying its decision on the basis of the liberal construction of the original section, and while it belabored the obvious in reciting Kentucky's disfavor toward fraudulent conduct, the decision is in accordance with the letter and spirit of the Celler Amend-

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money or property by false pretenses or false representations ... or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published ... with intent to deceive.

17 The original wording of Section 17(a)(2) exempted from discharge such debts as "are liabilities for obtaining money or property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another ... ."

18 The Court was correct in citing the following cases to substantiate this proposition: Time Fin. Co. v. Nelson, 312 Ky. 255, 227 S.W.2d 189 (1950); Loony Creek Coal Co. v. Scott, 227 Ky. 323, 12 S.W.2d 852 (1928); Bingham v. Kendall, 223 Ky. 661, 4 S.W.2d 681 (1928).

19 KRS §§ 411.070, 411.090 (1942).

20 Erickson v. Bicknell, 28 F.2d 729 (8th Cir. 1928); In re Russell, 52 F.2d 749 (D.N.H. 1931); Gregory v. Williams, 106 Kan. 819, 189 Pac. 932 (1920); Stewart v. Emerson, 52 N.H. 301 (1872); Personal Fin. Co. v. Bruns, 16 N.J. Super. 183, 34 A.2d 32 (Super. Ct. App. Div. 1951); Personal Fin. Co. v. Snyder, 131 N.J.L. 597, 37 A.2d 822 (Sup. Ct. 1943); Elsburg v. Simpson, 173 N.Y. Supp. 128 (Sup. Ct. 1918); Public Loan Corp. v. Hood, 125 N.E.2d 770 (Ohio C.P. 1955); National Fin. Co. v. Valdez, 11 Utah 2d 389, 359 P.2d 9 (1961). The weight to which some of these cases are entitled is lessened by close scrutiny of their operative facts, but they do serve to show that liberal interpretation of the section was widespread.

21 Citing First Credit Corp. v. Wellnitz, 21 Wis. 2d 18, 123 N.W.2d 519 (1963); M-A-C Loan Plan, Inc. v. Cooper, 23 Conn. Supp. 184, 179 A.2d 313 (1961); CHF Fin. Co. v. Jochum, 241 La. 155, 127 So. 2d 534 (1961). The Jochum case is distinguishable on its facts, but the Wellnitz case, upon which the Court relied heavily, is squarely in line with the McDougale facts.
ment. One precautionary word: McDougale presents a factual situation where the amendment is undoubtedly applicable. Application may well encounter more difficulties in a case where the equities are not so clearly on the side of the creditor. For example, applicability would be doubtful where the lender's insistence on extensive disclosure by the borrower "induces" the misrepresentation.

In the remaining contract cases decided last term, the Court adhered to principles already well entrenched. Two such cases involved the measure of damages arising from the breach of a contract. In the first of these, Gray v. Mattingly, the Court held that the measure of damages for breach of a building contract is the amount reasonably necessary to make the building conform to the requirements of the contract, but not to exceed the difference between market value as it should have been built and its value as it actually was built. This holding is sound on precedent and is approved by the text writers. The second case involving damages, King v. Holly Oil and Gas Corp., arose from the breach of a contract whereby the defendant undertook to conduct an experimental water-flooding project. The Court held that the plaintiff was entitled to recover only nominal damages from the breach. It based its holding on two grounds. First, the contract terms were so unclear as to when performance was to be begun and completed that it was impossible to ascertain the date of the breach. Second, the Court believed the subject matter of the contract was so speculative that damages could not be ascertained. The disposition of the case seems to be sound although at least some of the cases cited by the Court are not squarely in line with the King case. Either ground is sufficient to make ascertainment of damages impossible.

22 399 S.W.2d 301 (Ky. 1966).
23 In addition to the damage issue, the Court also held that an instruction authorizing a finding of liability up to $4,000 was not prejudicial error where the jury returned a verdict which did not exceed the highest amount authorized by the evidence. This holding seems to be clearly in line with precedent. See River Queen Coal Co. v. Mencer, 379 S.W.2d 461 (Ky. 1964).
25 5 CORBIN, CONTRACTS § 1089 (1964); MCCORMICK, DAMAGES § 168 (1938).
26 402 S.W.2d 851 (Ky. 1966).
27 5 CORBIN, CONTRACTS § 1001 (1964) provides:
A plaintiff who has proved the breach of a contractual duty by the defendant is always entitled to a judgment for damages therefore ... it is not necessary for the plaintiff to prove the amount of harm that he has suffered. ... If he makes no such proof, however, the judgment in his favor will be for nominal damages only.
28 The Court cited North Star Co. v. Howard, 341 S.W.2d 251 (Ky. 1960); Midland Gas Corp. v. Reffitt, 286 Ky. 11, 149 S.W.2d 537 (1941); Carroll Gas (Continued on next page)
The Court disposed of one case which presented a reformation issue, and one which turned on a question of mutuality of obligation. The reformation case, *Spratt v. Carroll*, was disposed of under the established rule that one who seeks to have a contract reformed because of mutual mistake must show the mistake by clear and convincing proof. The Court believed the plaintiff in *Spratt* failed to meet this burden of proof, since her whole proof consisted of a deposition by plaintiff's sister to the effect that she overheard the plaintiff and defendant orally agree to terms at variance with the written contract. *Spratt* is sound in principle as well as precedent. The statute of frauds was not directly applicable in the case but, since it lurks in the background of any case where reformation of a written agreement is sought, the one who would so reform the writing should bear a strict burden of proof. In the mutuality case, *Coleman v. Ponticos*, the result was similarly dictated both by precedent and contract theory. The Court simply applied the test by which it is said that a contract is void for lack of mutuality and hence unenforceable only where the parties, or one of them, could abandon the contract at any time.

Other cases decided by the Court involved restitution, termination of purchase options, formation of a contract to purchase land, and precipitation of a buyer's promissory note because of fraudulent mis-

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and Oil Co. v. Skaggs, 231 Ky. 284, 21 S.W.2d 445 (1929). *Howard* held on the facts before it that the evidence of loss was too indefinite to support an assessment of damages, but all three involved instances where the amount of loss was the sole issue. The Court apparently believed *King* was governed by different principles, since the undetermined element was the date of the breach rather than the actual losses incurred. Unfortunately, the speculative nature of the contract further obscured the picture.

Whether the facts of *King* actually presented an instance where assessment of damages was impossible is questionable, since the Kentucky Court has a workable standard for measuring damages in mineral lease cases. See Midland Gas Corp. v. Refitt, 236 Ky. 11, 149 S.W.2d 537 (1941). It is submitted, however, that the Court was correct in viewing *King* as a typical contract damage case, rather than applying the particular rules for mineral lease cases since the indefinite aspects of *King* are not those which are restricted to mineral lease cases.

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*King* was governed by different principles, since the undetermined element was the date of the breach rather than the actual losses incurred. Unfortunately, the speculative nature of the contract further obscured the picture.

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representations by the seller. In the restitution case the Court held, applying the generally accepted rule derived from equity, that where two persons operate a business jointly for a matter of months without negotiating a contract to govern their relationship, each party is under a duty to restore to the other his goods to the extent of their value or proceeds. In the purchase option case the Court applied the rule which has prevailed in Kentucky for fifty years and which has the support of the writers and other courts. It held that where a purchase option was conditioned to remain in effect until a landowner tendered a general deed, the option terminated when such a deed was tendered and rejected. In the case involving formation of a land conveyance contract, the Court held that, where the contract was between the vendor and a real estate agent purchasing for himself, the fact that the contract was on a printed form naming the purchaser as a real estate agent of the plaintiff, the realtor, would not render the vendor liable for a brokerage commission. This decision is laudable as an indication of the Court's willingness to look to the realities of the situation before it. It was likewise soundly rooted in precedent. The case in which precipitation of promissory notes given for the purchase of stock was sought, though it presented a complex factual maze, actually amounted to no more than a holding that a contracting party must exercise reasonable care to protect himself and, more specifically, that a party should examine the seller's records when they are available to him. The propriety of the decision is unquestionable.

In one case the Court considered the issue of priority between an

38 Herman v. Jackson, 405 S.W.2d 9 (Ky. 1966).
39 See Restatement, Contracts § 326 (1932); 5 Williston, Contracts §§ 1458-59 (1938).
40 "The equitable doctrine underlying the rule concerning restitution is that a benefit conferred through a mistake of law or of fact must be restored." 77 C.J.S. Restitution at 822 (1952). See, e.g., Western Cas. & Sur. Co. v. Meyer, 301 Ky. 487, 192 S.W.2d 388 (1946).
41 Phelps v. Gover, 394 S.W.2d 927 (Ky. 1965).
42 Stewart v. Gardner, 152 Ky. 120, 153 S.W. 3 (1913).
43 See Restatement, Contracts § 35 (1932).
44 91 C.J.S. Vendor and Purchaser § 10 (1955).
45 Curtis v. Spadie, 399 S.W.2d 731 (Ky. 1966).
47 McClure v. Young, 396 S.W.2d 45 (Ky. 1965).
48 In McClure the suit was brought by the seller for breach of contract. The purchaser sought to have the amount of the debt precipitated for the reason that the seller had fraudulently misrepresented the cost of constructing the building owned by the close corporation. The record reveals a series of transactions involving inter- and intra-corporate manipulations which obscure the clarity of the decision. It appears, however, that the purchaser had complete access to the corporation's books during the negotiations which preceeded the sale.
49 Johnson Lumber Co. v. Stovall, 394 S.W.2d 930 (Ky. 1965).
unrecorded materialman’s lien and a recorded mortgage lien. Since the materialman had not complied with the statutory filing requirements and since the mortgagee was not chargeable with notice that the builder was not paying his debts, although he did have notice that work was being done on the property, the mortgage was given priority. The holding is in accordance with precedent and reflects the position taken by most courts.

Finally, the Court invoked in two cases the established rule of construction whereby contracts are construed in accordance with the ordinary meaning of their terms and in such a manner as to implement the parties’ intention as it appears from the writing. In three other cases it found the lower court’s decision supported by substantive evidence and on that ground refused to disturb the findings made below.

50 KRS § 376.010 (1952).
51 Collier v. Dillon, 313 Ky. 244, 230 S.W.2d 617 (1950).
52 59 C.J.S. Mortgages § 254 (1949).
53 Mayes v. Coe, 402 S.W.2d 685 (Ky. 1966); Accurate Answering Serv. v. Answering Serv., Inc., 394 S.W.2d 765 (Ky. 1965).
55 Ori v. Steele, 399 S.W.2d 727 (Ky. 1966); BSY Co. v. Fuel Economy Eng’r Co., 399 S.W.2d 308 (Ky. 1965); Ford v. Gilbert, 397 S.W.2d 41 (Ky. 1965).
VIII. CRIMINAL LAW AND
CONSTITUTIONAL INTERPRETATION

A. Search and Seizure

In the recent decision of *Lane v. Commonwealth*\(^1\) the Court of Appeals held that any search made incidental to an arrest for a minor traffic violation is illegal, even though conducted against a nonowner of the vehicle, and that no evidence obtained as a result of such a search is admissible in a criminal prosecution. In a companion case to that decision,\(^2\) the Court clarified its position by adding that the *Lane* rule does not prevent the admission of evidence obtained where no search is necessary for its discovery. During the past term, the Court unequivocally affirmed these precedents. Appellant in *Johns v. Commonwealth*\(^3\) had a reputation as a bootlegger. When he was arrested for reckless driving, the arresting officer repeatedly requested him to open the trunk of his car. Appellant reluctantly acquiesced and the officer discovered a large quantity of beer. The Court emphasized that there was no reasonable basis for the search of the car in connection with a charge of reckless driving. Moreover, in view of the fact that the beer was not plainly visible to the officer, appellant was the victim of an illegal search and seizure, and his conviction should therefore be reversed.

*Commonwealth v. Mayfield*\(^4\) presented a situation in which defendant-victim of the illegal search and seizure was not the owner of the vehicle searched but merely the one in control of the vehicle. The Court held that non-ownership is of no consequence since the victim of such a search is entitled to the same rights as the owner, namely, to have the evidence obtained by the search suppressed.

It has been held in the federal courts that the fourth amendment exclusion rule\(^5\) is fundamentally a means of protecting privacy and securing property, *i.e.*, a personal protection. Therefore, to avail himself of that protection, one must establish the invasion of his own right to property\(^6\) or privacy.\(^7\) He must be the one against whom the search

\(^{1}\) 386 S.W.2d 743 (Ky. 1965).
\(^{2}\) Clark v. Commonwealth, 388 S.W.2d 622 (Ky. 1965).
\(^{3}\) 394 S.W.2d 890 (Ky. 1965).
\(^{4}\) 394 S.W.2d 914 (Ky. 1965).
\(^{5}\) U.S. Const. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
\(^{6}\) United States v. Lee Wan Nam, 274 F.2d 863 (2d Cir. 1960).
was directed or a victim of the seizure, and not merely a person claiming prejudice through the use of evidence gathered as a consequence of a search and seizure directed at another.⁸ Ownership of the property searched is not necessary in order to give a right to object to a search⁹ and not even consent on the part of the owner will sanction a search against the non-owner while the latter is legally in possession of the vehicle.¹⁰ Conversely, since an interest in the property is ordinarily a prerequisite for the giving of consent,¹¹ the non-owner may not waive the protection afforded the owner. Thus it appears that the Lane and Mayfield decisions are well grounded in precedent.

Again, in Collins v. Commonwealth,¹² the Court reaffirmed its adendum to the Lane and Mayfield doctrines by holding that, if an officer stops a car for a traffic violation, he can search the car for evidence of other offenses only if the incriminating evidence can be readily seen and is in view of the officer. Of course, incriminating evidence found on the person or in the immediate area following an arrest based on probable cause is admissible despite the fact that no warrant was obtained.¹³ Likewise where an officer stops a vehicle and by shining his flashlight through the window recognizes certain property alleged to have been stolen, the statements of the officer as to having seen the property will be sufficient to constitute probable cause for obtaining a warrant for arrest.¹⁴ But where there is no evidence obtained incidental to the arrest and no search was made that disclosed any incriminating evidence, the defendant is in no way prejudiced by the search arrest.¹⁵

B. Double Jeopardy

The Supreme Court of the United States held in Bartkus v. Illinois¹⁶ that an indictment and acquittal in a federal district court for robbery of a federally insured savings and loan association did not preclude a subsequent trial and conviction for the same offense in the state courts of Illinois. Justice Frankfurter, writing for the 5-4 majority, traced a long line of precedents upholding the dual rights

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⁸ Ibid.
¹² 396 S.W.2d 318 (Ky. 1965).
¹³ Wilson v. Commonwealth, 403 S.W.2d 705 (Ky. 1966).
¹⁴ Taylor v. Commonwealth, 394 S.W.2d 895 (Ky. 1965).
¹⁵ Ferguson v. Commonwealth, 401 S.W.2d 225 (Ky. 1965).
involved. The case has been much criticized, but it is still the law. This year, the case of Hall v. Commonwealth placed the “separate sovereignties” question squarely before the Kentucky Court of Appeals.

In Hall the defendant was convicted in Ohio of contributing to the delinquency of a minor and was subsequently convicted of the same offense in Kentucky. The facts on the record are not copious, and the comment here is only on the court’s assertion that, though the delinquency may have been a continuing course of conduct culminating in the Ohio conviction, “such portion of the conduct occurring in Greenup County, Kentucky, and contributing to the delinquency of the minor could be prosecuted in Greenup County.”

Though the holding is in line with the prevailing national standard, the Court unfortunately chose to adhere to the Bartkus rule. Various arguments can be made against the standard. First, the right against double jeopardy was designed to prevent the persecution of an individual by repeated trials for essentially the same crime. An accused should not be harrassed with the anxiety and expense of continuous prosecution. Furthermore if the hypothesis be accepted that the likelihood of a conviction increases in direct proportion to the number of trials, the probability that an innocent man may be convicted must correspondingly increase. Thirdly, an individual should be regarded as having the right to rely on the finality of a judicial determination. Finally, the achievement of certainty and finality is essential to the courts themselves. To try a man over and over again for the same offense taints the system with a spirit of vindictiveness and revenge which undermines respect for the whole judicial process.

Ultimately, however, the problem of double jeopardy is not one that may be dispensed with merely by exhortations to fairness, decency, and the conscience of mankind. Dual allegiance is an inescapable attribute of a federal system. From this axiom the corollary necessarily follows that a single act may very well be injurious to the interests of two or more states. But that similar conflicts in the context of civil action arise daily and are resolved must surely im-

press on us that the success of the federal system depends finally on cooperation between sovereigns. The spirit of full faith and credit should extend to criminal prosecutions, but each affected state should be allowed to contribute to the full presentation of all the evidence at a single trial in the court mutually adjudged most appropriate. The opportunity existed in Hall to articulate these considerations and to establish the Kentucky rule against double jeopardy at a level of protection for the individual comparable to that recently established by the Supreme Court for search and seizure, self-incrimination, and confession.

In two other cases the Kentucky Court faced the question of whether an indictment on two crimes somewhat similar to each other constitutes double jeopardy. In both cases the Court held it did not. The test used is that, if proof of one indictment would not sustain the other, there are two distinct offenses, and the defendant is not protected by the privilege.

The Court ruled in Runyon v. Commonwealth that a previous acquittal on a charge of embezzlement did not preclude a conviction of submitting a false claim to a political subdivision. In Schweinefuss v. Commonwealth, the same decision was reached on indictments for pandering and for aiding and abetting prostitution. It is regretted that more documentation and reasoning was not provided. No cases were cited in Runyon; the Court merely stated summarily that proof of the elements of one crime would not sustain the other. In Schweinefuss the Court cited Adams v. Commonwealth as precedent. Adams supports the Court’s ruling by dictum. A Kentucky case, Lutes v. Commonwealth, in discussing the offense of procuring, apparently laid down a contrary rule to that of Schweinefuss and Adams when it spoke of a panderer or procurer as one who “abets, aids, finds, introduces...” The Court of Appeals made no mention of Lutes.

In Commonwealth v. Devine, the Commonwealth successfully appealed from a directed verdict for acquittal on charges of hunting rabbits out of season and hunting rabbits with headlights. KRS

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24 Easley v. Commonwealth, 320 S.W.2d 778, 779 (Ky. 1958).
25 393 S.W.2d 377 (Ky. 1965).
26 395 S.W.2d 370 (Ky. 1965).
27 313 Ky. 298, 231 S.W.2d 55 (1950).
28 236 Ky. 549, 33 S.W.2d 620 (1930).
29 Id. at 553, 33 S.W.2d at 622.
30 396 S.W.2d 60 (Ky. 1965).
21.140(3) permits appeal by the Commonwealth from adverse rulings where such an appeal does not constitute double jeopardy. The Court has construed this statute to permit appeals not only for certification of the law, but also for appeal in misdemeanor cases punishable by fine alone.

The proposition apparently had its beginning in Commonwealth v. Keathly. Section 852 of the criminal code provided that "a judgment on a verdict of acquittal, the punishment of which is imprisonment, shall not be reversed." From this negative rule, the court construed positively that where imprisonment could not be a part of the punishment, the Commonwealth could appeal. The authorities indicate that Kentucky is the only jurisdiction holding that such an appeal does not place one twice in jeopardy of "life or limb."

The reasoning of the Court should be reconsidered. A heavy fine can be equally as oppressive to life or limb as a ten day jail sentence. The distinction is artificially subtle. In this case, the maximum penalties were, respectively, fines of $100 and $1,000. Should the defendant be convicted in the subsequent trial and be financially unable to pay the penalty, he might be incarcerated in the county jail for as long as 1,100 days. An indigent is generally permitted to pay off his fine with a jail term credited at $1.00 per day.

It was, perhaps, the success in the Devine case which encouraged the Commonwealth to challenge the very guts of the double jeopardy privilege in Commonwealth v. Mullins. Defendants were convicted of murder. The conviction was reversed, and the case was remanded for a new trial. When both sides rested in the subsequent trial, the defendants' motion for a directed verdict was granted. The Commonwealth, claiming the grant of the directed verdict was erroneous, asked the Court of Appeals to re-examine the rationale of the principle that an accused might not be put twice in jeopardy for the same offense.

The Commonwealth advanced the theory that the trial judge had wielded the most awesome power of which he was capable—the power to absolve an accused of guilt—and that absolute power may no more be tolerated when invoked wrongly against society in favor of a criminal defendant than when invoked wrongfully in favor of society and against a criminal defendant. The argument was that

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31 82 S.W. 1001 (Ky. 1904) (not otherwise reported).
33 See KRS § 441.190 (1942). Other provisions for payment for labor by prisoners at $2 or $3 per day are made in KRS § 431.150 (1942), and KRS § 441.180 (1942).
34 405 S.W.2d 28 (Ky. 1966).
jeopardy should not attach until the accused has had a *fair trial*, and that jeopardy is single and continues until such time as a fair trial has been accomplished.\textsuperscript{35}

The Court affirmed the acquittal and adhered forthrightly to the concept that a jury verdict, whether a directed one or not, is a final judgment from which no appeal for error may be taken. The ruling of the Court was unquestionably correct, but it may be noted that in this challenge to a fundamental principle of jurisprudence is illustrated the very tenuous nature of the Bill of Rights.\textsuperscript{36} The forces chipping away at these freedoms under the guise of public policy and expediency are ever at work.

\section*{C. Right to a Speedy Trial}

In *Dupin v. Commonwealth*\textsuperscript{37} defendant moved under RCr 11.42\textsuperscript{38} to vacate judgment against him for failure of the Commonwealth to grant a speedy trial. The Court of Appeals denied the petition. The propriety of the refusal to vacate judgment is not questioned. Rule 11.42 does not pretend to grant relief for every discrepancy in the trial or inroad on due process. Only violations which may have had some bearing on the legality or fundamental fairness of the trial may be considered. Probably the movant could not satisfy such requirements here.

However, the rule expressed in this case and in a previous case decided in this session of the Court,\textsuperscript{39} that failure to demand an early trial constitutes waiver of the constitutional right to a speedy trial, is questionable. The case reaffirms the holding in *Barker v. Commonwealth*,\textsuperscript{40} a case decided during the 1964-1965 session, in which the Court laid down four factors relevant to consideration of whether denial of a speedy trial assumes due process proportions: 1) the length of the delay; 2) the prejudice to the defendant; 3) the reason for the delay; 4) waiver by the defendant. The rule is the prevailing one in most United States jurisdictions.\textsuperscript{41} Its practical effect is to place on

\textsuperscript{35}Id., at 29.
\textsuperscript{36}In one other case, *Jones v. Commonwealth*, 401 S.W.2d 68 (Ky. 1966), the Court affirmed that the state's Habitual Criminal Statute is not unconstitutional as placing an accused in double jeopardy. The Court reasoned that the mere increasing of the penalty, where one has been previously convicted of the prime offense, does not constitute double jeopardy.
\textsuperscript{37}404 S.W.2d 280 (Ky. 1966).
\textsuperscript{38}Provisions of RCr 11.42 are set out above. See text of Section IX at note 170 for a more complete discussion.
\textsuperscript{39}La Vigne v. Commonwealth, 398 S.W.2d 691 (Ky. 1966).
\textsuperscript{40}385 S.W.2d 671 (Ky. 1964).
\textsuperscript{41}See Walton v. Bradley, 386 S.W.2d 457 (Ky. 1965); Note, 57 COLUM. L. REV. 846, 853-55 (1957).
the accused the burden of showing that the delay was not for proper cause. It seems to establish a presumption that any delay was for a lawful cause.

The better rule is that the burden of initiating and carrying through the litigation is the responsibility of the state and in no respect is the defendant responsible for bringing his case to trial. Since the guidelines establishing reasonable or unreasonable delay are determined by the circumstances of each particular case, the prosecutor should properly bear the responsibility for scheduling his cases at the appropriate period. It seems both unfair and practically impossible to require the defendant to expedite his own trial. This latter consideration was present in Green v. Commonwealth. The Court held that, where a defendant pleaded guilty in 1959 to illegal possession of liquor for purpose of sale in local option territory and in 1965 a judgment of conviction was entered for one year imprisonment, the delay in sentencing was unreasonable. The Court stipulated that orderly procedure and due process require sentencing without unreasonable delay. If delay is not purposeful or oppressive, sentencing two years after conviction has not been unreasonable. In Green, the delay was regarded as a calculated one. The trial judge necessarily had to know there had been no sentence imposed when the motion for a new trial was overruled and the case stricken from the docket. Apparently, the judge here was acting as his own self-styled probation officer.

D. Other Constitutional Questions

Four cases, which seemed to defy classification elsewhere, are discussed in this section.

In Commonwealth v. Allen, the state appealed for certification of the law from a dismissal on a charge of operating a lottery in violation of KRS 436.360(2). The Court of Appeals reversed. Defendant was indicted for operating a scheme of "referral selling" in which salesmen solicited names of possible future customers from present customers. The person submitting the name was assured some prize if a sale was

44 400 S.W.2d 206 (Ky. 1966).
46 In another Kentucky case, Runyon v. Commonwealth, 393 S.W.2d 877 (1965), the Court reasoned that appellant's right to a speedy trial had not been violated if five months elapsed between indictment and trial.
47 404 S.W.2d 484 (Ky. 1966).
effected to the referral. The decision preceded the 1966 amendment to the statute which clearly made such a scheme illegal.

The decision cannot be applauded. A lottery involves a payment of a price for a chance to gain a prize. The Court conceded that the price-change element is necessary but found this element "permeating the whole scheme." The customer took a chance (a) that the referent would not be interested, (b) that the salesmen would not adequately make their presentations, (c) that the referent might already have been referred to, (d) that the market might be saturated, and (e) that the salesmen might not ever contact the referent. If satisfying these criteria does, in fact, constitute the operation of a game of chance, then every business in any state is an illegal one. Regardless of the public policy involved in referral selling, such a plan was most certainly not a lottery before the 1966 amendment to the applicable statute. It is readily conceded that the Legislature had every right to outlaw the plan if it chose to do so, but the violations charged here preceded that amendment. In 1964, referral selling was nothing more than a quite profitable method of passing on to the customer part of the merchandising aspect of a business. It was no more a game of chance than buying a share of stock. The reasoning here is artificial and indicates that the Court was more interested in rendering a pre facto effect to the policy of the 1966 amendment than in considering the merits of the precise case before it.

In *Commonwealth v. Hall,* the Court held that the state statute making the mere status of narcotics addiction a criminal offense was in violation of the eighth amendment to the federal constitution and invalid. The case, like *Allen,* was an appeal from a dismissal in the trial court for a certification of the law. The holding in the case cannot be criticized, though the grounds for the disposition are not

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49 The term "lottery" clearly requires the payment of a consideration in order to be eligible for an award thereof by chance. See Wells v. J.C. Penny Co., 250 F.2d 221 (9th Cir. 1957); Commonwealth v. Malco-Memphis Theaters, Inc., 293 Ky. 531, 169 S.W.2d 596 (1945); Commonwealth v. Jenkins, 159 Ky. 80, 166 S.W.2d 794 (1914).
50 394 S.W.2d 448 (Ky. 1965).
51 The applicable statute was KRS § 218.250 (1946) which, omitting subsection (2) authorizing probation, reads as follows:
(1) Any person who habitually uses narcotics as defined in KRS 218.010 shall be imprisoned in the workhouse or county jail for twelve months.
(3) Any peace officer who apprehends a person under the influence of a narcotic drug, or who hears a person state that he is addicted to the use of narcotics, shall immediately arrest such person and take him before the proper court to be dealt with according to law.
clear. It is only in the headnote for the case that any reference is made
to the eighth amendment. Presumably the reference is to the
privilege against cruel and unusual punishment, but no elucidation is
given in the text. Robinson v. California, a 1962 Supreme Court case
which held a similar California statute unconstitutional on eighth
amendment grounds, is apparently the controlling precedent. The
Court, in suggesting to the Legislature a number of valid enactments
which might replace the statute, cites cases from other jurisdictions for
the proposition that similar legislation might have been held opera-
tive had it required proof of actual use of narcotics within the state.

In Johnson v. Commonwealth, defendant appealed from a con-
viction of storehouse breaking on grounds that his joint prosecution
with a co-defendant violated the fifth amendment safeguard against
self-incrimination. Defendant voluntarily entered into the joint pro-
secution and declined to move for a separate trial. When the co-
defendant testified for himself the appellant made no objection or
motion to admonish the jury that the witness' testimony should be
disregarded as it pertained to appellant. At the close of the evidence
appellant requested such an instruction.

In holding that the request came too late, the Court pointed out
that by failing to ask for a separate trial the defendant must be said to
have assumed the hazards of the joint trial. The defendant should

Walker, 244 La. 699, 154 So. 2d 368 (1963); State v. Margo, 40 N.J. 188, 191
54 The Hall case is part of the newly emerging constitutional controversy
concerning the so-called "status crimes." Many states have made unlawful the
quality or condition of: narcotic addiction (e.g., KRS § 218.250 [1946], ) the statute
interdicted in Hall), public drunkenness (e.g., KRS § 244.020 [1938]), and
vagrancy (e.g., KRS § 436.520 [1940] ). Since the Supreme Court in Robinson
held that it was cruel and unusual punishment to make the status of narcotic
addiction a criminal offense, at least two circuit courts of appeal have ruled that
criminal prosecution of a chronic alcoholic for public drunkenness is also a
violation of the eighth amendment of the federal constitution. Easter v. District
of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761
(4th Cir. 1966). See 55 Ky. L. J. 201 (1966). The Supreme Court recently
denied certiorari to a California appellant who was challenging the consti-
tutionality of a state statute which provided for punishment of chronic
alcoholics for public drunkenness. Budd v. California, 35 U.S.L. Week 3139
(U.S. Oct. 18, 1966). Justices Fortas and Douglas dissented from the denial of
certiorari. The Supreme Court has yet to decide the constitutionality of state
statutes which make vagrancy a crime. But see Hicks v. District of Columbia, 197
A.2d 154. cert. granted, 379 U.S. 998 (1965), cert. dismissed as improvidently
granted, 383 U.S. 252 (1966). Hicks involved the question of whether the Dis-
trict of Columbia vagrancy statute is void for vagueness. Justice Douglas, in a
dissent to the dismissal of certiorari, said: "I do not see how economic or social
status can be made a crime any more than being a drug addict can be."
55 403 S.W.2d 36 (Ky. 1966).
reasonably have anticipated that his co-defendant would want to testify on his own behalf, and that perhaps this evidence might incriminate him.

The case raises a latent due process issue which affects all trials of multiple defendants. Where one lawyer must defend several accused persons should the court ever permit a single trial? It is submitted that the possibilities of conflicting interests require a summary order for separation.

In *Roe v. Commonwealth*, the Court of Appeals struck down the Kentucky statute regulating nudist societies. The Court held that state laws requiring a 20-foot brick, stone, or cement wall around the society's premises and payment of an annual tax of $1,000 by persons owning or operating the society were unconstitutional as an unreasonable exercise of police power. The Court indicated by way of dictum that the legislature could have obtained its objectives by far less stringent and more "reasonable" methods.

A study of recent Kentucky cases shows that the Court of Appeals has generally refused to strike down state regulatory legislation on grounds of reasonableness. It is questionable whether it should have done so on the grounds discussed here. A long line of Supreme Court precedents under the federal constitution holds that a state legislature has the right to pass any legislation it chooses, unless that legislation conflicts with some specific prohibition covered by the Bill of Rights, federal due process, the supremacy clause, or the like. The opinion does not intimate that any such conflict existed for the instant statutes, nor do the texts of the opinions cited by the Court as

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56 405 S.W.2d 25 (Ky. 1966).
57 See KRS §§ 232.010–050 (1942).
58 See Puckett v. City of Muldraugh, 403 S.W.2d 252 (Ky. 1966); Moore v. Ward, 377 S.W.2d 881 (Ky. 1964); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).
59 See Ferguson v. Skrupa, 372 U.S. 726 (1963); Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941); West Coast Hotel v. Parrish, 300 U.S. 379 (1937). See also HAND, THE BILL OF RIGHTS 70 (1958), which states:

Judges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary, they wrap up their veto in a protective veil of adjectives such as "arbitrary," "artificial," "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually, though quite incorrectly, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.

60 The thrust of the Court's argument goes solely to the police power aspect, but the case presented grave constitutional questions on the rights of freedom of religion and freedom of assembly. Appellants' offense consisted of conducting a church service on property situate in a remote section of Greenup County and (Continued on next page)
precedent indicate any such conflict. If, then, the statutes are unconstitutional under the state police powers, it must be because the Court of Appeals has limited the scope of the powers by specifications more restrictive than those of the Supreme Court.

Somewhere along the way the Court has apparently equated the prohibition against exercise of arbitrary power in section 2 of the Kentucky Constitution with a general requirement of "reasonableness" in the exercise of the police powers. In the first place, such a vague and indefinite criterion does not provide any sort of precise formula or automatic mechanism for deciding cases. The restrictive connotations of the term, however, (which in other contexts have been used to expand the Court's power inordinately, see, e.g., Moore v. Ward, and Jasper v. Commonwealth) are a plain recognition of the fact that the state legislature is to have the broadest leeway in areas where it has a general constitutional competence to act. Secondly, if comparison with other jurisdictions can be a factor in determining the "reasonableness" of discrimination in a state law, then, whatever may be one's personal opinion, the statute is probably "reasonable." Even the Court concedes that had the Legislature chosen to abolish the societies altogether it perhaps could have done so.

(Footnote continued from preceding page)

belonging to the appellants. The property was visible from a surrounding ridge on which sightseers carrying binoculars had assembled. Appellants had circulated an application for membership in their church, but only the property owners were participating in the service at the time of arrest. A sign warning people of the nudist church had also been posted on the road to the area. The attorneys' briefs indicate that appellants were sincere in their belief that certain Bible texts called upon them to establish their church. Reference is made to the fact that Adam and Eve were without raiment before the first sin, that King Solomon prophesied in the nude, that Christ's clothing was taken from him when he was crucified (Matthew 27: 31) and that in the third chapter of Isaiah it is written that all clothing will be taken from the people on the day of judgment and that ruin shall await those rulers who wear clothing (King James version).

The Kentucky Constitution, § 5 reads in part:

... and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

§ 2. "Absolute and arbitrary power denied. Absolute and arbitrary power over the lives, liberty and property of freemen, exists nowhere in a republic, not even in the largest majority."

The best examples of such permitted discriminations are United States v. Doremus, 249 U.S. 86 (1919) (upholding a special tax on the production or distribution of narcotics); McCray v. United States, 195 U.S. 27 (1904) (upholding a federal tax of $.10 per pound on colored oleomargarine while uncolored oleo was taxed at $.005 per pound). See also Veazie Bank v. Fenno, 75 U.S. (8 Wall) 533 (1869) (upholding a prohibitive tax on state bank notes).
Although the Court is to be commended for its dislike of the crawfish policy of driving an undesirable cult out of business by the taxing and police powers, historically this has not been a justifiable reason under federal due process for holding a statute unconstitutional. It is submitted that section 2 of the state constitution is but shorthand for the federal due process requirement and should be governed by the same rules. Such reasoning as the Court relies on here must necessarily end by being no more than a judicial attempt to write into state laws and the state constitution the Court's notions of good public policy. It is a power which no constitution confers upon any court in the land.

See Moore v. Ward, 377 S.W.2d 881, 885 where the Court said: "due process . . . of the Federal Constitution, is simply another way of presenting the argument that the Act is arbitrary under section 2 of the Kentucky Constitution." See also Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1963); 16 Am. Jur. 2d Constitutional Law § 266 (1964).
IX. CRIMINAL PROCEDURE

A. Right To Counsel

The past year saw several cases which were squarely within the problems created by recent Supreme Court rulings on self-incrimination and right to counsel. This section of the Court of Appeals Review will consider the serious constitutional issues in these Kentucky cases. In doing so, Escobedo v. Illinois¹ and its relation to these cases will be discussed first, followed by examination of the latest Supreme Court case, Miranda v. Arizona,² its implications for future state court cases, and a short discussion of the problems left unsolved.

The sixth amendment to the United States Constitution provides that every accused shall be entitled to the assistance of counsel in criminal proceedings.³ Gideon v. Wainwright⁴ made this right to counsel obligatory upon the States through the fourteenth amendment. However, the 1963 Gideon decision was merely the opening statement in what has become a series of attempts to settle problems surrounding an accused’s right to counsel.

One year later, the Supreme Court in the landmark decision of Escobedo v. Illinois⁵ attempted to pinpoint the exact moment when the right to counsel attached. This case has become the subject of sometimes heated, sometimes scholarly, debate and interpretation.⁶ Both state and federal courts, in assessing Escobedo’s implications, severely split on their conclusions.⁷ One line of courts has given a liberal interpretation to the broad language of Mr. Justice Goldberg in Escobedo:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting

² 86 S. Ct. 1602 (1966).
³ U.S. Const. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”
incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution...  

From such language, these courts determined that, when the process has focused on the accused with the purpose of eliciting incriminating statements, the right to counsel attaches without any action by the accused. Other courts attempted to limit the Escobedo decision to its facts. These courts, relying on the Escobedo language that the accused must have “requested and been denied an opportunity to consult with his [retained] lawyer...,” found that Escobedo did not apply to situations where there is no retained counsel nor in either situation—retained or appointed—unless a request has been made. These restrictive interpretations have been subjected to stinging criticism by the commentators. However, the Kentucky Court of Appeals followed the narrow view in deciding cases during the 1965-66 term.

One of these decisions, Scamahorne v. Commonwealth, involved the admissibility of an oral confession obtained during in-custody interrogation. The accused did not “request” counsel either before or after the questioning which led to an oral confession. However, when asked to transcribe his oral confession, he refused and requested counsel. Defendant was convicted on the basis of his oral confession.

10 A narrow reading is given in United States v. Robinson, 354 F.2d 109 (2d Cir. 1965); Edwards v. Holman, 342 F.2d 679 (5th Cir. 1965); Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964); United States ex rel. Townsend v. Ogilvie, 334 F.2d 887 (7th Cir. 1964); People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 63 (1964); State v. Fox, 151 N.W.2d 694 (Iowa 1964); Parker v. Warden, 203 A.2d 418 (Md. 1964); State v. Howard, 383 S.W.2d 701 (Mo. 1964); Bean v. State, 399 P.2d 251 (Nev. 1965); Hodgson v. New Jersey, 207 A.2d 542 (N.J. 1965); People v. Gunner, 15 N.Y.S.2d 226, 205 N.E.2d 852 (1965); Commonwealth ex rel. Linde v. Maroney, 206 A.2d 288 (Pa. 1965); Browne v. State, 131 N.W.2d 169 (Wis. 1965).
12 See cases cited note 10 supra.
13 Ibid.
14 See 54 Ky. L.J. 602 (1966) and cases cited therein.
16 Smith v. Commonwealth, 403 S.W.2d 686 (Ky. 1966). For other narrow interpretations see cases cited note 10 supra.
17 394 S.W.2d 113 (Ky. 1965).
The Court of Appeals, seizing upon the defendant’s failure to request counsel, distinguished Escobedo and affirmed. The Court then entered into an extended analysis of the waiver of right to counsel, concluding that, if any intelligent person who should know of his right to counsel fails to request it, there will be a presumption of waiver.18 This approach leaves unanswered the question of the degree of intelligence required for the presumption of waiver to apply. In Scamahorne, the Court “found” the requisite intelligence by commenting on the defendants’ behavior during the commission of the crime.

They had the intelligence to operate their automobile; leave it parked a mile from the crime; to grovel across a back field where no one was expected to see them; to sack up a 25-pound sledge hammer, a crow bar, a screw driver and other tools; to get to the back of the building wherein there was a possibility there was money; to run and hide behind the evergreens when the lights from the police cruiser appeared; to put up their hands when flashed on them, and ask the officers not to shoot. We think the appellants were sufficiently intelligent to know that anything they admitted could be used against them, and to know they had a right to counsel and a right to waive counsel.19

The Court’s application of the test leads one to conclude that it believes the mechanics of pulling a heist are on an intellectual par with constitutional interpretation. Clearly there are conceptual and practical difficulties presented by use of the objective tort test of the hypothetically reasonable man, i.e., “known or should have known.”

This conclusion was borne out in a later case involving the admissibility of a written confession.20 In that case, no warning was given the accused of his right to remain silent or to have counsel. The interrogating officers testified that they did not warn the defendant because they already “knew” he had earlier made an oral confession. The Court, considering this along with the fact that the defendant had not testified to the circumstances of his oral confession, presumed therefore that it must have been completely voluntary. By making this presumption, the Court skirted the problem of right to counsel at interrogation. Moreover, it lapsed into an obiter discussion, saying that Escobedo applied only where the defendant requested counsel and this request was denied.21

This decision put on the accused the burden of proving the involuntary character of a confession, despite the Supreme Court’s words in Carnley v. Cochran:22 “[I]t is settled that where the as-

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18 Id. at 116-17.
19 Ibid.
21 Id. at 688.
sistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Although Carnley involved counsel at the trial stage, it seems that after Escobedo the proposition would apply with equal force during interrogation to help the accused not only utilize his fifth amendment privilege against self-incrimination but also generally prepare his defense.

Further, Escobedo stated that the right to representation, to be effective, must be provided early and that, so far as the defendant is concerned, the time commencing immediately after arrest is one of the most critical stages in the criminal process. At this stage the arrestee can be taken to a back room of a police station for interrogation. The proceedings conducted in those rooms are not of record, and the only transcript of them is the policemen's testimony. At this point, the clear effect of the Kentucky Court's decision is to place on the accused the burden of proving the confession involuntary. In reality, the police have conducted an unrecorded trial in the stationhouse and merely give their oral version of it when called to testify. It was with respect to this "Kangaroo Court" that Mr. Justice Goldberg, speaking for the majority in Escobedo, wrote:

The rule sought by the state here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel" at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.\(^2\)

The only way to avoid an unequal swearing contest between policemen and a lone defendant as to what occurred in the stationhouse is to place on the state the burden of proving the confession was voluntary. Thus, it seems that the Court of Appeals' approach in this second case again went contrary to the spirit, if not the letter, of Escobedo.

The question of waiver was involved in still a third case decided last term by the Court. In Hamilton v. Commonwealth,\(^2^4\) the defendant was in the custody of military authorities. Prior to questioning, they warned the defendant of his right to remain silent. After they read to the defendant a statement of a co-defendant which implicated him, he requested counsel. At this point, the questioning officer, following the mandate of Escobedo, stopped the interrogation and attempted to obtain counsel for the accused. Unable to do so, the officer informed the accused that after a request was made the law did not permit further questioning and he would be forced to surrender

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\(^2^3\) 378 U.S. at 487.
\(^2^4\) 401 S.W.2d 80 (Ky. 1966).
the accused to the custody of the civilian authorities. Informed of this prospect, the accused waived his right, and the subsequent interrogation led to his "voluntary" confession. This confession was admitted into evidence in the state criminal prosecution which resulted in a conviction. The Court of Appeals affirmed, after concluding that the procedures in *Hamilton* met all the requirements of *Escobedo*. Undoubtedly, this is a close case, as the accused was warned of his right to remain silent, and he also exhibited a knowledge of his constitutional rights when he requested counsel even though the officers had not informed him of this right. The Court found that the waiver was made with full knowledge of the consequences and therefore lawful. Under a liberal interpretation of *Escobedo*, the question would be whether the officers' whipsawing the accused between continuing with interrogation and being turned over to state police was implied coercion which caused the waiver of right to counsel and rendered the confession inadmissible.

The previous discussion does not show the present state of the law on the admissibility of statements obtained through in-custody interrogation. A Supreme Court decision on June 13, 1966, has helped clear the muddied waters in this area. This decision, *Miranda v. United States*, made crystal clear the Supreme Court's intention to enforce all of the essential principles of the Bill of Rights through the fourteenth amendment at the exact point where individual freedom comes into conflict with police powers. The judge-made rules of *Miranda* do not apply to the three Kentucky cases decided last term nor to any case in which the trial was held before June 13, 1966. However, even though *Miranda* is not retroactive, it is hoped that the Kentucky Court, when deciding pre-*Miranda* cases, will apply *Escobedo* liberally and give effect to the spirit of *Miranda*. Since Kentucky practitioners now have, and the Court of Appeals will soon have, cases in which *Miranda* is the applicable law, it is advisable to briefly discuss the case, its specific holding and a few of the unresolved problems.

On March 13, 1963, Ernesto Miranda was arrested and taken to a Phoenix police station. He was there identified by the complaining witness. The police then took him to Interrogation Room No. 2 of the detective bureau, where he was questioned by two police officers. The officers admitted at trial that Miranda was not advised of his right to have an attorney present. Two hours later, the officers had obtained a written confession, signed by Miranda. At the top of the statement

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26 Johnson v. New Jersey, 86 Sup. Ct. 1772 (1966) (*Miranda* held to apply only to cases coming to trial after June 13, 1966).
was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity, and "with full knowledge of all my legal rights, understanding any statement I make may be used against me." At the trial, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified as to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty. Holding that Miranda's constitutional rights were not violated, the Supreme Court of Arizona emphasized heavily Miranda's failure to specifically request counsel. Miranda appealed, and the Supreme Court granted certiorari. Held: Reversed. Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation. Nor was Miranda's right not to be compelled to incriminate himself effectively protected in any other manner. The Court found that, absent these warnings, a confession obtained was inadmissible. The typed waiver clause was considered insufficient to constitute the knowing and intelligent waiver required to relinquish constitutional rights.

Miranda was only one of five post-Escobedo cases, which the Court decided together in an attempt to clarify the confusion resulting from the Escobedo language. To this end, some very specific rules were set forth succinctly in Chief Justice Warren's opinion:

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27 One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally. MEDALIE, FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION 244 n.67 (1966).

28 One case interpreting the intelligent waiver requirement is Haley v. Ohio, 332 U.S. 596 (1948). In that case a fifteen-year-old defendant read and signed a confession in which the last line contained this “waiver” clause: "the law gives you the right to make this statement or not as you see fit." The Supreme Court held that the defendant could not have appreciated the true significance of the statement and reversed. In other words, a more explicit waiver is required.

29 Prior to Miranda, the Oregon Supreme Court and the Second Circuit had opportunities to rule on waiver cases and held the following sufficient:

1. "I know that I am not required to make any statement and I know that any statement I make may be used against me in criminal proceedings in court." State of Oregon v. Neely, 398 P.2d 482 (Ore. 1965).

2. "You need not make a statement but if made, it might be used against you in any trial of the charges in question." Lyles v. Beto, 329 F.2d 332 (2d Cir. 1964).

It is interesting to note that both of these valid waivers would now be suspect since Miranda seems to require the presence of counsel in order to waive the right to counsel and the right to remain silent. The position of the Supreme Court as stated through the language in Haley and the Miranda decisions is that a defendant cannot appreciate the legal consequences of his actions and the presence of counsel under the sixth amendment is the only effective way to protect the fifth amendment privilege.
The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any other significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required:

Prior to any questioning, the person (taken into custody) must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.30

Thus, Miranda requires a four-fold warning to be given the accused prior to any in-custody interrogation by police officers. The individual must be warned that he has an absolute constitutional right to remain silent,31 that any statement he does make may be used as evidence against him,32 that he has the right to have counsel present,33 and that, if indigent, he has the right to appointed counsel.34 By presenting its holding with great specificity, the Court made an earnest attempt to avoid the problems created by the broad language of Escobedo.

In explaining the first requirement, that an individual has a constitutional right to remain silent, the Court said: "If a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has a right to remain silent."35 The Court made it clear that this protection must be extended to everyone, including those who should have known of the right. This holding seems to abolish the totality of the circumstances approach.36

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31 Id. at 1624.
32 Id. at 1625.
33 Ibid.
34 Id. at 1627.
35 Id. at 1624.
36 The totality of the circumstances rule is a test used by the Court to determine whether a defendant was aware of his rights. The age, intelligence, education, prior contact with authorities, and the defendant's behavior in the instant case all serve to make up the totality of the circumstances. See Crooker v. (Continued on next page)
which was previously used in determining whether, on the face of a silent record, an accused was aware of his rights. The Court said: "We will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 37 The rationale behind this rule was that such inquiries could "never be more than speculation," 38 while "a warning is a clear cut fact." 39 The Court pointed out a secondary purpose of the warning: to "overcome its [in-custody interrogations] pressures and to insure that the individual knows he is free to exercise the privilege..." 40

The purpose of warning the accused that "any statement he does make may be used as evidence against him" 41 is to make known to him the consequences of foregoing the right to remain silent. The Court asserted that a warning to an accused of his right to consult a lawyer and to have one with him during the interrogation will, as stated in Malloy v. Hogan, assure the individual’s right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." 42

After Miranda, the rule is that, if the prescribed warnings are not given, there is a presumption against waiver and the burden is placed on the police to prove the voluntariness of any confession. This new approach will change several of the Kentucky Court’s past practices. For instance, the Court of Appeals in Scamahorne apparently used the totality of the circumstances rule in finding an awareness of his rights from the defendant’s behavior, viewed in light of the reasonable man test (i.e., known or should have known). Miranda specifically overrules this procedure by stating: "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, are speculation; a warning is a clearcut fact." 43 This holding also reverses the current Kentucky practice of presuming a confession valid on the basis of a silent record. 44 Miranda also reiterated the high standards set out in Johnson v. Zerbst 45 for proving waiver of constitutional rights. The Court stated that the police must prove that the defendant knowingly and intelligently waived his

(Footnote continued from preceding page)
38 Ibid. See note 36 supra.
39 Id. at 1625.
40 Ibid.
41 Ibid.
44 Smith v. Commonwealth, 402 S.W.2d 686 (Ky. 1966).
privilege against self-incrimination and his right to retained or appointed counsel. The policy behind the Court's decision to apply these high standards to waivers made during in-custody interrogations is that, since the state is responsible for the incommunicado interrogation and has the only means of proving that the required warnings were given, then the burden rightfully rests on its shoulders.\textsuperscript{46} One interesting aspect of the waiver question is the Court's statement that where in-custody interrogation is involved there can be no valid contention that the privilege is waived if an individual answers some questions prior to its invocation. Thus, it seems that one can do in the interrogation stage that which is impermissible at the pre-trial grand jury hearings,\textsuperscript{47} \textit{i.e.}, an accused may waive his privilege at one point without being estopped from later asserting it.\textsuperscript{48}

The practical effect of the Court's presumption against waiver clearly places a heavy burden on the police. The State must establish that the waiver was made knowingly, intelligently, and with full appreciation of the consequences. To understand the magnitude of the burden, one need only visualize any lay defendant "appreciating" the consequences of admitting the commission of a felony, when he is under indictment for a felony-murder prosecution,\textsuperscript{49} or the effect under state law of admitting complicity in a crime.\textsuperscript{50} Thus, it seems that one will virtually need counsel in order to waive counsel.

Another noteworthy feature of the \textit{Miranda} opinion is the Supreme Court's new conceptual approach in this area. In \textit{Gideon}, the Court characterized the problem as one involving the sixth amendment right to counsel. It nurtured this approach and applied it at different stages of the criminal process in a series of subsequent cases from \textit{White v.}

\begin{itemize}
\item \textsuperscript{46} 86 Sup. Ct. at 1628.
\item \textsuperscript{47} The Court shows how privilege of self-incrimination in pre-trial proceedings differs from trial proceedings. In Rogers \textit{v.} United States, 340 U.S. 367 (1951) the Court held that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others. Yet in \textit{Miranda} the Court specifically held that there would be no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. The Court made an attempt at distinguishing the apparent inconsistency between the two holdings by saying that no legislative or judicial fact-finding authority was involved in the interrogation process. Further, there is no possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.
\item \textsuperscript{48} 86 Sup. Ct. at 1627.
\item \textsuperscript{49} California \textit{v.} Stewart, 86 Sup. Ct. 1602, 1639 (1966), a companion case to \textit{Miranda}, the defendant confessed to a robbery but denied the homicide connected therewith. The defendant never appreciated the fact that he was facing a felony murder prosecution. In order to understand the complexities of the law, it seems that one must have counsel before any "intelligent" waiver can be made.
\item \textsuperscript{50} In \textit{Escobedo}, the defendant admitted to complicity in a robbery not knowing that under Illinois law his punishment was the same.
\end{itemize}
Maryland to Massiah v. United States, culminating in Escobedo v. Illinois. After Escobedo, the Court was plagued by cases involving the point at which the right to counsel arose and the acts needed to secure it. In the post-Escobedo cases, it dealt with these problems by skirting difficult questions raised by the right to counsel approach and adopting the "Compulsion" doctrine. This doctrine is based on the fifth amendment guaranty that no person may be compelled to incriminate himself. The Court stated that since the purpose of the privilege is to prevent compulsion, warnings are necessary from the outset of in-custody interrogations, because they are inherently coercive. By adopting this approach, the Court merely holds that the right to counsel attaches when it becomes necessary to protect and effectuate the purposes of the fifth amendment privilege.

Miranda also attempted to deal with the problems which had developed after Escobedo as to the effort required to invoke the right. This presented the questions of whether a request is necessary and the appointed counsel problem. The Court solved this by stating "an individual need not make a pre-interrogation request for a lawyer. While such requests affirmatively secure his right to have one, his failure to ask for a lawyer does not constitute a waiver." The Court supported this statement by citation to a California Supreme Court decision and one of its own decisions. Addressing itself directly to the indigency problem, the Court held: "The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals." The Court rationalized its holding by citing statistics that a majority of the past cases before the courts involved those unable to retain counsel. It then reached the "Lawyer

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55 Id. at 1626.
56 People v. Dorado, 42 Cal. Rptr. 169, 177-78, 62 Cal. 2d 338, 351, 398 P.2d 861, 369-70 (1965) wherein that court stated:
Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant, who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it.
58 86 Sup. Ct. at 1626-27.
59 Estimates of 50-90 per cent indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 MINN. L. REV. 737, 738-39 (Continued on next page)
in the Stationhouse” argument presented by several critics of recent Court decisions. The Court asserted that its decision did not go that far because the police had an alternative to securing counsel for an accused: they could stop interrogation once an indigent requested counsel. Thus, the police can either find counsel for an indigent or stop questioning him.

Miranda represents an attempt to formulate Black-letter Judge-made rules relatively free of ambiguity. Although at first blush one might conclude that the Court’s warning requirements will hamper police interrogation, such probably will not be the case. Moreover, the Court did not arbitrarily formulate these rules, but borrowed liberally from practices of the Federal Bureau of Investigation and from the English Judges Rules.

However, even the specificity of Miranda did not solve all the problems. The Court stated that the prosecution could not use any statements stemming from custodial interrogation unless it demonstrated the use of procedural safeguards to secure the privilege against self-incrimination. From this language, Miranda clearly applies when the defendant is undergoing in-custody incommunicado interrogation in the stationhouse. However problems arise as to arrests made on the street or questioning of an arrestee in a police car. Does Miranda apply in such situations? A more difficult situation arises when the police are forced to question a defendant after he has requested counsel because of the nature of the case, e.g., kidnapping. Are the police faced with the choice between endangering the victim and rendering inadmissible all the evidence obtained from the quizzing? Admittedly, these are hard situations, but they may be presented to

(Footnote continued from preceding page)


60 See, e.g., 54 KY. L.J. 602 (1966).
61 See KAMBAR, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in CRIMINAL JUSTICE IN OUR TIME 64-51 (1965). As was stated in the REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963): When government chooses to exert its powers in the criminal area, its obligation is merely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused’s liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.
63 86 Sup. Ct. at 1633, 1634 n.57.
64 Id. at 1612.
65 Id. at n.4.
66 Id. at 1612.
courts in the future. The Court has attempted to solve the pressing problems presented by *Escobedo*, and only time will tell whether *Miranda* clarified or confused the right to counsel area.

At any rate, it is clear that *Miranda* would have required a different decision in last term's three Kentucky cases, *Scamahorne*, *Smith*, and *Hamilton*. The future will reveal whether *Miranda* will unduly hinder police investigation of crime; the commentators are already in disagreement on this point. At the very least, *Miranda* should benefit the state and lower federal courts because the Supreme Court has made crystal clear its intention to enforce all of the essential principles of the Bill of Rights through the fourteenth amendment at the exact point where individual freedoms are threatened by coercive police practices.

The Court last term also decided cases which involved complaints of ineffective assistance of counsel.

### B. Pretrial

1. **Indictment.**—Fundamentally, an indictment is an accusation in writing found and presented by a grand jury on oath of affirmation as a true bill, charging a defendant with some act or omission to act which, by law, is a public offense. An indictment may originate upon the initiative of a grand jury legally convoked and sworn to the court to which it is impaneled, or it may be found and presented pursuant to a written accusation drawn up and submitted to such grand jury by the public prosecuting attorney. There is no right to an examining trial where an indictment has been returned pursuant to a direct

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68 In *Himes v. Commonwealth*, 404 S.W.2d 281 (Ky. 1966), the defendant became dissatisfied with counsel whom the judge felt were doing a satisfactory job. However, the judge dismissed the original counsel and appointed new counsel. Prior to such action he warned defendant that he would allow only a one hour continuance for new counsel to prepare if defendant insisted on new counsel. Defendant still requested new counsel. On appeal he claimed that the judge should not have allowed him to finish trial with such inadequately prepared counsel. The Court found an intelligent waiver since the judge had warned the defendant of this problem and the defendant still chose to have new counsel. In *Fultz v. Commonwealth*, 398 S.W.2d 881 (Ky. 1966), the defendant went to trial represented by appointed counsel. Mid-trial, the defendant became dissatisfied with his counsel and asked the court to dismiss him. The judge said that he believed the attorney was doing a good job and would not appoint another, but that the defendant could continue without counsel if he so desired. The defendant chose this option and finished the trial defending himself. The Court held this to be a waiver of the right to effective assistance of counsel. In *Henderson v. Commonwealth*, 396 S.W.2d 313 (Ky. 1965), the defendant had counsel appointed long prior to trial. However, the attorney appointed became unable to serve and defendant was without counsel for some short period of time. The Court held that the right to counsel is only essential at critical stages, and it is not necessary for a defendant to have counsel at every moment from the time he is charged until the end of the trial.
submission of evidence before a grand jury. The indictment clearly satisfies the express mandate of the sixth amendment that an accused be informed of the nature and cause of the charge against him.

It is basic to this constitutional right that a defendant is entitled to insist that an indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and can protect himself after judgment against another prosecution on the same charge. Therefore, no indictment is sufficient if it does not allege all of the elements which constitute the crime.

Pursuant to this fundamental concept, it has long been the rule in Kentucky that amendment to an indictment will be permitted only where such amendment does not charge a new or different offense and where there is no resultant substantive change in the indictment which could in any way prejudice the defendant's substantive rights. But an indictment will not fail for want of technical details, and amendment is to be freely permitted where the change does not go to the substance. Thus, the Court held last term that alterations which do no more than change the date when the offense was committed, allege the victim was wounded, or correct an erroneous statutory citation, are permissible.

Liberality in allowing amendments which charge no new offense and in no way prejudice defendant's substantive rights does not violate any constitutional guarantee, and such policy is consistent with the liberal interpretation given the Federal Rules of Procedure by the federal courts. The Court held that an indictment which sets forth a plain, concise, and definite statement of the essential facts constituting the specific offense is sufficient within the constitutional mandate.

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60 Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965).
61 U.S. CONST. amend. VI provides:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
63 See Brown v. Commonwealth, 378 S.W.2d 608 (Ky. 1964); Kinmon v. Commonwealth, 255 S.W.2d 987 (Ky. 1953); Hooper v. Commonwealth, 250 Ky. 405, 63 S.W.2d 467 (Ky. 1933).
64 Stephens v. Commonwealth, 397 S.W.2d 157 (Ky. 1965).
65 Cavitt v. Commonwealth, 397 S.W.2d 54 (Ky. 1965).
66 Ward v. Commonwealth, 399 S.W.2d 483 (Ky. 1966); Botkins v. Commonwealth, 394 S.W.2d 583 (Ky. 1965).
67 Bullock v. United States, 265 F.2d 683 (6th Cir. 1959).
68 Botkins v. Commonwealth, 394 S.W.2d 586 (Ky. 1965).
and an action based upon such an indictment will not fail due to technical discrepancies.\textsuperscript{78}

2. Habitual Criminal Statutes.—The defendant in Spears v. Commonwealth,\textsuperscript{79} for the third time, was convicted of illegally selling liquor. Two counts of the indictment charged him with having been convicted of similar offenses in quarterly court on two other occasions. On appeal defendant contended, \textit{inter alia}, that it was error to charge him with a felony under the Habitual Criminal Statute.\textsuperscript{80} He argued that, although a specific statute\textsuperscript{81} provides that quarterly courts have concurrent jurisdiction with circuit courts when the penalty does not exceed $100 fine and 60 days incarceration, quarterly courts may not give punishments for second offenses,\textsuperscript{82} and therefore both previous convictions should be considered as first offenses. Circumventing this argument, the Court reasoned that the statute was more concerned with the number of offenses than with the accumulation of punishment. It was not the purpose of the statute that an offender be immune from conviction under the Habitual Criminal Act if the second offense had not been meted increased punishment.

In Rodgers v. Commonwealth\textsuperscript{83} the Court stated very specifically what shall constitute a valid and sufficient instruction under the Habitual Criminal Statute. Holding that every factual question must be submitted to the jury, the Court reasoned that failure to instruct on prior convictions was error. There must be, said the Court, an instruction on the primary crime; an instruction on the primary crime and either previous conviction; a third instruction on the primary and two previous convictions which together constitute a felony under the statute; and a fourth instruction on reasonable doubt. This decision was well within the bounds of existing law.\textsuperscript{84}

Similarly, Wilson v. Commonwealth\textsuperscript{85} held that a defendant's sixth amendment guarantee of a fair trial by impartial jury and his rights under due process of law were not violated when, pursuant to the Habitual Criminal Statute, two former convictions were introduced to the jury for joint consideration along with the issue of the specific crime alleged. The Court, with one dissent, affirmed a recent deci-

\textsuperscript{78} Wheeler v. Commonwealth, 395 S.W.2d 565 (Ky. 1965); Brock v. Commonwealth, 391 S.W.2d 693 (Ky. 1965).

\textsuperscript{79} 399 S.W.2d 693 (Ky. 1966).

\textsuperscript{80} KRS § 431.190 (1963).

\textsuperscript{81} KRS § 242.990 (1942).

\textsuperscript{82} Crabtree v. Commonwealth, 278 S.W.2d 732 (Ky. 1955).

\textsuperscript{83} 399 S.W.2d 693 (Ky. 1966).

\textsuperscript{84} 399 S.W.2d 693 (Ky. 1964).

\textsuperscript{85} 403 S.W.2d 705 (Ky. 1966).
sion,\textsuperscript{86} which upheld the constitutionality of the Habitual Criminal Statute as a wholesome, time-tested, and approved rule which should not be discarded even in the wake of what might be called the "'evolution and revolution' in thinking."
\textsuperscript{86a}

The recurrence of litigation challenging the validity of the Habitual Criminal Statute reflects divergent opinions not only within the Kentucky Court of Appeals, but also among the states and the federal circuits. The position of the Kentucky Court is in line with certain federal circuits which uphold the procedure a la Wilson\textsuperscript{87} and with earlier decisions of the Supreme Court to the effect that such statutes do not put a defendant in double jeopardy for the same offense.\textsuperscript{88}

There is other state and federal authority,\textsuperscript{89} however, which contends, as does the Wilson dissent, that an accused can never have a trial unaffected by prejudice or by considerations which should not influence the jury, if during the trial the jury is informed that the accused has previously been convicted of certain crimes and evidence of his former convictions has been introduced.

There is also the renewed attack on Habitual Criminal Statutes as putting a defendant in double jeopardy for the same offense. But such consideration finds only token judicial authority in the dicta of the majority opinion in \textit{Chewing v. Cunningham}\textsuperscript{90} where Mr. Justice Douglas of the United States Supreme Court suggested that the possibility might be considered by an imaginative lawyer. Although Justice Douglas expressly declined to discuss the point further, this suggestion might indicate that prior Supreme Court decisions on the point\textsuperscript{91} are ripe for reconsideration.

The proper procedure under the enlightened viewpoint of the Wilson dissent is first to obtain a verdict on one part of the indictment, \textit{i.e.}, the present crime, and then to read to the jury that part of the indictment dealing with defendant's prior convictions, allowing the latter to be considered only in determining the degree of punishment. Clearly enough, if such procedure were adopted in Kentucky, the use and application of the Habitual Criminal Statute would be severely restricted; in the light of arguments to which the Court in \textit{Jones

\textsuperscript{86} 401 S.W.2d 68 (Ky. 1966).
\textsuperscript{86a} Ibid. at 70.
\textsuperscript{87} Breen v. Beto, 341 F.2d 96 (5th Cir. 1965).
\textsuperscript{88} Gryger v. Burke, 334 U.S. 728 (1948); Moore v. Missouri, 159 U.S. 673 (1895).
\textsuperscript{89} See Lane v. Warden, Md. Penitentiary, 320 F.2d 179 (4th Cir. 1963); State v. Ferrone, 96 Conn. 160, 113 Atl. 452 (1921); Harrison v. State, 394 S.W.2d 713 (Tenn. 1965).
\textsuperscript{90} 368 U.S. 443 (1962).
\textsuperscript{91} See text at note 88 supra.
referred as "so-called 'evolution and revolution' in thinking," it would not be too far afield to predict such an occurrence, eventually. Before that event, however, perhaps the Supreme Court will resolve the conflict among the circuits and establish a uniform rule applicable to the states as well.

C. Venue

The defendant in Brunner v. Commonwealth was twice tried for knowingly receiving stolen property. The first trial resulted in a hung jury but the second yielded a conviction. Prior to each trial, defendant, in compliance with the statute, filed his petition together with affidavits for change of venue. As grounds for relief he alleged widespread publicity and resulting prejudice. In both instances the Commonwealth failed to controvert the defendant's application by counter-affidavits or testimony. Nevertheless, both of defendant's applications were denied without a hearing. Not until after the second trial and after motion for a new trial did the Commonwealth file affidavits of persons stating their belief that an unbiased jury could be procured.

In reversing the conviction and directing a trial de novo, the Court reaffirmed its definite criteria as to the procedure for change of venue under KRS § 452.220(2). Echoing its prior position that defendant has the burden to make out a prima facie case for change of venue, the Court asserted that where proof presented is adequate under the statute and is uncontradicted by proof on behalf of the Commonwealth, the trial judge has no discretion and must grant the motion. The Court made it clear that, when a defendant complies with the statutory provisions and the Commonwealth fails to controvert, a change of venue should be granted as a matter of right.

Pointing to its decision in Brunner as outlining the proper procedure for obtaining a change of venue, the Court subsequently denied a motion for rehearing where defendant's application failed to

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92 395 S.W.2d 382 (Ky. 1965).
93 KRS § 452.220(2) (1942) provides:
If the application is made by the defendant, it shall be made by petition in writing, verified by the defendant, and by the filing of the affidavits of at least 2 other credible persons, not akin to or of counsel for the defendant, stating that they are acquainted with the state of public opinion in the county objected to, and that they verily believe the statements of the petition for the change of venue are true. The Commonwealth's attorney or, in his absence from the county, the county attorney shall be given reasonable notice, in writing, of the application. If objections to all the adjoining counties are made and sustained, the change shall be made to the nearest county to which there is no valid objection, preference being given to counties of the same judicial district.
95 ROBERSON, NEW KENTUCKY CRIMINAL LAW AND PROCEDURE § 162, at 254 (2d ed. 1927).
address itself to conditions existing at the time of trial. Likewise, in another case it held that if a motion for change of venue is made without verification or support of affidavits it fails to comply with the statutory provisions and may be denied.

**D. Judges' and Attorneys' Conduct During Trial**

In general the law concerning the conduct of judges and attorneys during trial was little affected by the decisions of the Court during the past term, the major decisions in this area being but an affirmation and clarification of existing law. However, in *Collins v. Commonwealth* the Court was presented with a unique situation of first impression.

KRS § 455.090(1) grants a defendant the right not to testify and provides that his failure to do so shall not be commented upon or create any presumption against him. Obviously the statute is based on the fifth amendment right against self-incrimination and was designed to deal with possible abuses by the prosecution. However, in *Collins*, it was the defendant who was seeking to comment upon his own refusal to testify. Holding that the trial court did not err in preventing him, the Court construed the statute to mean that, where a defendant refuses to testify, all parties, as well as the court, must remain silent.

If the statute and its underlying policies are primarily for the protection of the defendant, it is perhaps unreasonable to construe the statute to mean that the defendant cannot comment. The argument will invariably be made that defendant's silence in itself raises a presumption against him, that the prohibition against all comment is therefore insufficient, and that defendant ought to have the right to rebut the impression generated by his silence. On the other hand it can be argued that, if defendant is allowed to comment in the absence of a like privilege on the part of the prosecution, the result would be too much protection for the defendant, i.e., in addition to the privileges of refusing to testify and having the prosecution not comment on that refusal, defendant would be able to affirmatively defend his inaction without fear of a rebuttal. Of course this objection would lose much of its force if the defendant's comment on his own refusal to testify was regarded as a waiver of his statutory privilege, thereby permitting rebuttal by the prosecution. Still another objection against allowing

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96 Howard v. Commonwealth, 395 S.W.2d 355 (Ky. 1965).
97 White v. Commonwealth, 394 S.W.2d 770 (Ky. 1965).
98 Griffin v. California, 380 U.S. 609 (1965); Stewart v. United States, 366 U.S. 1 (1961); DeLuna v. United States, 308 F.2d 140 (5th Cir. 1963); Roberts v. United States, 137 F.2d 413 (4th Cir. 1943).
100 Bradley v. Commonwealth, 261 S.W.2d 642 (Ky. 1953).
the defendant to comment is that such a rule would permit evidence otherwise irrelevant, for instance, defendant's speech impediment, to be admitted into the record.

The conduct of the trial judge was at issue in Davidson v. Commonwealth,\(^{101}\) where a Commonwealth's witness refused to answer whether he had pawned stolen property to appellant. At that point the trial judge asked the witness if he were afraid of the appellant or if anyone had threatened him concerning his testimony. On appeal, it was held that this questioning reflected the trial judge's opinion that appellant was possibly the type of person who would intimidate a witness. Since appellant's good faith and lack of knowledge were the major questions before the jury, the judge's opinion could have influenced the verdict and thus was prejudicial. In so holding the Court stated that a trial court's discretion in questioning a witness must be used carefully and in conformity with the standards of impartiality governing his judicial office. When asking such questions in the presence of the jury while issues are still in the balance, the judge should not disclose personal opinions.\(^{102}\) But as with all matters within the discretion of the trial judge, the Court will not disturb the ruling in the absence of a positive showing of abuse of discretion.\(^{103}\)

A question of misconduct of the prosecuting attorney was before the Court in Gossett v. Commonwealth.\(^{104}\) Appellant contended that where the Commonwealth's attorney in his closing argument comments on the failure of defendant's wife to testify either for or against her husband, it is prejudicial misconduct violative of defendant's rights of privileged communications under KRS § 421.210. Pointing to that statute, the Court sustained appellant's contention, reversed the conviction, and remanded the case for new trial. Communications between husband and wife are privileged, and comments by the prosecution on the failure of one or the other to testify are improper as prejudicial to the substantive rights of the defendant.

### E. Evidence

While classifications are usually artificial and per force overlapping, the criminal law section on evidence has been divided into two parts—admission and sufficiency. The first section will generally

\(^{101}\) 394 S.W.2d 911 (Ky. 1965).

\(^{102}\) For discussions see Kennedy, Judge-Jury-Counsel Relations in Kentucky, 54 Ky. L.J. 243 (1965); Lukowski, The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence, 55 Ky. L.J. 121 (1966).

\(^{103}\) Tussey v. Commonwealth, 397 S.W.2d 166 (Ky. 1965).

\(^{104}\) 402 S.W.2d 837 (Ky. 1966).
discuss questions of the proper use of testimony taken outside the courtroom, various problems having to do with competency, relevancy, and materiality, and the issue of privilege. In the second section the discussion will relate to the principles used in determining the requisite weight of evidence for conviction, and the comparative weight of different kinds of evidence.

1. Admission of Evidence.—The problem of the "turncoat" and the absent witness seems to be occurring with "increasing frequency," said the court in Thacker v. Commonwealth, and prosecutors and defense attorneys alike have resorted to various home remedies to cure the evil. When one principal witness failed to appear at a second trial on the merits, and another witness appeared, but was hesitant to answer the same questions put to her successfully in the first trial, an enterprising Commonwealth's attorney in Thacker read into the evidence the uncontested testimony of the absent witness elicited at the previous trial and at the grand jury indictment.

In two other cases where a witness testified contrary to expectations, an attempt was made to impeach the testimony. In McQueen v. Commonwealth, the prosecutor sought to bring in contradictory statements made at the time of arrest by his supposedly cooperative witness, who ultimately failed to give the favorable testimony expected of him. In McGee v. Commonwealth, where the same problem arose for a defense attorney, counsel requested permission to play back a tape recording of the witness' testimony taken one day after the homicide. In each of these two cases the remedy attempted was unsuccessful.

In Thacker the Court laid down the guidelines for dealing with the absent witness. The Court held that in order to allow testimony at an earlier trial to be introduced at a later trial, the moving counsel must meet three requirements: he must let the judge know (1) that the witness is not available, (2) that a subpoena had been timely served upon him, and (3) that a diligent search had been made for the witness to no avail. The Court held that the reading of the testimony was proper in Thacker since opposing counsel had had an unrestricted opportunity to cross-examine at the previous trial, and the other elements were present.

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105 401 S.W.2d 64, 68 (Ky. 1966).
106 393 S.W.2d 787 (Ky. 1966). See also Rowe v. Commonwealth, 394 S.W.2d 751 (Ky. 1965) (impeachment of own witness).
107 395 S.W.2d 378 (Ky. 1966).
108 See RCr 7.12, 7.10 and 7.20. See also Noe v. Commonwealth, 396 S.W.2d 808 (Ky. 1965). This case laid down the criteria for admitting transcribed
(Continued on next page)
With respect to the so-called "turncoat witness" the Court was less generous. The attorney, by leave of court, shall only be permitted to examine his witness in closed chambers in an effort to refresh his recollection. If the witness persists in his lack of memory it would be inappropriate to have the purported testimony read to the jury. Citing Davidson v. Commonwealth,109 and McQueen v. Commonwealth,110 the Court reaffirmed the rule that such "negative testimony" was not prejudicial and thus not subject to impeachment by the grand jury testimony. McQueen stands for the proposition that if a witness has given merely negative evidence or has failed to make statements expected of him, the party calling the witness cannot contradict him by showing prior inconsistent statements. The evidence has not been prejudicial and there is thus no ground for impeachment. The holding is in line with the authorities.111

In McGee, however, it was a Commonwealth's witness whom the defense attorney sought to impeach by the use of the taped testimony. The witness' story had varied from the recording—or so it was claimed. In denying counsel the right to so impeach the witness, the Court held that no proper foundation had been laid for the recording. The Court relied upon Commonwealth v. Brinkley112 that recordings are admissible into evidence only if the proper foundation is laid. Such foundations included, (1) a showing that the device was capable of taking testimony, (2) the operator was competent, (3) the device was authentic, (4) there were no changes, additions, or deletions in the testimony, (5) the tape was carefully preserved, (6) the speakers were identified, and (7) the testimony was elicited without duress.

Brinkley seems to be a proper application of the rule on laying proper foundations for evidence. However, it is one thing to require

(Footnote continued from preceding page)

testimony of witnesses who failed to appear in response to subpoena but who had appeared on an earlier date, originally set for trial, and had then given their depositions. The Court relied on dicta in Pointer v. Texas, 380 U.S. 400 (1965), where the Supreme Court said that the result would be different if the statement had been taken at a "full-fledged" hearing with the defendant having a complete and adequate opportunity to cross-examine. This was construed as not to require a public hearing in a courtroom. The decision seems correct. The right of confrontation guaranteed by the state and federal constitutions is not violated per se by the use of depositions in evidence. 109 394 S.W.2d 911 (Ky. 1965). 110 393 S.W.2d 787 (Ky. 1965). 111 See Harlan Pub. Serv. v. Eastern Constr. Co., 254 Ky. 135, 71 S.W.2d 24 (1934); Champ v. Commonwealth, 59 Ky. 17 (1859); Travelers Ins. Co. v. Herman, 154 Md. 171, 140 Atl. 64 (1928). See 58 Am. Jur. Witnesses § 800 at 446 (1948) stating: "Where the testimony of a witness is not prejudicial to the party calling him, the credibility of the witness is immaterial, and no reason exists for impeaching him. It is not sufficient that the witness merely fails to testify to a material fact." 112 362 S.W.2d 494 (Ky. 1982).
a careful showing of authenticity for taped evidence in chief, as in Brinkley, and it is quite another thing to place the same burden upon counsel who has taken the testimony only for impeachment purposes. The job of negating the value of the tape should properly have been placed upon the party introducing the evidence in chief. The ultimate weight of the impeaching evidence should be left to the jury to determine. The other case relied upon by the McGee Court, United States v. McKeener,113 also deals with evidence in chief and self-serving declarations (documents used to refresh a witness' memory) and is not precedent for a strict rule on impeachment testimony. McGee is probably correct on the theory of harmless error since the discrepancies in the tape and the testimony in court were minor ones, but the rule laid down was too inflexible.114

In a fourth case similar to those above, Brannon v. Commonwealth,115 defendant's counsel requested a continuance because of the absence of an eyewitness to the homicide. The trial court denied the request but permitted the absent witness’ testimony to be read into the record. The Court followed RCr 9.0416 that the granting of postponement of the trial for absence of a witness is discretionary with the judge, and, according to precedent,117 will not be granted where the testimony sought is only cumulative.

Possibly the holding in Brannon rests more on grounds of necessity than of ideal justice. It would seem a continuance should be granted as a matter of right where, as here, an eyewitness to a possible capital offense is absent through no fault of counsel. Recorded testimony is never a substitute to hearing the facts from the horse's mouth. A continuance should be denied only after a most careful review of the testimony counsel certifies will be given. Mere cumulativeness of the

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113 271 F.2d 669 (2d Cir. 1959).
114 Model Code of Evidence rule 106(2) (1942) leaves the enforcement of the foundation requirement to the judge's discretion. For a discussion of the problem see McCormick, Evidence § 37 (1954).
115 400 S.W.2d 680 (Ky. 1966).
116 RCr 9.04 Postponement of Learning or Trial; motion and affidavit: The court upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the attorney for the Commonwealth consents to the reading of the affidavit on the hearing or trial as the deposition of the absent witness, the hearing or trial shall not be postponed on account of his absence.
117 The Court cited Miller v. Commonwealth, 395 S.W.2d 598 (Ky. 1965).
testimony seems specious grounds for a denial. Such testimony is especially vital when it tends to corroborate that of a previously testifying eyewitness. An adversary system implies in its makeup that an attorney's opinion as to the importance of evidence to be so presented should usually be determinative as to whether a continuance should be granted. This should be particularly true where, as here, the offense is a capital one and there is no allegation that the continuance is being used to delay. Recent Kentucky cases reveal that the trial court's exercise of discretion in denying a continuance where an affidavit of the absent witness is read has almost always been sustained. 118

Three cases in the last session of the Court illustrate that the trend of Kentucky law on admissibility of evidence is more surely to insulate the accused from testimony designed to elicit sympathy or prejudice. 119 However, in Peters v. Commonwealth, 120 the Court's ruling went against the trend. Appellant was convicted of storehouse breaking. He was arrested soon after the crime was committed and while intoxicated signed a confession. The confession was signed when appellant was without counsel. He had been apprised of his right to counsel and had waived it. Though surely the fact of intoxication is a crucial one, it is as yet undetermined whether this, alone, would require reversal. Miranda v. Arizona, 121 decided subsequent to Peters, and later held not to be retroactive, 122 held that an

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118 See 6 Ky. Dig. 652 Criminal Law § 600(3) (1947), and cases cited therein.
119 See Bell v. Commonwealth, 404 S.W.2d 462 (Ky. 1966) for the proposition that only in exceptional circumstances may other crimes of the accused be introduced against him when on trial for a distinct offense. The rule is, of course, different where the defendant's counsel, himself, opens the door on direct examination. See Taylor v. Commonwealth, 392 S.W.2d 914 (Ky. 1965).
Barnett v. Commonwealth, 403 S.W.2d 40 (Ky. 1966), found prejudicial error where a sheriff, during a jury view of the location of a homicide, supplemented his testimony by pointing out the location of a scuffle and thus contradicted the defendant's testimony. Kentucky case law establishes the rule that a jury view is just a view and nothing more. No explanation is permitted.
In Hatfield v. Commonwealth, 395 S.W.2d 768 (Ky. 1966) the statement by a witness in a conviction for illegal sale of whisky that she had decided to cooperate with the police because the defendants were "selling my husband whisky and selling my sister whisky. They have about got her crazy. She runs her kids off and won't buy clothes for them and half the time they ain't got nothing to eat" was held clearly inflammatory and prejudicial.
In Daniels v. Commonwealth, 404 S.W.2d 446 (Ky. 1966), however, the Court found harmless error and refused to order a new trial where the lower court adjourned the jury and admonished them not to discuss the case with anyone or among themselves, but neglected to warn the jury not to form or express an opinion as required by RCr 9.70.
120 403 S.W.2d 686 (Ky. 1966).
accused must "voluntarily" waive right to counsel before a confession may be taken from him. The jury in Peters found the confession factually reliable and that the defendant knew the "nature and effect" of his act, i.e., the act of confession. The problem lies in the definition of that weasel-word "voluntarily." May a person voluntarily waive while beset with a great moral compulsion to expiate his guilt, such compulsion being experienced only while under the influence of alcohol? The problem is not one of not knowing what he was doing. The defendant did know, and wanted to do it, but this desire was aroused only by the unnatural effects of the alcohol. Perhaps Miranda should be construed to require counsel at the time of the waiver of counsel.123

The issue in two other cases in the last session was whether the item which resulted in the offense should be admitted into evidence. In Cook v. Commonwealth,124 a wooden block found near a point at which a police cruiser struck an object hurled from a fleeing car was linked sufficiently in time, place and a tire mark stained on the block to qualify it as circumstantial evidence against the driver. In Helvey v. Commonwealth,125 the prosecution, in an indictment for illegal possession of alcohol, was allowed to show proof of sale of the alcohol, even though illegal sale and illegal possession are separate offenses. Evidence of one may not be used to prove the other.126 The case is undoubtedly correct since the defendant had not been indicted for the companion-offense.

The final case in this section deals with the marital testimony privilege. By statute,127 one spouse may not testify as to confidential communications with the other spouse during marriage. At first blush the privilege seems a broad one. The word "communications" is not confined to mere statements between husband and wife, but is construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it would not have been known to the

124 401 S.W.2d 51 (Ky. 1966).
125 396 S.W.2d 780 (Ky. 1965).
126 See Newton v. Commonwealth, 198 Ky. 707, 249 S.W. 1017 (1923). Where several indictments charged the same person with separate and distinct offenses of the same kind, a conviction or acquittal upon one is a bar to prosecution upon the others, if the evidence in the first case covers the separate, several acts. Thus, after conviction for sale of liquor there cannot be a conviction for illegal possession on the same evidence. See also Davis v. Commonwealth, 398 S.W.2d 701 (Ky. 1966).
127 KRS § 421.210(1) (1942).
party. In practice, however, the protection is not so extensive, as *York v. Commonwealth* shows. In *York*, the defendant was tried for the crime of incest. His daughters testified against him and thereafter the wife was permitted to testify. The Court of Appeals held that the information passed by the wife was not privileged since it was equally available to other persons who were living in the home.

This interpretation of the statute is out of date and needs changing. For practical purposes the conditions of a highly mobile and interdependent society permit most any communication to be heard or observed by another person. Moreover, the exception does not make the spouse competent to testify merely where another actually overhears, but also includes communication which might have been heard. The exception swallows the privilege.

It is not in the best public policy to require marriage partners to first seek out some sheltered rendezvous before they may confide any potentially damaging information. An exception to the exception exists for communications between lawyer and client in the presence of the lawyer's secretary. The same rationale exists for recognizing the husband-wife privilege where other members of the family reside in the home.

2. Sufficiency of Evidence.—In most of the cases classified here the contention was that the requisite degree of evidence to establish the defendant guilty beyond a reasonable doubt was not present and that a directed verdict or new trial should be granted. This was


129 395 S.W.2d 781 (Ky. 1965).

130 See Gill v. Commonwealth, 374 S.W.2d 848 (Ky. 1964).


132 The precise question has not arisen in Kentucky, but the authorities and outside precedents all bring the attorney's secretary within the privilege. See Foley v. Poschple, 137 Ohio St. 593, 31 N.E.2d 845 (1941); McCormick, Evidence § 95, at 191 (1964); Rice, Evidence-Privileged Communications-Extension of the Privilege to Communications Involving Agents, 50 Mich. L. Rev. 309, 311 (1950).

133 Most of these cases may be dispensed with summarily. In *Yates v. Commonwealth*, 399 S.W.2d 736 (Ky. 1966), the Court affirmed that a witness' confusion as to the name of a seller of illicit liquor, but not as to other pertinent facts, tended only to affect the credibility of the testimony, and did not destroy its value as a matter of law. In *Dale v. Commonwealth*, 397 S.W.2d 169 (Ky. 1965) where defendant was the only witness to the slaying of his wife, and refused to take the stand in the trial, evidence of what the defendant had told the police after the homicide was sufficient to submit the case to the jury and sustain a conviction of voluntary manslaughter. *Lang v. Commonwealth*, 396 S.W.2d 806 (Ky. 1965), affirmed that circumstantial evidence of a break-in and defendant's actual flight from the scene were sufficient to convict although there was no (Continued on next page)
the problem in Commonwealth v. Devine, where the arresting officer observed two men in an auto after dark drive into a park, and using their auto's headlights for illumination, kill and retrieve a rabbit in violation of KRS § 150.370, hunting rabbits out of season, and KRS § 150.390(2), hunting rabbits with headlights. The judge directed a verdict for acquittal because the officer could not distinguish which man had done the shooting. The Commonwealth successfully appealed under KRS § 21.140(3). The opinion cites no cases to sustain the reversal saying only that "without belaboring the matter it is our opinion that the circumstantial evidence was ample to sustain a conviction." (Emphasis added.)

Granting for the moment the constitutionality of the statute permitting appeal from acquittal of misdemeanors punishable by fine, it seems that the evidence requisite for reversal of a directed verdict of acquittal should be substantially more than that required "to sustain a conviction." Such a reversal should be governed by the same rule which gives wide discretion to the trial judge in the granting or refusing of the request for a new trial. Such discretion will not be interfered with unless the ruling is manifest error or abuse of discretion. The rationale for the rule is a logical one—the trial judge is closest to the facts and is the person most qualified to sift the evidence.

The same considerations are present here, the only difference being that the judge has directed a verdict in favor of the defendant, not against him. Indeed the authorities indicate but a single early case decided on similar evidence and in that case the conviction was reversed. It is one thing to sustain a conviction and quite another to reverse an acquittal and require a new trial. The judge obviously, and it would seem, quite reasonably, placed much weight on the failure of positive identification. The Court of Appeals has here

(Footnote continued from preceding page)

positive evidence showing defendant had entered the building. Taylor v. Commonwealth, 392 S.W.2d 914 (Ky. 1965), similarly held that the failure of the arresting officer to note in his description of the suspect that he wore a mustache at the time of the alleged theft did not destroy the officer's testimony vis-a-vis the mustached defendant. In Williams v. Commonwealth, 392 S.W.2d 454 (Ky. 1965), where a conviction of a county treasurer for failure to publish the county's financial statement in the time and manner required by KRS §§ 424.120 and 424.220 (1958) was reversed because the prosecution failed to prove that the newspaper in the county possessed the qualifications required by the statutes. The result may be criticized in that the requirements of the statute are probably facts of common knowledge. The court is not required to instruct the jury on such matters. See State v. Blair, 209 Iowa 229, 223 N.W. 554 (1929); 23A C.J.S. Criminal Law § 1159 (1961).

134 396 S.W.2d 60 (Ky. 1965).


emasculated a trial judge's function simply because it disagreed with that court's determination of the facts. The determination is not clearly against reason. In fact it seems quite sound. The Court has laid down, with the barest of documentation, a very dangerous precedent which should be changed at the earliest opportunity.

Defendant's counsel in Durham v. Commonwealth, attempted to exclude the evidence of two witnesses, claiming they were accomplices and that it was necessary for their testimony to be corroborated. The witnesses, two women, stood nearby and watched the robbery, and later made use of the loot. They did not participate. The Court held that though the women might have been accessories after the fact, they were not accomplices and their testimony need not be corroborated.

The authorities state that an accomplice is one who knowingly, voluntarily, and with common intent, unites with the principal in the perpetration of the crime, either by being present and joining in the criminal act, by aiding and abetting in its commission, or, if not present, by advising and encouraging the performance of the act. It would seem that a defense attorney faced with a similar predicament should be particularly careful to impress upon the court that an accomplice when acting only as an aider and abettor need not command, assist, or instigate, but may be guilty by his mere advice or encouragement. Such was apparently not done here.

It is noted with approval that the Court has not equated the terms "aider and abettor" and "accomplice." These are not precisely synonymous terms, and care should be taken when they are used together.

In one final case in this section it was affirmed, and rightly so, that a $1,000 fine levied against a constable for assault and battery of a motorist for insisting on his right of way on a one-way street was not excessive.

F. Instructions

An ever-present source of controversy in the area of instructions for criminal cases, the proper instruction on an indictment under the

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137 398 S.W.2d 696 (Ky. 1966).
138 See Clark v. Commonwealth, 386 S.W.2d 458 (Ky. 1965); Head v. Commonwealth, 310 S.W.2d 285 (Ky. 1958) and cases cited therein.
139 See Miller v. Commonwealth, 395 S.W.2d 598, 600 (Ky. 1965) wherein the Court recognizes the rule that:
To constitute an aider and abettor, sometimes called a principal in the second degree, it is essential that he be present, actually or constructively, at the commission of the crime, and participate in it, sharing the criminal intent of the principal in the first degree.
140 See Hall v. Commonwealth, 403 S.W.2d 287 (Ky. 1966).
Habitual Criminal Statute, was considered in some detail in cases before the Court of Appeals last session. In Rodgers v. Commonwealth, the Court clarified the problem, holding that every factual question must be submitted to the jury. Rodgers is discussed in more detail above.

Two cases dealt with the question of when objections to instructions must be made to preserve the objection for appeal. Early Kentucky criminal procedure required such objections to be made at the time the instructions were given, but Harstock v. Commonwealth, a 1964 case, construed the rules as permitting objections through the period for the motion for a new trial. Marcum v. Commonwealth followed Harstock in holding that since there was no counterpart for CR 51 in the criminal rules, objection to instructions need not be made before, or at the time, the instructions were given. The case left open, however, the question as to what would be the result if the record disclosed that a particular basis for objection had not been argued at all. The Court in Marcum would not assume that no objection had been argued where the record did not so stipulate.

In Ward v. Commonwealth the Court laid down a new definition of the term "feloniously." Defendant appealed from a conviction of receiving stolen property. Defendant claimed he had purchased the property with the intent of communicating with the sheriff before disposing of it. The trial court instructed the jury to find the defendant guilty if it believed he "willfully, unlawfully, and feloniously received

141 KRS § 431.190.
142 See also Jones v. Commonwealth, 401 S.W.2d 68 (Ky. 1966); Marcum v. Commonwealth, 398 S.W.2d 886 (Ky. 1966). In Marcum the instruction was appropriate but incomplete. The failure to instruct the jury as to the option of believing that the defendant had been convicted only once previously, was prejudicial error.
143 399 S.W.2d 299 (Ky. 1966).
143A See text at note 83 supra.
144 382 S.W.2d 861 (Ky. 1964).
145 398 S.W.2d 886 (Ky. 1966).
146 CR 51. Instructions to Jury; Objections: At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may offer written requests that the court instruct the jury on the law as set forth therein; the court shall give or refuse the instructions and shall give the jury written instructions before the commencement of the argument to the jury. No party may assign as error the giving or the failure to give an instruction, unless he objects thereto before the court instructs the jury, stating specifically the matter to which he objects and the grounds of his objections. Opportunity shall be given to make his objections out of the hearing of the jury.
147 The problem was resolved in Brannon v. Commonwealth, 400 S.W.2d 680 (Ky. 1966). The time for such objection stops at the end of the period for requesting a new trial and a subsequent objection is not meant for appellate review.
148 399 S.W.2d 463 (Ky. 1966).
the property knowing it had been stolen.” The word “feloniously” was defined as “preceeding from an evil heart or purpose.” The Court of Appeals reversed, holding that the instruction did not adequately present the theory of appellant’s defense.¹⁴⁹ The Court amplified the original definition of feloniously to include the additional words, “done with a deliberate intention of committing a crime.”¹⁵⁰ Other instructional errors are summarized in the footnotes.¹⁵¹

G. Post-Conviction Remedies and Procedure

1. Appeal.—In dealing with questions pertaining to procedures for obtaining a new trial, the Court demonstrated its unwavering devotion to established rules in the face of what would appear to be

¹⁴⁹ See Evitts v. Commonwealth, 257 Ky. 586, 78 S.W.2d 798 (1935). Wherein it is stated:
Where an accused admits the offense, or essential elements of the offense, but relies on facts or circumstances amounting to an avoidance of the crime, he is entitled to a concrete instruction upon his theory of the case, and a mere general instruction is not sufficient.

¹⁵⁰ Id. at 589, 78 S.W.2d at 800.

¹⁵¹ In a number of other cases the instructions were objected to. In Russell v. Commonwealth, 403 S.W.2d 684 (Ky. 1966) it was held not error to refuse to give an accomplice instruction where a witness was allegedly a thief who passed the property on to the defendant. The Court cited authority to hold that the thief is not an accomplice of the receiver of stolen goods.

In Spears v. Commonwealth, 399 S.W.2d 693 (Ky. 1966), where the defendant was indicted for illegally selling alcohol in a dry territory, evidence was introduced as to his possession of the alcoholic beverages. The trial court instructed that if the jury believed appellant “did keep for sale” alcoholic beverages, they should find him guilty. The Court of Appeals reversed. The Court here drew a fine semantic line, but accurately. Though the instruction contains the word “sale” it is technically an instruction on possession. Unlawful possession for the purpose of sale is a separate offense from that of illegally selling alcoholic beverages in dry, local option, territory. See Helvey v. Commonwealth, 396 S.W.2d 780 (Ky. 1965). The point is well-taken.

In Noe v. Commonwealth, 396 S.W.2d 808 (Ky. 1965), the Court sustained a conviction where a defendant, indicted for murder, objected to an instruction on voluntary manslaughter on which he was convicted. The judgment is undoubtedly correct. The general rule in Kentucky is that if a reasonable inference can be drawn from the evidence that the defendant in a homicide case is guilty of a lesser crime than murder, an instruction should be given thereon. Here, there seemed a clear inference that the homicide was committed in a sudden heat of passion or sudden affray. The instruction was proper.

In Mason v. Commonwealth, 396 S.W.2d 797 (Ky. 1965), the Court affirmed that the trial court did not err in failing to submit to the jury whether a pocket knife with a three-inch blade is a deadly weapon within the meaning of the statute which states that robbery with a deadly weapon shall be punished by life imprisonment. The Court followed a previous case, Montgomery v. Commonwealth, 346 S.W.2d 479 (Ky. 1961).

In Kilburn v. Commonwealth, 394 S.W.2d 948 (Ky. 1965), where the evidence indicated clearly that the defendant killed the deceased to protect his friend, it was incorrect to instruct that if the jury believed the friend started the disagreement, then the defendant was guilty of voluntary manslaughter. The defendant was granted a new trial, and the trial court was instructed that if no stronger evidence than that at the first trial could be produced, a verdict for the defendant should be directed.
a just disposition of the merits. The case of *Wheeler v. Commonwealth* is in point. There appellant had been convicted of aiding and abetting an armed assault with intent to rob. Pending appeal, he moved for a new trial on the ground of newly-discovered evidence. New evidence was submitted along with an affidavit by appellant's counsel asserting due diligence and giving reasons why the evidence was not presented at the trial. The Court held this was not enough. The Commonwealth had presented new evidence of an impeaching nature, but more importantly, an affidavit from appellant himself was not produced.

In most jurisdictions, a motion for a new trial based on newly discovered evidence must be supported by the affidavits of the accused, his counsel, and the new witnesses. An affidavit of the accused is essential because counsel cannot speak for his client in the sense of giving the client's testimony. Doubtless the weight of authority persuaded the Court to refuse the motion for a new trial in the absence of an affidavit submitted by the appellant. It might well be questioned, however, whether strict affirmation of the conviction in *Wheeler* and other cases involving purely procedural errors, without granting the defendant an opportunity to remedy his error, is warranted under modern notions of justice and procedural due process. Although there is lack of authority to support the proposition, it would appear that the interest of justice would be better served if, as in the case of the insufficient criminal indictment and defective pleading under the new civil rules, the party were given the opportunity to correct his procedural error and obtain a disposition of the case on the merits. This does not mean that, where a defendant has had ample opportunity to comply with the rules for obtaining a new trial but has failed to do so, the Court is justified in construing such rules so liberally as to sanction the procedures actually followed.

2. **Probation and Parole.**—The question of whether or not an illegal condition for probation will render the prior conviction and judgment

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152 395 S.W.2d 569 (Ky. 1965).
153 RCr 10.06 provides: "The motion for new trial based on the ground of newly discovered evidence shall be made within one year after entry of the judgment or at a later time if the court for good cause so permits."
154 For a full discussion of the substantive prerequisites for granting a new trial on the basis of newly discovered evidence, see Hunter v. Commonwealth, 259 S.W.2d 74 (Ky. 1953); Spurlock v. Commonwealth, 311 Ky. 238, 223 S.W.2d 910 (1949).
156 Bales v. Commonwealth, 313 Ky. 273, 231 S.W.2d 61 (1950).
157 Lawson v. Commonwealth, 403 S.W.2d 281 (Ky. 1966).
158 See text at note 72 *supra*.
159 CR 15.
160 Queener v. Commonwealth 399 S.W.2d 485 (Ky. 1966).
void was before the Court in Weigand v. Commonwealth. Appellant, who was suspected of having entered the country illegally, was convicted on a charge of issuing bad checks and given a suspended sentence on the condition that he leave and remain outside the United States. After being sent to a reformatory for violation of this condition, appellant contended that the sole basis of his probation was banishment from the country and that the imposition of such a requirement rendered the entire proceedings against him void ab initio. Declining to sustain this contention, the Court held that, although a circuit court has no power to inflict banishment from the country as an alternative to imprisonment, the order of probation is separate from the conviction and the judgment entered thereon. Therefore, a conviction and judgment are not rendered void by a void order of probation. This decision is of practical significance in that it ensures that proceedings otherwise validly conducted will not be set aside due to an illegal order issued subsequent to judgment. To declare the entire proceedings void ab initio in such a case would be to arm the defendant with a means for setting aside convictions which would not otherwise be accepted for review in a proceeding under RCr 11.42 or other requisite procedures for appeal.

The Court also this past term twice reaffirmed prior holdings pertaining to waiver of jurisdiction and the right to a fair hearing before revocation of parole under KRS 440.330, which provides that extradition may be granted to persons accused or convicted in Kentucky.

In Herndon v. Wingo the Court reaffirmed the well-established rule that, where a convict is on probation and is sent to prison outside of the state for another offense, the state can revoke the original probation and arrest him again without a new trial. This holding was dictated by the strong policy underlying the new Uniform Criminal Extradition Act and the general rule that in no case shall the surrender of a prisoner be construed as a complete relinquishment of jurisdiction by the asylum state. Likewise a surety will not be exonerated from forfeiture of a bail bond under the Uniform Criminal Extradition Act on the ground that defendant had been extradited to another state, where such surety fails to show defendant was imprisoned in the other state and where he fails to show any other justifiable excuse for defendant's non-appearance.

161 397 S.W.2d 780 (Ky. 1965).
162 See text at notes 153-154 supra.
163 404 S.W.2d 453 (Ky. 1966).
165 Chick v. Commonwealth, 405 S.W.2d 14 (Ky. 1966); Crady v. Cranfill, 371 S.W.2d 640 (Ky. 1963).
166 Vaughn v. Commonwealth, 355 S.W.2d 763 (Ky. 1965).
Also, the Court restated prior interpretations\textsuperscript{167} by holding in Wright v. Commonwealth\textsuperscript{168} that, while KRS 439.300 requires hearing before probation may be revoked, probationer is entitled only to a fair hearing and not to the formalities of an indictment and trial. A probationer is therefore not unlawfully detained if he is arrested and held in custody prior to the hearing. KRS 439.340 vests a broad authority in the State Board of Parole, and the statute requires no mandatory service before a person confined in the penitentiary is eligible for parole.\textsuperscript{169}

3. RCr 11.42 and Post Conviction Habeas Corpus.—RCr 11.42 was enacted as a mere procedural change in the traditional habeas corpus remedy in cases involving prisoners in state penitentiaries.\textsuperscript{170} It is very similar in effect to 28 U.S.C. Section 2255, although it differs in one significant respect.\textsuperscript{171} The federal rule provides that petitions by prisoners seeking relief on certain grounds—namely, grave constitutional errors or lack of jurisdiction—should be filed in the court in which they were convicted, rather than the district in which the prison is located. The Kentucky rule merely provides that prisoners are to bring post conviction collateral attacks on the judgment in the court in which they were convicted, without limiting the grounds on which such relief is available. The Kentucky rule has been held to be an exclusive remedy; if one can bring an RCr 11.42 motion to vacate, then he cannot bring a habeas corpus motion.\textsuperscript{172} The rule itself does not represent an extension of the relief available traditionally under

\textsuperscript{167} Ridley v. Commonwealth, 287 S.W.2d 156 (Ky. 1956).
\textsuperscript{168} 391 S.W.2d 685 (Ky. 1965).
\textsuperscript{169} Pryor v. Commonwealth, 396 S.W.2d 43 (Ky. 1965).
\textsuperscript{170} RCr 11.42: “Motion to Vacate, Set Aside or Correct Sentence. (1) 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 the sentence to vacate, set aside or correct it.”
\textsuperscript{171} 28 U.S.C. § 2255 (1948): “Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”
\textsuperscript{172} Davis v. Wingo, 396 S.W.2d 53 (Ky. 1965); Harris v. Wingo, 396 S.W.2d 46 (Ky. 1965); Ayers v. Davis, 377 S.W.2d 154 (Ky. 1964). But there are still areas in which it is appropriate to bring habeas corpus: Herndon v. Wingo, 399 S.W.2d 486 (Ky. 1966) (involving claimed waiver of jurisdiction after judgment entered); Thacker v. Asher, 394 S.W.2d 588 (Ky. 1965) (prior to trial when defendant unlawfully detained), and areas where RCr 11.42 relief is not available; Chick v. Commonwealth, 405 S.W.2d 14 (Ky. 1966) (where petitioner is contesting a proceeding in which sentence has never been entered); Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966) (where petitioner not now serving sentence he is trying to vacate).
habeas corpus. However, *Rice v. Davis*, a case decided shortly after the rule took effect (1963), broadened the scope of relief to constitutional errors so grave that under federal constitutional law they rendered the judgment void. With that case began a flood of RCr 11.42 motions to vacate and it has continued unabated to the present.

The Court has attempted to stem this flow in two ways, first by constantly reiterating that not all errors in trial can be attacked through RCr 11.42 (for example, see *King v. Commonwealth*, which sets out a list of errors RCr 11.42 motions will not reach along with some discussion of the kind of remedies it will), and second, by promulgating an amendment to the rule designed to stop the flow of second and third petitions by the same prisoners. This amendment, RCr 11.42(3), requires the first motion to allege all the grounds for relief which can reasonably be brought at that time; it further provides that a final disposition of the first motion precludes further motions on any grounds which could reasonably have been raised. In discussing this amendment, the Court has said that it is merely declarative of the common law and hence is retroactive and that it is very similar to an amendment to the Federal Rule in § 2255. The amendment seems to preclude any consideration of areas which might render the judgment void because of severe constitutional violations which no court has heard. Additional RCr 11.42 relief would not be available because a prior motion to vacate had been brought and adjudicated on a different ground. In this situation, there would also be no state habeas corpus relief, since the rule is that if a prisoner could have brought a motion to vacate under RCr 11.42, but is foreclosed under RCr 11.42 (3) from seeking relief on the particular point advanced, then he had no state habeas corpus remedy. However, it is doubtful

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173 366 S.W.2d 153 (Ky. 1963) (a habeas corpus decision brought before RCr 11.42 took effect, but heard by the Court after the effective date).
174 387 S.W.2d 582 (Ky. 1965).
175 RCr 11.42(3): “The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall include all issues that could reasonably have been presented in the same proceeding.”
176 Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966). It is not indicative of the prior common law as evidenced by the cases cited in this case. These cases provide only that the Court does not have to consider a second motion on the same point brought in a previous motion. Burton v. Tartar, 395 S.W.2d 103 (Ky. 1964); Baker v. Davis, 383 S.W.2d 125 (Ky. 1964).
177 Tipton v. Commonwealth, *supra* note 176. Apparently, it is not. The federal rule provides that the court does not have to consider a second motion brought for "similar relief," which apparently has been interpreted to allow a second motion on different grounds. 28 U.S.C.A. § 2255 (1959) and accompanying annotation.
that the theoretical outline above will accurately describe the developing practice. Though the Court affirmed several decisions last year on the basis of RCr 11.42(3), it sometimes discussed new issues not raised on prior motions. Supposedly, the petitioner would still have his remedy under Federal habeas corpus.

To attack a judgment through an RCr 11.42 motion to vacate, one must first file a motion to vacate in the circuit court in which he was convicted. The Commonwealth does not have to answer the motion in order to contest the allegations. The motion may be dismissed summarily, when the allegations, if true, would not constitute a ground for which relief is available, or when they are mere conclusions without facts to substantiate them, or when they are clearly controverted by the record. However, if the motion alleges facts which if true would render the judgment void, a hearing must be held.

179 Jennings v. Commonwealth, 400 S.W.2d 233 (Ky. 1966); Rowe v. Commonwealth, 399 S.W.2d 790 (Ky. 1966); Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966); Warner v. Commonwealth, 398 S.W.2d 490 (Ky. 1966); Bell v. Commonwealth, 398 S.W.2d 772 (Ky. 1965); Kinmon v. Commonwealth, 396 S.W.2d 531 (Ky. 1965).


181 RCr 11.42(1).

182 Roark v. Commonwealth, 404 S.W.2d 22 (Ky. 1966); Ramsey v. Commonwealth, 399 S.W.2d 473 (Ky. 1966).

183 See text at notes 248-261 infra.

184 Cook v. Commonwealth, 402 S.W.2d 847 (Ky. 1966); Brown v. Commonwealth, 397 S.W.2d 160 (Ky. 1965).

185 Carter v. Commonwealth, 404 S.W.2d 461 (Ky. 1965) (alleged not informed of date the alleged offense took place, but record showed arraignment and indictment showed the date. Court took notice that arraignment includes giving defendant a copy of the indictment); Ray v. Commonwealth, 398 S.W.2d 504 (Ky. 1966) (alleged no counsel, record showed appearance with counsel and plea of guilty); Williams v. Commonwealth, 398 S.W.2d 503 (Ky. 1966) (alleged improperly denied a continuance, but record showed no motion made for a continuance); Carter v. Commonwealth, 397 S.W.2d 165 (Ky. 1965) (appellant claimed sentence was wrong for crime charged, but record showed charge of offense for which sentence was proper); Brown v. Commonwealth, 396 S.W.2d 773 (Ky. 1965) (alleged no counsel, but record bore name "Stone" which according to the custom at the time indicated that an attorney named Stone had been appointed, and all involved except petitioner now dead); Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965) (alleged insufficient time to obtain counsel and prepare a defense, but the record showed representation by counsel and that no continuance was requested); Bentley v. Commonwealth, 392 S.W.2d 67 (Ky. 1965) (alleged court had no jurisdiction and denial of right to counsel and that no continuance was requested); Bentley v. Commonwealth, 392 S.W.2d 697 (Ky. 1965) (alleged no counsel, but the record showed a named attorney served as counsel). However, the appellant can overcome this if the record contains only a vague and general statement and appellant gives particulars. Moore v. Commonwealth, 394 S.W.2d 931 (Ky. 1965) (record had general statement indicating counsel but not naming who was appointed—appellant got affidavits from clerk of attorney alleged to have represented him, held—overcome the record). But see Grider v. Commonwealth, 398 S.W.2d 496 (Ky. 1966)
If the motion raises only questions of law, no hearing is necessary. If the hearing, or if no hearing was required because no factual questions were raised, the judge determines the facts from the weight of evidence and applies the law to them. Either the petitioner or the Commonwealth may appeal from the judge's determination. The petitioner cannot raise issues on appeal not raised in the original motion; however, in one case the Court allowed the petitioner to submit affidavits with his brief which were not submitted as required in the original proceeding. The Court excused this usually fatal technical violation on the ground that the petitioner was appearing pro se. Finally, the Court held the allegations of his motion were in his brief.

RCr 11.42 or post conviction habeas corpus relief is available only if the judgment is void due to some substantial error in the proceeding. Exactly what errors are so substantial is not clear. Relief is always available where the prisoner was denied counsel at some critical stage in the proceedings, providing that he did not waive counsel, where representation by counsel was so ineffective as to "shock the conscience," where the defendant was so mentally incompetent as to be unable to effectively participate in the trial, or where for any reason the trial was so conducted as to be a mockery of justice. Relief is not available as a substitute for appeal or for mere

(Footnote continued from preceding page)

187 RCr 11.42(5) At such a hearing petitioner, if indigent, is entitled to appointed counsel. But such appointed counsel is not entitled to compensation from public funds. Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966).
187 Turner v. Commonwealth, 404 S.W.2d 13 (Ky. 1966).
188 RCr 11.42(6). The Court has held that the petitioner is not entitled to relief if he admits the falsity of his allegations at the hearing. (Doss v. Commonwealth, 396 S.W.2d 807 (Ky. 1965) or where the evidence presented at the hearing refutes the allegations (Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966)).
189 RCr 11.42(7). If the lower court releases petitioner pursuant to vacating the motion, and the Commonwealth appeals and wins, no new order of commitment is required to make the subsequent commitment legal. Watkins v. Wingo, 403 S.W.2d 19 (Ky. 1966).
190 Bell v. Commonwealth, 395 S.W.2d 784 (Ky. 1965).
191 Moore v. Commonwealth, 394 S.W.2d 931 (Ky. 1965); but as to their reasoning, the vast majority of these petitions are pro se (that is, argued by the petitioner without counsel) and there are many areas where the Court is very technical and strict.
192 Hargrove v. Commonwealth, 396 S.W.2d 75 (Ky. 1965).
193 Hall v. Commonwealth, 403 S.W.2d 288 (Ky. 1966).
194 Wedding v. Commonwealth, 394 S.W.2d 105 (Ky. 1965); Rice v. Davis, 366 S.W. 2d 153, 157 (Ky. 1963).
195 Barnes v. Commonwealth, 397 S.W.2d 44 (Ky. 1965); Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964).
errors in the trial. Whether a case falls within these broad generali-
ties is decided on a case by case basis.

Denial of counsel at a critical stage of the criminal proceeding
renders the judgment void. However, a mere allegation of denial of
counsel at some stage of the criminal proceeding is not enough. First
the allegation must pass the refuted-by-the-record test. Many
motions alleging denial of counsel were held last term to be properly
dismissed summarily where the record showed counsel to have been
appointed. This barrier can be overcome if the record does not
state who was appointed and the petitioner goes further to show that
he was not represented. The denial must have been at a critical
stage. The Court held many motions inadequate which alleged denial
of counsel at preliminary hearing, explaining that the preliminary
hearing is not a critical stage in Kentucky. Furthermore, the ap-
pellant must be able to show that he did not waive counsel either
expressly or by not objecting at a later stage.

This year the Court treated a new area of right to counsel relief,
the denial of assistance of counsel on appeal where counsel did not
take an appeal after being requested to do so. This is really an equal
protection claim, not a due process claim, and according to the cases
it would seem to be legitimate only for the indigent defendant, for the
equality of protection required is between the indigent and the non-
indigent. This problem fits but awkwardly in the RCr 11.42 post-
conviction habeas corpus area, because the petitioner is not attacking
the validity of the judgment on the basis of proceedings prior to the
rendering of the judgment, but is attacking on the basis of actions after

197 Thornsberry v. Commonwealth, 400 S.W.2d 226 (Ky. 1966).
198 Hall v. Commonwealth, 403 S.W.2d 288 (Ky. 1966).
199 See notes 170-192 and associated text supra.
200 Ray v. Commonwealth, 398 S.W.2d 504 (Ky. 1966); Brown v. Commonwealth, 396 S.W.2d 773 (Ky. 1965); Bentley v. Commonwealth, 392 S.W.2d 67 (Ky. 1965); Waddle v. Commonwealth, 391 S.W.2d 657 (Ky. 1965).
201 Moore v. Commonwealth, 394 S.W.2d 931 (Ky. 1965).
202 Dupin v. Commonwealth, 404 S.W.2d 280 (Ky. 1966); Turner v. Commonwealth, 404 S.W.2d 18 (Ky. 1966); Parsley v. Commonwealth, 400 S.W.2d 202 (Ky. 1966); Clark v. Commonwealth, 399 S.W.2d 478 (Ky. 1966); Commonwealth v. Watkins, 398 S.W.2d 688 (Ky. 1966); Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966).
204 Shepherd v. Commonwealth, 396 S.W.2d 341 (Ky. 1965).
205 Shepherd v. Commonwealth, supra note 205.
206 Maggard v. Commonwealth, 394 S.W.2d 593 (Ky. 1965) (alleged denial of counsel during interrogation; did not object when confession admitted).
207 Hammershoy v. Commonwealth, 398 S.W.2d 893 (Ky. 1966). In two earlier cases, Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966) and Short v. Commonwealth, 394 S.W.2d 987 (Ky. 1965), the Court denied that such a right existed. Short involved hired counsel.
the judgment which are not necessary to the finality of the judgment. The relief granted should be the vacation of judgment, not allowance of a late appeal. However, the Court has chosen to grant the latter. The principle was first broadly stated in *Hammershoy* v. *Commonwealth* to be:

the right of an indigent defendant in a criminal case to the assistance of counsel on appeal, secured by the Fourteenth Amendment, cannot be subjected to a determination by either a court or state-provided counsel that the grounds for appeal are "meritorious" or "feasible".200

However, the Court later limited the right in *Benoit* v. *Commonwealth*210 to proceedings where the petitioner alleged that he had requested counsel to make an appeal. In addition, the Court has limited it further to cases where the petitioner alleges errors which show that the appeal would have been of benefit.211 *Iles* v. *Commonwealth*212 is distinguishable. There the Court held that petitioner had not been denied any right when counsel refused to appeal, but informed him of this decision prior to the deadline for filing an appeal. The sum total of these cases may be no change in the law, for the rights which were so freely given in *Hammershoy* v. *Commonwealth* seem to have been eaten away by the subsequent cases.

The right to assistance of counsel is the right to effective assistance of counsel.213 The test as to what constitutes ineffective assistance of counsel so grievous as to require vacating the judgment was set out in *Rice* v. *Davis*214 to be "circumstances . . . such as to shock the conscience and make the proceeding a farce and mockery of justice."215

When a petitioner alleges ineffective assistance of counsel in his petition, a general allegation is not enough to prevent the motion from being summarily overruled without a hearing,216 and specific allegations may be summarily dismissed if the conduct complained of is not severe enough to suggest a constitutional violation.217 If the trial court does order a hearing on the basis of the motion, and if the motion is overruled after the hearing, the Court will not reverse un-
less the facts so adduced meet the *Rice v. Davis* test by "shocking the conscience" and making the trial into a "farce and mockery of justice."\(^{218}\)

In *Wedding v. Commonwealth*\(^{219}\) the Court apparently found such conduct. In this case, a murder prosecution, all the attorneys at the Harrison County Bar with the exception of the prosecutor and one elderly attorney were appointed to represent the defendant. At the hearing on the motion to vacate, the apparent leader of the group testified that they had not properly represented the defendant in light of the fact that he was in danger of getting a death sentence. The majority decision relies on *Powell v. Alabama*,\(^{220}\) in which the Supreme Court held that the appointment of the entire bar to represent an indigent where none of the attorneys apparently did anything at all was a denial of the right to counsel.\(^{221}\) Further, the majority stresses the testimony of the appointed attorney that the representation was not adequate and, in particular, that counsel did not properly prepare the defense. The dissent argues that the facts in *Wedding* do not meet the *Rice v. Davis* test for, looking at all the testimony and the transcript of the trial, the representation certainly would not "shock the conscience." This case can be explained by looking to the presumption set out in *Copeland v. Commonwealth*.\(^{222}\) The Court says in this later case that "... when the court in good faith appoints a member of the bar in good standing to represent the defendant, the presumption is that such counsel is competent and diligent." If this presumption runs through this entire area and is the basis for the very strict test applied, then *Wedding* would fall outside the test because appointed counsel, or at least one of them, overcame the presumption by his testimony to the contrary.

There were several cases in which the specific allegation of ineffective assistance was predicated upon a showing that counsel was appointed such a short time before trial that he could not possibly have done an adequate job. *Nelson v. Commonwealth*,\(^{223}\) gives as the rule:

> "Adequate preparation by an attorney employed by one charged with a crime includes full consultation with his client, interviews with prospective witnesses, study of the facts and law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during the trial."

\(^{218}\) *Wedding v. Commonwealth*, 394 S.W.2d 105 (Ky. 1965).

\(^{219}\) Ibid.

\(^{220}\) 287 U.S. 45 (1932).

\(^{221}\) See 54 Ky. L. J. 802 (1966) for an argument that this is a misapplication.

\(^{222}\) 397 S.W.2d 59 (Ky. 1965).

\(^{223}\) 295 Ky. 641, 175 S.W.2d 132 (1943).
If adequate preparation requires all this, then a certain amount of
time is required to prepare for any trial, no matter how simple. Ap-
parently the Court relies on the presumption that appointed counsel
would request a continuance if they felt it was needed; several of
the cases mention these factors,\textsuperscript{224} and \textit{Copeland v. Commonwealth}\textsuperscript{225}
specifically states a presumption, that appointed counsel is competent
and diligent, which must be overcome by the petitioner. The Court
did not grant relief for any of the motions alleging inadequate time to
prepare. In most of these cases a hearing was held and the facts
showed that counsel in good faith did not see the need for additional
time.\textsuperscript{226} But in two of the cases, the circuit court had not held a
hearing and the Court sustained the outcome. Specifically, the Court
held that the allegations that counsel was appointed only five minutes
before the trial began,\textsuperscript{227} and that counsel consulted with petitioner
only thirty seconds\textsuperscript{228} before advising him to plead guilty did not even
require a hearing. Apparently the Court is applying the presumption
of good faith with a vengeance. But surely thirty seconds could not be
enough time for the attorney even to see if the facts admitted by the
defendant fit the crime charged, let alone meet the other requirements
set out in the \textit{Nelson} rule. However, the Court goes even further and
implies that "three seconds" might be enough time.\textsuperscript{229}

In other cases where the petitioners claimed ineffective assistance
of counsel, the Court held the following acts or omissions of counsel
to be insufficient grounds for vacating the judgment: counsel did not
preserve errors in the record by filing a motion for a new trial.\textsuperscript{230}

\textsuperscript{224} Copeland v. Commonwealth, 397 S.W.2d 59 (Ky. 1965); Hargrove v.
Commonwealth, 396 S.W.2d 75 (Ky. 1965).
\textsuperscript{225} 397 S.W.2d 59 (Ky. 1965).
\textsuperscript{226} Smith v. Commonwealth, 404 S.W.2d 285 (Ky. 1966) (petitioner plea-
ded guilty after five minutes consultation with appointed attorney; at hearing on
motion appointed counsel testified that further time would not have been of
value); Coles v. Commonwealth, 401 S.W.2d 229 (Ky. 1966) (counsel, ap-
pointed on day of trial, testified that more time wasn't needed); Copeland v.
Commonwealth, 397 S.W.2d 59 (Ky. 1965) (five to ten minutes before trial,
petitioner's testimony revealed that counsel did not feel he needed additional
time); Collins v. Commonwealth, 392 S.W.2d 77 (Ky. 1965) (counsel, appointed
on day of trial, testified that no continuance was needed).
\textsuperscript{227} Hargrove v. Commonwealth, 396 S.W.2d 75 (Ky. 1965).
\textsuperscript{228} Burton v. Commonwealth, 394 S.W.2d 693 (Ky. 1965).
\textsuperscript{229} Burton v. Commonwealth, supra note 228, at 934.

Included in his second argument is the contention appellant was given a
total of "30 seconds or less" to confer with his appointed counsel. He
does not contend this brief time was insufficient, or that he asked for
more time and was refused. His attorney could ask, "are you guilty," and
get a yes or no answer in less than three seconds.

Furthermore, the Court apparently does not believe this result to be inconsistent
with the \textit{Nelson} rule for it cites this case as authority only one line after having
quoted the \textit{Nelson} rule as unchanged. Morgan v. Commonwealth, 399 S.W.2d
725, 726 (Ky. 1966).

\textsuperscript{230} Benoit v. Commonwealth, 403 S.W.2d 706 (Ky. 1966).
counsel did not move to dismiss the indictment, did not examine the
prosecuting witness, and did not argue the case to the jury; counsel
did not object to improper closing argument by the prosecutor; and
counsel refused to call certain witness on behalf of the appellant.

In two cases where petitioner asserted ineffective assistance of
counsel the Court summarily dismissed because the petitioners were
represented by hired counsel, citing King v. Commonwealth. This is a hard distinction to swallow since Rice v. Davis, the ineffective assistance of counsel case which set out the rule still followed, involved hired counsel. Surely the rule that ineffective assistance of hired counsel is not a ground justifying vacation of judgment is only a presumption, which could be overcome in a case which met the Rice v. Davis test of “shocking the conscience.” In a third case, where appellant alleged that his hired counsel was prejudiced against him, the Court said that if such were the case, then appellant could have dismissed him and gotten another. Since he did not, counsel must have not been that bad.

An extremely novel right to counsel question under the Ken-
tucky Constitution was raised in Ramsey v. Commonwealth. Appellant argued that he had been denied the right granted by Section 11 of the Kentucky Constitution “to be heard by himself and counsel” when the trial court refused to dismiss appointed counsel and let him try the case himself. The Court had already found that his appointed counsel was not ineffective and apparently thought that effective representation was all the Kentucky Constitution section re-
quired.

Insanity at the time of trial will render the judgment void and subject to attack under RCr 11.42. However, the degree of insanity that must be proved is extremely strict. The test as promulgated in

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231 Ramsey v. Commonwealth, 399 S.W.2d 473 (Ky. 1966).
232 Elliot v. Commonwealth, 400 S.W.2d 205 (Ky. 1966).
233 Thornberry v. Commonwealth, 400 S.W.2d 226 (Ky. 1966). There were two other cases, Bingham v. Commonwealth, 408 S.W.2d 280 (Ky. 1966); Wahl v. Commonwealth, 396 S.W.2d 774 (Ky. 1965), where the Court found allegations of error concerning ineffective assistance of counsel to be insufficient, but did not state in the opinion what the insufficient grounds were.
234 Gregory v. Commonwealth, 394 S.W.2d 944 (Ky. 1965); Johnson v. Commonwealth, 391 S.W.2d 365 (Ky. 1965).
235 387 S.W.2d (Ky. 1965).
236 366 S.W.2d 153 (Ky. 1963).
237 Short v. Commonwealth, 394 S.W.2d 937 (Ky. 1965).
238 399 S.W.2d 478 (Ky. 1966).
239 Barnes v. Commonwealth, 397 S.W.2d 44 (Ky. 1965); Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964).
240 McElwain v. Commonwealth, 400 S.W.2d 212 (Ky. 1966); Vincent v. (Continued on next page)
Commonwealth v. Strickland is "... whether he has substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense."

Procedurally, if appellant alleges that he was so mentally incompetent at trial as to fall within the Strickland rule, and he substantiates this allegation in his motion, he is entitled to a hearing on the facts. However, if the trial court decides after an inquiry into the facts, either prior to the original trial or at a hearing pursuant to the motion, that the appellant was competent to stand trial, petitioner faces a stringent burden on appeal to upset this determination. The circuit judge's adverse ruling was upheld where the defendant had a history of insanity prior to the trial and was diagnosed and treated for insanity some seven months after being convicted, and even where a jury found defendant to be insane the same day the trial was held. Apparently, these cases rely on the judge's failure to find evidence sufficient to meet the very strict test of mental incompetence necessary to vacate the judgment.

Although many allegations other than right to counsel, ineffective assistance of counsel, and insanity at time of trial were made, none were upheld. The Court held the following to be insufficient to warrant a hearing: defects in arrest or warrant; illegal search and seizure; denial of a preliminary hearing without a showing of pre-
judice; delay in the holding of a preliminary hearing without a showing of prejudice; excessive bail; defective indictment; denial of speedy trial without allegation the defendant sought a speedier trial; allegation that jury was prejudiced without any reason why this could not have been taken care of by usual trial safeguards; one of the jurors related to a prosecuting witness; no court reporter; perjured testimony; introduction of inadmissible evidence; insufficient evidence; circumstantial evidence; erroneous instructions; improper argument by the Commonwealth attorney; newly discovered evidence; counsel’s insistence on guilty plea, coupled with promise of probated sentence.

In certain cases the Court held the prisoner to have waived any right he might have had. A plea of guilty was held to waive any error (Footnote continued from preceding page)

monwealth, supra note 248; Gregory v. Commonwealth, 394 S.W.2d 944 (Ky. 1965); Moore v. Commonwealth, 394 S.W.2d 831 (Ky. 1965). See also, Brown v. Wingo, 396 S.W.2d 785 (Ky. 1965) (habeas corpus not available when illegally seized evidence admitted at trial).

Banton v. Commonwealth, 404 S.W.2d 277 (Ky. 1966); Roark v. Commonwealth, 404 S.W.2d 22 (Ky. 1966); Benoit v. Commonwealth, 402 S.W.2d 706 (Ky. 1966); Commonwealth v. Watkins, 398 S.W.2d 698 (Ky. 1965); Hargrove v. Commonwealth, 396 S.W.2d 75 (Ky. 1965). In Banton the appellant attempted to show prejudice by saying that because he had no preliminary hearing his counsel did not have adequate time to prepare. This contention was rejected by the Court, which pointed out that he had counsel over a month before trial.

Wahl v. Commonwealth, 396 S.W.2d 774 (Ky. 1965).

Dupin v. Commonwealth, 404 S.W.2d 280 (Ky. 1966).

Ramsey v. Commonwealth, 399 S.W.2d 473 (Ky. 1966); Gregory v. Commonwealth, 394 S.W.2d 944 (Ky. 1965); Waddle v. Commonwealth, 391 S.W.2d 697 (Ky. 1965); Johnson v. Commonwealth, 391 S.W.2d 385 (Ky. 1965).

Dupin v. Commonwealth, 404 S.W.2d 280 (Ky. 1966).

Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965).

Dupin v. Commonwealth, 404 S.W.2d 280 (Ky. 1966).

Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966).

Thornsberry v. Commonwealth, 400 S.W.2d 226 (Ky. 1966); Moore v. Commonwealth, 394 S.W.2d 931 (Ky. 1965).

Brown v. Commonwealth, 397 S.W.2d 160 (Ky. 1965).

Humphries v. Commonwealth, 397 S.W.2d 163 (Ky. 1965); Brown v. Commonwealth, supra note 260; Gregory v. Commonwealth, 394 S.W.2d 944 (Ky. 1965); Short v. Commonwealth, 394 S.W.2d 987 (Ky. 1965); Henry v. Commonwealth, 391 S.W.2d 355 (Ky. 1965).

Johnson v. Commonwealth, 391 S.W.2d 365 (Ky. 1965).

Benoit v. Commonwealth, 402 S.W.2d 706 (Ky. 1966); Copeland v. Commonwealth, 397 S.W.2d 59 (Ky. 1965); Gregory v. Commonwealth, 394 S.W.2d 944 (Ky. 1965); Moore v. Commonwealth, 394 S.W.2d 931 (Ky. 1965).

Gregory v. Commonwealth, supra note 262.

Roark v. Commonwealth, 404 S.W.2d 22 (Ky. 1966); Parsley v. Commonwealth, 400 S.W.2d 202 (Ky. 1966); Bell v. Commonwealth, 397 S.W.2d 784 (Ky. 1965); Fannin v. Commonwealth, 394 S.W.2d 897 (Ky. 1965); Johnson v. Commonwealth, 391 S.W.2d 365 (Ky. 1965).

Ray v. Commonwealth, 398 S.W.2d 504 (Ky. 1966); Humphries v. Commonwealth, 397 S.W.2d 163 (Ky. 1965); Burton v. Commonwealth, 394 S.W.2d 933 (Ky. 1965).
in indictment\(^{266}\) and all pretrial errors.\(^{267}\) Failure to object to the admission of a confession at trial was held to waive constitutional violations in obtaining the confession.\(^{268}\) Failure to object to the composition of the jury until after jury was sworn was held to waive any defects in the method of selecting the jury.\(^{269}\)

4. Mandamus.—The most important of several miscellaneous mandamus cases was Matthews v. Pound,\(^{270}\) a case which brought about a somewhat unique situation due to the relatively intense public and political fervor attendant the investigation in issue. Following a grand jury investigation into the activities of certain state parole board members, the judge, pursuant to the request of the grand jury foreman, impounded some nine items from the report on the ground that if they were released, those mentioned might be jeopardized. The grand jury had made no indictments or recommendations. Contending that without the impounded items the report was incomplete and seriously hampered possible future action by proper authorities, the Governor, under statutory authority,\(^{271}\) requested the intervention of the Attorney General. Under similar statutory authority,\(^{272}\) two Commonwealth attorneys requested the assistance of the Attorney General with reference to such matters in their district.

With no significant precedent available, the Court resorted to an interpretation of the pertinent statutory and constitutional provisions in light of what it considered to be the general policy of the law. Apparently adopting an exception to the general policy of shielding the proceedings of grand juries from public scrutiny, the Court held that in view of the request of the Governor under KRS 15.200 and of the two Commonwealth's attorneys under KRS 15.190, and in light of the official capacity of the Attorney General under common law and the state constitution,\(^{273}\) the judge had no right to impound the items from the grand jury report. Moreover, withholding certain items from the released report in effect created two grand jury reports, \textit{i.e.}, the one released to the public substantially differed from that rendered to the court, and nowhere could any authority be found which sanctioned such procedure.

\(^{266}\) Waddle v. Commonwealth, 391 S.W.2d 687 (Ky. 1965).
\(^{267}\) Burton v. Commonwealth, 394 S.W.2d 933 (Ky. 1965).
\(^{268}\) Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965).
\(^{269}\) Johnson v. Commonwealth, 391 S.W.2d 365 (Ky. 1965).
\(^{270}\) 403 S.W.2d 7 (Ky. 1966).
\(^{271}\) KRS § 15.200(1) (1964).
\(^{272}\) KRS § 15.190 (1964).
\(^{273}\) Ky. Const. § 91.
The final determination was sound. The items should have been included no matter how meritorious the purpose for omitting them. The request of the grand jury foreman was a mere recommendation to be treated as surplusage, and the items omitted in the report submitted to the court should be incorporated by reference into the report actually released.

In the other cases concerning mandamus the Court merely affirmed and restated established law. In reiterating precedent, the Court held that mandamus will lie to compel the circuit court to furnish the petitioner with the record of the proceeding in order to perfect his appeal. Likewise mandamus will lie to compel the circuit court to furnish the petitioner with the record of the proceedings free of charge when such petitioner is proceeding in forma pauperis to perfect his appeal. Thus, where the respondent judge does not state why he denied the record to a petitioner appealing in forma pauperis, the Court of Appeals will order the record produced. The same will hold true where the judge does not deny petitioner's allegation that he is a pauper.

Similarly, where a petitioner alleges that he spent all his money and resources obtaining bail and trying to get legal services to defend the charges against him, and where the response of the judge is so insufficient as to render it impossible to determine whether petitioner had been deprived of any right, justice entitles him to at least appointment of counsel and a hearing. But a petitioner is not entitled to a record when he is not making an appeal. Thus a petitioner is not entitled to a writ of mandamus requiring the circuit court to furnish portions of the record of his trial where no motion has been filed to vacate the judgment. Also, before an order compelling a court to furnish a transcript will issue, there must be a showing of some ground which would entitle a defendant to relief. A petition for the writ of mandamus to compel a court to furnish a copy of the trial record and of the hearing on motion to vacate in order to perfect appeal before the United States Supreme Court is fatally defective if it does not allege that proceedings in the Supreme Court have been commenced.

274 Davenport v. Winn, 385 S.W.2d 185 (Ky. 1964).
275 Roark v. Stivers, 401 S.W.2d 56 (Ky. 1966).
276 Wilson v. Jefferson Circuit Court, 401 S.W.2d 54 (Ky. 1966).
277 Hall v. Stivers, 399 S.W.2d 312 (Ky. 1965).
278 Bingham v. Stivers, 396 S.W.2d 800 (Ky. 1965).
279 Wright v. Pound, 399 S.W.2d 309 (Ky. 1965).
280 See Moore v. Ropke, 385 S.W.2d 161 (Ky. 1964); Jones v. Breslin, 385 S.W.2d 71 (Ky. 1964).
281 Johnson v. Turner, 399 S.W.2d 316 (Ky. 1965); Harden v. Turner, 394 S.W.2d 749 (Ky. 1965).
Turner v. Dept of Parole & Probation\textsuperscript{282} was a mandamus proceeding seeking to require the Department of Parole and Probation to restore petitioner to a parole status which was allegedly arbitrarily and illegally revoked. Turning to Article 10 of the Kentucky Constitution and the prior decision under that article,\textsuperscript{283} the Court pointed out that its own jurisdiction in a mandamus proceeding extends only to judicial officers. Therefore petitioner's motion must be denied, since an action against any state officer other than a judicial officer must be brought in the appropriate court of general jurisdiction and against the individual or individuals sought to be controlled.

\textsuperscript{282} 394 S.W.2d 889 (Ky. 1965).
\textsuperscript{283} Commonwealth v. Wise, 351 S.W.2d 491 (Ky. 1961).
X. DOMESTIC RELATIONS

A. Age of Majority

The most important domestic relations case to come before the Court in several years is Commonwealth v. Hallahan, which interpreted KRS 2.015, the Kentucky age-of-majority statute. Although this 1964 enactment states that eighteen shall be the age of majority for all purposes except the purchase of alcoholic beverages and the care and treatment of handicapped children, the Court held that a person under twenty-one could not obtain a marriage license without parental consent. Procedurally, the case arose when the county court clerk of Jefferson County, who had been sued to compel issuance of a marriage license, sought a declaration of rights because of the penal sanctions of KRS 402.990(8).

At the time the majority statute was passed, the Legislature also expressly amended in the same bill five previous enactments which had used the specific age of twenty-one. Taking this as a point of departure, the Court reasoned that statutes using a specific age, rather than a general term such as "adult" or "majority," were not intended to be affected by the present statute. In other words, five statutes reading "twenty-one years" having been amended to read "eighteen," other similarly worded statutes must remain as they stand.

1 391 S.W.2d 878 (Ky. 1965).
2 "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 years is the age of majority."
3 There is an exception in the case of pregnancy, in which case the male under eighteen and/or the female under sixteen may apply to the county judge who has discretion to grant permission to marry. KRS § 402.020(5) (1960).
4 "Any clerk who knowingly issues a marriage license to any person prohibited by this chapter from marrying shall be fined not less than five hundred nor more than one thousand dollars, and removed from office by the judgment of the court in which he is convicted."
5 KRS § 385.010 (1958) (repealed 1966); KRS § 389.010 (1944) (sales of minors' realty by court); KRS § 394.020 (1942) (power to make a will); KRS § 394.030 (1942) (minor can exercise a power of appointment); KRS § 405.390 (1950) (adoption of adults).
6 The rule which the Court held to be applicable was: "Before a statute shall be considered amended by implication by a later statute, the two statutes must be repugnant to each other and be irreconcilable, or the later act must cover the whole subject of the earlier act." Hallahan v. Sawyer, 390 S.W.2d 664 (Ky. 1965). It then gave examples of each of these types of repeal by implication. Fiscal Court of Jefferson County v. City of Anchorage, 393 S.W.2d 693 (Ky. 1965) stated that the transfer of zoning power in sixth class cities from the city legislative body to the county judge and fiscal court necessarily transferred all statutory powers to implement this. This was a case of incompatibility. Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 388 (Ky. 1961) held that the enactment of the Uniform Commercial Code repealed certain statutes by implication. The Legislature obviously meant to cover the entire subject of commercial law.
The result reached is questionable. For instance, since KRS 199.470(1) provides that any "adult" person may file a petition for adoption, the rule promulgated by *Hallahan*, if followed, could allow a person who is not old enough to exercise his own discretion as to marriage to adopt a child. Another potentially troublesome area is guardianship, since chapter 387 of KRS does not specify an age at which a minor ward attains majority. Under *Hallahan*, this indicates that he could assume control of his property at age eighteen. Also under chapter 387 of KRS, if an infant who dies without issue has title to real estate derived by gift, devise, or descent from a parent, the whole descends to that parent. The question arising from *Hallahan* would then be whether or not the death of an eighteen-year-old in such circumstances would be the death of an adult or the death of an infant.

Other interesting questions could arise in a lawsuit concerning an eighteen-year-old killed by another's negligence. The father and mother of a minor child are entitled to his earnings. Would three years of earnings therefore be includable in damages, or would the deceased be considered a minor at all for purposes of parental recovery?

If the parents of an adult become indigent, he is responsible for their support. The question then becomes whether *Hallahan* would require an eighteen-year-old to support his indigent parents, and the answer demanded by the principal case would seem to be in the affirmative.

Furthermore, a father is liable for the nurture and education of his minor children. This could create a problem, since most undergraduates are dependent upon their parents for the financing of a college education. Some courts hold that a parent owes his child a college education if he is able to provide it. If the Court decided to follow this line of decision, it would have to overthrow arguments that the child between eighteen and twenty-one is an adult to whom no such duty is owed.

Quite possibly the *Hallahan* decision was based on unspoken policy considerations. The Court might have considered eighteen as too...
unripe an age to marry without parental blessings. In fact the Court might well have considered wholesale lowering of the age of majority to be so unwise as to demand judicial modification of legislative intent. After all, another established rule of interpretation which would have produced the opposite result was available. "The primary rule is to ascertain the intention [of the legislature] from the words employed in enacting the statute and not to guess what the legislature may have intended but did not express."

The opinion suggested that the Legislature clarify or eliminate this statute. Efforts were made in this direction during the 1966 General Assembly, but no legislation resulted. The Legislature should carefully examine each area of the age of majority question, considering the shortcomings in both its 1962 statute and the Hallahan decision. It should then make a discriminating choice of the proper age of majority in each of these areas.

B. Adoption

Arciero v. Hager involves a conflict of laws problem as well as one of adoption and inheritance. At the time of the adoption in New York of Thomas Bertram Lively (now Arciero), the Kentucky statute permitted inheritance through the natural as well as the adoptive parents. Later the statute was amended to sever all ties to natural parents. Thus, when his natural father's uncle died intestate in Ken-

13 386 S.W.2d 247, 249 (Ky. 1962).
14 Senate Bill 297, which would have reversed the Hallahan decision, was tabled in the House 30–28 after passing the Senate 29–0. 1966 Final Legislative Record 14, 28, 30.
15 397 S.W.2d 50 (Ky. 1965).
16 The Court decided Kentucky law applied and quoted the following from 2 Am. Jur. 2d Adoption § 115 (1962):
According to the better view and weight of authority the rights of inheritance of the child as an adopted child, and the extent of such right of inheritance, will be determined, not by the law of the state where the adoption took place, but in the case of real property by the law of the state where the property is located, and in the distribution of personal property by the law of the domicil of the intestate property owner, at the time of his death. This rule is applied regardless of whether the local law enlarges the rights of the adopted child as fixed by the law of the state where the adoption took place and confers right of inheritance where none existed in the state of adoption or diminishes such rights. The fact that an adopted child can inherit under the law of the state of his adoption will not enable the child to inherit property in another state under the laws of which a child, if adopted in that state, cannot inherit or can inherit only to a limited extent. (Emphasis added.)
The policy clearly is that a state where property is located has a superior interest in how it passes by inheritance.
17 KRS § 405.340(9) (1946).
18 KRS § 199.520(2) (1956).
tucky, Thomas could not inherit. This is in line with a previous case which held that KRS 199.520(2) "excises the adopted child from its 'blood' family tree," thus placing an adopted child in the exact status of a natural one.

Minary v. Minary\(^{20}\) concerned a testator who adopted his wife in order to make her his heir. This enabled her to inherit under a trust established in his mother's will which limited inheritance of the corpus to her children's heirs at law. The trustees brought an action in Jefferson Circuit Court for a declaration of rights to determine how to distribute the corpus of the trust; in a separate action, heirs other than the wife/daughter sought to have the judgment of adoption declared void. Both actions were heard together and dismissed by the trial court, which regarded them as essentially in personam suits. Since the wife had been served only constructively, neither action could be maintained. Although the Court of Appeals agreed that the adoption decree could not be attacked without personal jurisdiction over the wife/daughter, it held that the lower court did have jurisdiction to determine the questions raised by the trustees because the situs of the trust was in Jefferson County. The Court accordingly reversed with directions to permit the trustees' action for a declaration of rights and to proceed in a manner "not inconsistent with this opinion." The Court did not specifically state whether or not the wife's status as adopted child could be brought into issue in the distribution proceedings.

Certainly the wife's status is not subject to direct attack, because the validity of such an adoption in Kentucky was established several years ago under nearly identical circumstances.\(^{21}\) The statute effective at the time of the earlier adoption\(^{22}\) permitted the adoption of an adult, as does the present statute.\(^{23}\) The Court rejected the argument that such adoption was against public policy because it results in an incestuous relationship, and cited a Mississippi case which did not find an adopted child to be a daughter within the incest statute.\(^{24}\)

Adoption of one's wife as his daughter clearly defeats the intent of a testator who has established a trust for "heirs at law." However, the Legislature was surely aware that adoption of an adult is probably

\(^{10}\) Jovett v. Rhorer, 339 S.W.2d 865 (Ky. 1960). Here the Court held that a natural grandfather has no visitation rights—"personal" as well as "legal" rights are broken.

\(^{20}\) 335 S.W.2d 598 (Ky. 1965).

\(^{21}\) Bedinger v. Graybill's Ex'r and Trustee, 302 S.W.2d 594 (Ky. 1957).

\(^{22}\) Baldwin's Kentucky Statute Service § 3316-S(1) (1941 Supp.).

\(^{23}\) KRS § 405590 (1950).

\(^{24}\) State v. Lee, 196 Miss. 311, 17 So. 2d 277 (1944).
for inheritance purposes.\textsuperscript{25} Regarding adoption as the creation of a parent-child relationship when the adoptee is well into middle age is an irrelevant, if not silly, approach. The statute permitting adoption of adults therefore should be regarded as an expression of legislative intent to override testamentary intent in adult-adoption cases. Once the practice of choosing adult heirs by adoption is allowed, there seems to be no valid reason for excluding the wife.\textsuperscript{26}

\section*{C. Custody}

The common law rule that the father has superior right to the custody of his children began to lose force in Kentucky at least as early as 1864.\textsuperscript{27} Presently, giving custody to the mother is presumed to best serve the welfare of children of tender years (under eight or nine), and girls of all ages.\textsuperscript{28} Although during the past year several cases granted custody to the father or a third person, this does not represent a step backward, but merely reflects unusual fact situations,\textsuperscript{29} in which the mothers were clearly less able to provide for the welfare of the children.

The Court's reluctance to overrule the discretion of the chancellor,

\textsuperscript{25} 7 Md. L. Rev. 275-76, 283-84 (1948).
\textsuperscript{26} But see 47 Ky. L. J. 149, for remarks critical of the \textit{Graybill} decision, the gist of which is that the Court improperly construed the testator's intent, which was not necessarily in conflict with the adoption statute if he desired to exclude adopted heirs.
\textsuperscript{27} Adams v. Adams, 62 Ky. (1 Duval) 168 (1864).
\textsuperscript{28} Babb v. Babb, 293 S.W.2d 728 (Ky. 1956); Ragland v. Ragland, 299 Ky. 699, 187 S.W.2d 257 (1945).
\textsuperscript{29} In \textit{Whisman v. Whisman}, 401 S.W.2d 583 (Ky. 1966), where the mother had borne two illegitimate children since her divorce and stated in court that she intended to have more by her present boyfriend, the father, who lived on a farm with his present wife, was given custody. It appears that a bucolic atmosphere may go over well with the Court of Appeals. \textit{Accord}, Polivick v. Polivick, 375 S.W.2d 689 (Ky. 1964). Yelton v. Yelton, 395 S.W.2d 590 (Ky. 1965), gave custody to the father who was remarried and prosperous. His former wife was less fortunate. She was poor and her new spouse was serving his second prison term for bootlegging. She and the children frequently visited him at the prison. There was no evidence that she was of bad character. \textit{Accord}, Maynard v. Maynard, 302 Ky. 590, 195 S.W.2d 304 (1946). Readen v. Roaden, 394 S.W.2d 754 (Ky. 1965), comes closer to departing from the general rule than the other custody cases. It was proved that the wife had been seeing other men prior to the divorce, but it was also proved that she had behaved properly during the two years of the divorce action. Two important factors were that the girls were ten and fourteen, not of especially tender years, and the reluctance to overrule the discretion of the lower court. For the proposition that evidence of reformed behavior is sufficient for custody, see \textit{Estes v. Estes}, 299 S.W.2d 785 (Ky. 1957) where a mother regained custody of her children after proving she had overcome her addiction to alcohol; \textit{Runge v. Runge}, 307 Ky. 752, 212 S.W.2d 275 (1948) where custody originally went to the husband whose wife had been guilty of adultery. She later got custody because his plans were uncertain and she proved her present good behavior. \textit{Contra}, Skidmore v. Skidmore, 261 Ky. 327, 87 S.W.2d 631 (1935).
absent a clear-cut abuse of discretion or misinterpretation of the law, was the factor behind two decisions.30

D. Miscellaneous

The Court of Appeals continued to require alimony to be paid in a lump sum where possible, and as a general rule, one-third of the husband's estate is a proper award. This rule was followed in four cases.31 Another case reversed the chancellor, but did not award a lump sum.32

Two convictions for failure to pay child support were reversed because of misinterpretation of the statutes in the lower courts.33 Two

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30 McReynolds v. Hughes, 398 S.W.2d 482 (Ky. 1966). Here the maternal grandmother was allowed to retain custody as against the mother absent clear proof of abuse of discretion. This was somewhat similar to the now-famous case of Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), cert. denied, 35 U.S.L. WEEK — (U.S. Nov. 22, 1966), which allowed the maternal grandparents to retain custody in a stirring victory for God, mother, and the Iowa way of life. The court stated that grandparents' home provides "a stable, dependable, conventional, middle-class background" while the father's would be "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." See Note 79 Harv. L. Rev. 1710. Sexton v. Sexton, 391 S.W.2d 380 (Ky. 1965) held there was no evidence to justify reversing the lower court which awarded custody to the mother.

31 Elliot v. Elliot, 400 S.W.2d 222 (Ky. 1966); Ralston v. Ralston, 396 S.W.2d 775 (Ky. 1965); Hunt v. Hunt, 394 S.W.2d 743 (Ky. 1965); Porter v. Porter, 394 S.W.2d 456 (Ky. 1965). See, Furgerson v. Furgerson, 307 Ky. 394, 211 S.W.2d 161 (1948), which listed factors the chancellor should consider in determining whether or not to award alimony:

1. the extent of the husband's estate.
2. his earning capacity.
3. their social position.
4. their accustomed standard of living.
5. the reasonable needs of the wife.
6. other factors.

In Cawood v. Cawood, 329 S.W.2d 567 (Ky. 1959) the wife got one-third of the estate in a lump sum despite a finding on the trial court that she:

[C]reated an unhappy home life for plaintiff; was cold and indifferent towards plaintiff; was too preoccupied with all of her social and club activities to give any attention to plaintiff; spent most of her evenings drinking ... and slept most of the mornings; never prepared plaintiff's breakfast, and very few other meals; spent his income faster than he could make it.

For other extreme cases, see Heustis v. Heustis, 346 S.W.2d 778 (Ky. 1961); Yents v. Yents, 329 S.W.2d 209 (Ky. 1959); Alexander v. Alexander, 317 S.W.2d 494 (Ky. 1958); Oldham v. Oldham, 259 S.W.2d 42 (Ky. 1953); Ahrens v. Ahrens, 313 Ky. 55, 250 S.W.2d 73 (1950); Green v. Green, 182 Ky. 486, 153 S.W.775 (1913).

32 McLaughlin v. McLaughlin, 405 S.W.2d 22 (Ky. 1966).

33 In Gauze v. Commonwealth, 400 S.W.2d 227 (Ky. 1966) the defendant was convicted under KRS § 435.240(3) (1954). This was reversed since the statute expressly limited its application to decrees made after its enactment. In Fitzgerald v. Commonwealth, 403 S.W.2d 21 (Ky. 1966), KRS § 435.240(3) (a) (1954) required that the children be in indigent circumstances, and this requirement was not met.
other child support cases were decided, one covering the method of payment and the other the adequacy of payments.\textsuperscript{34}

Restoration of property to the spouse who held it before marriage was considered in three other cases.\textsuperscript{35}

\textsuperscript{34} Tucker v. Tucker, 398 S.W.2d 238 (Ky. 1965) held that a person ordered to pay child support through a domestic relations court cannot defeat a judgment for arrearages by showing he has paid by other means. Taylor v. Taylor, 394 S.W.2d 896 (Ky. 1965) declared $30 per month child support inadequate and suggested a $50 minimum.

\textsuperscript{35} McLaughlin v. McLaughlin, 405 S.W.2d 22 (Ky. 1966), reduced a restoration award to the husband from $7,000 to $4,000 because some of the $7,000 had gone for a car instead of real property. Taylor v. Taylor, 400 S.W.2d 677 (Ky. 1966), refused restoration to a husband who had conveyed a farm to his wife to escape a possible judgment. Hoehle v. Hoehle, 397 S.W.2d 161 (Ky. 1965), reaffirmed the rule that a wife whose income was spent solely for living expenses will not be entitled to a restoration of real property acquired by the husband during the marriage. See Bissell v. Gentry, 403 S.W.2d 15 (Ky. 1966), discussed \textit{infra} Sec. XIII, \textit{Insurance}, note 7.
XI. ELECTIONS

As illustrated by the legal complications resulting from the 1966 Georgia gubernatorial election, disagreements over elections often produce the most heated and controversial of court battles. Courts have the delicate problem of making legal determinations which by their very nature have political repercussions, regardless of which side wins. Cognizant of this problem, the General Assembly has enacted specific instructions as to how elections are to be conducted. The Court was called upon to interpret these election statutes five times last term.

One such controversy concerned the meaning of “election” as used in the Constitution and the statutes. Prior to this term, the Court had said that section 148 of the Constitution, which prohibits the holding of more than one “election” per year, does not refer to primary elections.\(^1\) This interpretation was based on the fact that it has become a political necessity to hold primary as well as general elections. In *Stevens v. Hicks*,\(^2\) decided this term, the Court, without overruling prior cases which construed “election” in a constitutional context, interpreted “election” as used in a reapportionment statute\(^3\) to include primary elections. The Court apparently felt that it was important to clear up the endless confusion over reapportionment near election time, although it thereby laid itself open to criticism for being inconsistent. However, a strong case can be presented that it is not inconsistent to give a word one meaning when used in a statutory context and quite a different one when a constitutional provision is being interpreted. In another reapportionment case,\(^4\) the Court held that, under statutes\(^5\) authorizing the filing of vacancies after nomination in primary elections, the party’s county executive committee can select candidates for magistrate and constable in five new magisterial districts, where a county court order (adjudged valid by the Court of

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\(^1\) Wilson v. Dean, 177 Ky. 97, 197 S.W. 547 (1917); Morgan v. Goode, 151 Ky. 284, 152 S.W. 584 (1912); Hodge v. Bryan, 149 Ky. 110, 148 S.W. 21 (1912); Montgomery v. Chelf, 118 Ky. 766, 82 S.W. 388 (1904).

\(^2\) 401 S.W.2d 75 (Ky. 1966).

\(^3\) KRS § 25.680 (1942) provides: “A county may be reapportioned into justices’ districts under the provision of KRS 25.690 and 25.700 at any county term four years after a previous apportionment but not within sixty days previous to an election for justice of the peace. . . .”

\(^4\) Davenport v. Redmon, 394 S.W.2d 737 (Ky. 1965).

\(^5\) KRS § 118.090(4) (1942) authorizes the chairman of the state, county, or city district committee of the party to fill a vacancy in case of the removal of a candidate subsequent to nomination. KRS § 119.020 (1948) provides that the governing authority of the party has the power to fill vacancies of unopposed candidates in certain situations.
Appeals) had reapportioned the county into five, in lieu of eight, districts.

Two other cases pertaining to the filling of vacancies of candidates were decided by the Court during the past term. In Brock v. Helton\(^6\) two candidates had withdrawn before the primary election but after the date for filing. The Court held that since the date for filing had passed, the vacancies came within the meaning of KRS 119.020(3), which allows the governing authority of the party to fill the vacancies. In the second case,\(^7\) a list of qualified precinct officers was given to one member of the board of elections by one of the political parties. The Court held that the list must be submitted to the whole board, not just one member. And as dictum the Court stated that substantial compliance with KRS 116.170\(^8\) would be delivery to the chairman of the board.

In the last case\(^9\) the Court established guidelines for determining what a complainant must allege in order to state a cause of action to contest the election of a nominee in a primary.\(^{10}\)

\(^6\) 395 S.W.2d 765 (Ky. 1965).

\(^7\) Ball v. Helton, 395 S.W.2d 786 (Ky. 1965). In this case the Republican executive committee submitted a list of eight names for each of the thirty-two precincts to one member of the board of election commissioners who, in turn, submitted only the top two names from each precinct list to the board. Anything other than the entire submission of all eight names on each list would, according to the Court, have been in defiance of KRS § 116.050 (1942).

\(^8\) KRS § 116.070 (1942) requires that "the county executive committees of the two political parties . . . [submit] in writing to the county board of election commissioners a list of at least eight [qualified precinct officers] for each precinct."

\(^9\) Davis v. Britt, 394 S.W.2d 738 (Ky. 1965).

\(^{10}\) The Court said the complainant does not state a cause of action where he fails to allege: (1) that 20 percent of the voters voted illegally, based on voting requirements; (2) how each voter who allegedly voted illegally actually voted; or (3) that proof of how each voted is unattainable. The Court indicated that the complainant, in order to state a cause of action under KRS Chapter 123, Corrupt Practices Act, must allege (1) that the successful candidate committed a violation of the act, or (2) that any violation was committed in his behalf by others with his knowledge.
XII. ETHICS

A. Unauthorized Practice of Law

Historically, the judiciary has concerned itself with the problem of unauthorized practice of law in order to protect the public from the unscrupulous, the untrained, and the incompetent.\(^1\) However, institutions such as trust companies have been refused the right to offer legal services mainly because of potential conflict of interests between the client and the company.\(^2\)

*Frazee v. Citizens Fidelity Bank & Trust Co.*\(^3\) represents the Court's first important pronouncement in this area since *Hobson v. Kentucky Trust Co. of Louisville.*\(^4\) As fiduciaries, five trust companies, through salaried lay and legal employees, were appearing in probate court, drafting all necessary papers, and making final settlements of a number of estates without legal counsel. They were soliciting fiduciary business through local news media and occasionally referring to the value of legal aid in drafting wills and planning estates. Some materials sent to prospective customers focused upon the ability of the trust company to analyze, plan, and suggest possible improvements in estates.

As a first defense, the trust companies contended that *Hobson* permitted these activities. The Court, however, found “that invoking the jurisdiction of the county probate court through pleadings or appearances is the practice of law.”\(^5\) Thus a corporate fiduciary can file probate or fiduciary documents in the probate court or other court of record only if they are in the name and by the authority of a licensed

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\(^2\) Following is a list of six possible conflicts in every trust arrangement: 1) an outright disposition of estate might be in order, but the trust company's fees would be reduced; 2) circumstances may deem it advisable to have two trustees, but the trust company is not interested in sharing trust fees; 3) a short-term trust may be in the client's best interest while the trust company wants to manage a long-term one; 4) the client's interest may be best served by limiting the power of the trust company, while the trust companies encourage broad grants of power; 5) the client may desire a high degree of responsibility while the trust company wants a low standard of care; 6) and in an unusual situation the same trust company may represent both claimant and defendant trust funds. Hicks and Katz, *The Practice of Law by Layman and Lay Agencies*, 41 Yale L.J. 69, 82 (1931).

\(^3\) 393 S.W.2d 778 (Ky. 1965). For another discussion of *Frazee*, see Rouse, *What Does the Decision in Frazee v. Trust Companies Mean to the Lawyer and to the Banker*, 29 Ky. S.B.J. 5 (1965).

\(^4\) 303 Ky. 493, 197 S.W.2d 454 (1946). The Court held that a trust company is not, when acting in a fiduciary capacity, acting for itself, and is not a "party" to an instrument within the meaning of the statute providing that one may draft instruments to which he is a party.

\(^5\) 393 S.W.2d at 782.
attorney. Instead of attempting to distinguish *Hobson*, the Court overruled it to the extent that it was inconsistent with its findings.

A second defense interposed was KRS 395.145. The Court quickly disposed of this argument by ruling that insofar as the statute provided that "no fiduciary shall be required to be represented by an attorney," it was ineffectual and superseded by the Court's Rules. Also, in affirming the ruling of the lower court concerning advertising, the Court held:

It is specifically declared that the defendants do not have the right to advertise their services in such manner as to assert the claim that they or their officers are (independent of specific advice from lawyers) authorized or permitted to plan, or make suggestions for the savings to be effected by the planning of, the legal aspects of estates of decedents or the settlors of voluntary trusts.

The plain import of *Frazee* is to partially declare the rights, duties, and obligations of bankers in relation to lawyers, this being accomplished through judicial recognition of a joint Statement of Policy adopted by the two interested professions and an enumeration of services which banks and trust companies may and may not perform. Evidently, no other jurisdiction has attempted to define the unauthorized practice of law in this manner, proceeding rather in a case by case method. However, the Court seemingly has provided a workable solution by which future "practices" can be clearly defined by mutual accommodation and compromise, recognized judicially.

B. Suspension, Disbarment, and Reinstatement

The past year's cases add little or nothing to the body of law concerning suspension, disbarment, and reinstatement of attorneys. A six month suspension for assaulting an attorney, threatening another

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6 KRS § 395.145 (1942): "At the time of appointment of a fiduciary, he may designate an attorney who will represent him in matters relating to the trust, and when so designated notices to such fiduciary shall also be sent by the court to such attorney, but no fiduciary shall be required to be represented by attorney."

7 KRS § 30.170(2) (1962): "The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict."

8 The Standing Committee on Unauthorized Practice of the Law of the American Bar Association and the Executive Committee of the Trust Division of the American Bankers Association adopted this Statement of Policies. The Court's enumeration of services not to be performed by banks or trust companies can be generally categorized as follows: 1) Drafting of instruments, 2) Conducting litigation or appearing before the courts, 3) Rendering legal advice, 4) Preparation and filing of tax returns. For a complete listing, see 393 S.W.2d at 783.

attorney, improper political advertising, and failure to attend to a client's affairs, all occurring over a ten-year period, seems rather short and perhaps can only be rationalized in light of the absence of moral turpitude. The Court apparently found this moral turpitude when it disbarred the Public Administrator of Fayette County for improperly accounting for funds over an extended period.

The two reinstatement cases decided in this term merely reinforce the established rule that a disbarred attorney is under a heavy burden of proof in such proceedings.

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11 *In re* Gordon, 402 S.W.2d 854 (Ky. 1965).
12 This emphasis on moral turpitude is readily apparent in the 1964-65 decisions. *In re* Porter, 393 S.W.2d 881 (Ky. 1965); *In re* Shumate, 382 S.W.2d 405 (Ky. 1964).
13 *In re* Lewis, 404 S.W.2d 469 (Ky. 1966). In addition, the Court under RCA 3.050 would not allow respondent to voluntarily resign in order to escape the stigma of disbarment.
14 *In re* Applewhite, 401 S.W.2d 757 (Ky. 1966) (an examination of applicant's conduct prior to disbarment was allowed); *In re* Cohen, 401 S.W.2d 54 (Ky. 1966) (the Court relying on applicant's failure to satisfy a civil fraud judgment rendered against him in 1954).
XIII. INSURANCE

Most of the insurance cases decided last term involved the construction of various insurance policies. However, the Court did face some other issues in cases involving the changing of beneficiaries, the right of a divorcée to recover as beneficiary on a life insurance policy of her former husband, an attempt by an insured to revive an expired policy after an accident, and misrepresentations by an applicant for life insurance coverage.

In Marshall v. Marshall,1 a case dealing with an attempted beneficiary change, the Court relied upon its “substantial compliance” rule to give effect to an attempted change which failed to comply with the instructions for beneficiary changes set out in the policy. The insured was covered by a group life insurance policy paid for and administered by his employer. When he began his employment in 1954, the insured signed a statement informing the employer that he wanted his mother named as his beneficiary. When he returned to his employment in 1958 after a military leave of absence, he filled out two information sheets wherein he named his wife as beneficiary. He died before any other steps toward perfecting a change of beneficiary were taken. According to the policy, a change could only be perfected by written notice to the insurer.

The insured’s wife sued his mother to recover the amount of the proceeds of the policy. The Court of Appeals rejected the mother’s argument that the change was ineffective for failure to comply with the provisions of the policy and held, reversing the lower court, that the wife was entitled to the proceeds. The Court looked at the realities of the case and took cognizance of Kentucky’s adherence2 to the “substantial compliance” rule, a rule by which an otherwise ineffective change of beneficiaries is given effect when the insured has substantially complied with the enumerated procedures “and has done ‘all’ or ‘about all’ he could do to make the . . . change effective.”3

In applying the rule to the facts of the case before it, the Court was compelled to scrutinize the efforts of the insured to change the beneficiary on the policy. He had signed an “information sheet” requesting a beneficiary change, had always dealt with the insurer through his employer, and had been required merely to fill out similar papers when he named his mother as beneficiary in 1954. The

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1 399 S.W.2d 487 (Ky. 1966).
3 399 S.W.2d at 489.
only difference was in the employer's conduct—in 1954 the employer completed the transaction, in 1958 he did not.

The substantial compliance rule, a result of the notion that equity will not prevent circumstances beyond the insured's control to defeat his best efforts to change his beneficiary, is universally applied where the defect is merely formal. By applying it to Marshall the Court of Appeals stretched this doctrine, but the very nature of the rule warrants the extension. It should be remembered, though, that Marshall presented a factual situation that virtually cried out for application of the rule. Whether the Court would reach the same result under a less extreme situation seems doubtful.

In Bissell v. Gentry the Court was faced with the question of whether a named beneficiary's right to the proceeds of a life insurance policy was extinguished by KRS 403.060, which provides that, upon a final divorce judgment, each party is to be restored to any property which was not disposed of at the beginning of the action and which he obtained from or through his spouse during, or in consideration of, the marriage.

In Bissell, the plaintiff was the wife of the insured, who named her as beneficiary in the group life insurance policy paid for by his employer. Following their divorce, the insured never changed the beneficiary, and on his death the plaintiff and the insured's administrator both claimed the proceeds. The circuit court held the administrator entitled to the proceeds, and the Court of Appeals affirmed. The Court, holding KRS 403.060 applicable, decided that, since the plaintiff had not made the premium payments, the statute extinguished her right to the proceeds. The Court was impressed with the idea that the insured's employment was the only consideration for his employer's paying the premiums and that, consequently, "the result is as though

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4 Vance, Insurance § 148 (2d ed. 1930).
5 Ibid.
6 The well-reasoned opinion of the Court discusses this. The mother urged adoption of the reasoning applied in Johnson v. Johnson, 139 F.2d 930 (5th Cir. 1943), while the wife based her argument on Johnston v. Kearns, 107 Cal. App. 557, 290 P. 640 (1930). The Court accepted Kearns. In Kearns the California court held that an insured who notified his employer from his deathbed that he wanted to change the beneficiary on his group policy had substantially complied with the policy's requirement that notice be given to the insurer by the insured. The Court characterized Kearns as consonant with reasoning and precedent, while it criticized the Johnson case as inconsistent with the substantial compliance doctrine.
7 403 S.W.2d 15 (Ky. 1966).
7A See other cases involving post divorce restoration of property noted supra Sec. X, Domestic Relations, note 35.
8 This holding is based on solid precedent. See Sea, Adm'r v. Conrad, 155 Ky. 51, 159 S.W. 622 (1913).
Bissell [the insured] individually procured and paid for the policy.9

The decision falls squarely under the rule, established in the cases cited by the Court,10 that if the wife procures the policy and pays the premiums during the marriage, the policy is her property, not the insured-husband's, and, conversely, if she has not paid the premiums the policy is the husband's property11 and is restored to him by the statute. As Vance12 points out, the general rule is that, absent statute, a beneficiary's interest is not divested by his divorce from the insured, but Bissell is in accordance with the construction given similar statutes in other jurisdictions.13 The decision is sound for two reasons: first, there is no reason for giving a divorced spouse's beneficial interest in an insurance policy any better treatment than other property would receive under the same statute; second, since this was a group policy paid for and presumably administered by the employer, the insured's failure to change beneficiaries probably resulted from oversight rather than from a wish to retain the plaintiff as beneficiary.

Another significant case decided last term, Trautman v. Nationwide Mut. Ins. Co.,14 involved the insured's efforts to revive an automobile liability policy which by its terms had lapsed before the accident. The Court refused to hold that the insurer extended the policy's express time limitation by cashing a check15 which purported to be full payment of a premium and which was mailed after the policy had expired and after the insured had been involved in the accident. The Court in so holding was swayed by what it called the "immutable fact" that the policy by its express terms had expired before the accident occurred. It focused on the utter absence of any conduct on the part of the insurer which could have led the insured to believe the policy

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9 403 S.W.2d at 16.
10 Salisbury v. Vick, 368 S.W.2d 317 (Ky. 1963); Henderson v. Baker, 362 S.W.2d 720 (Ky. 1962); Ficke v. Prudential Ins. Co. of America, 305 Ky. 172, 202 S.W.2d 429 (1947).
12 Vance, op. cit. supra note 4, at 597 contains a substantial discussion of the Kentucky statutory scheme.
13 Ibid.
14 400 S.W.2d 215 (Ky. 1966).
15 In Carden v. Liberty Mut. Ins. Co., 278 Ky. 117, 128 S.W.2d 169 (1939), cited by the Court as binding precedent on this point, the insurer exercised the right given it by the terms of the policy to cancel the policy at any time. In holding that the insurer did not vitiate the cancellation by cashing a check in payment of premiums, the Court was more concerned with enforcing the right of free cancellation reserved by the insurer than with the effect of the cashing of the check itself. However, though no precise case in point has been found, the holding in Trautman is proper in light of the fact that a corporate insurer must, as a result of internal operations, be given a reasonable time before imputation of such knowledge will be assumed.
would continue in force after the stated expiration date.\textsuperscript{16} The decision is sound because it reflects a willingness by the Court to recognize a fact of corporate life, namely, the necessary internal mechanics of corporate functioning.\textsuperscript{17} The Court was correct in refusing to let the insured take advantage of this fact at the insurer's expense. Since the case was disposed of by holding that no policy of insurance existed at the time of the accident, an interesting problem—the plaintiff's right to sue on the policy as a third party beneficiary since the plaintiff was not the insured\textsuperscript{18} was avoided.\textsuperscript{19}

In \textit{Lincoln Income Life Ins. Co. v. Burchfield},\textsuperscript{20} the Court was called upon to apply KRS 304.656,\textsuperscript{21} which provides that "misrepresentations [by an applicant for life insurance] unless material or fraudulent, shall not prevent a recovery on the policy." The Court had no difficulty in concluding that, although the insured had made material misrepresentations concerning his previous state of health, the insurer was estopped to deny liability on the policy, since it was clearly chargeable with notice of the misrepresentations. The soundness of \textit{Burchfield} is unquestionable both on precedent\textsuperscript{22} and policy, since the decision does no more than implement the widely entertained\textsuperscript{23} notion that the insurer will be presumed to have waived

\textsuperscript{16} The Court distinguished three cases cited by the plaintiff on the ground that they involved acceptance of premium payments with knowledge of a ground for forfeiture: \textit{Home Ins. Co. v. Caudill}, 366 S.W.2d 167 (Ky. 1963); \textit{Glens Falls Ins. Co. v. Elliott}, 223 Ky. 205, 3 S.W.2d 219 (1928); \textit{Kentucky Live Stock Ins. Co. v. Stout}, 175 Ky. 343, 194 S.W. 318 (1917).

\textsuperscript{17} Since renewal of an insurance policy which by its terms has expired is in effect no more than the creation of a new contract of insurance, there must be contractual intent by both parties. Such an intention cannot be found from the mere failure of a corporation to immediately refuse a check given to pay a premium on a lapsed policy. See 13 \textit{Appleman, Insurance Law & Practice} \textsuperscript{2} § 7641 (1948).

\textsuperscript{18} Note that the plaintiff in \textit{Trautman} had been awarded a judgment against the insured. Presumably this judgment was worthless, since plaintiff sought recovery on the policy against the insurer.

\textsuperscript{19} See 1 A. \textit{Corbin, Contracts} § 214 (1963); 46 C.J.S. \textit{Insurance} §§ 1191, 1243 (1946). There is Kentucky authority to the effect that the injured person may sue the insurer as a third party beneficiary, at least where the policy does not provide contra. See \textit{Central Mut. Ins. Co. v. Pippen}, 271 Ky. 280, 111 S.W.2d 425 (1937); \textit{Metropolitan Cas. Ins. Co. v. Albritton}, 214 Ky. 16, 282 S.W. 187 (1926); \textit{Transylvania Cas. Ins. Co. v. Williams}, 209 Ky. 626, 273 S.W. 537 (1925). Such a rule seems consistent with Kentucky's attitude toward third party beneficiaries generally. \textit{Traylor Bros., Inc. v. Pound Tire Supply}, 338 S.W.2d 657 (1960).


\textsuperscript{21} KRS § 304.656 (1950).

defenses based on facts of which it had knowledge, and will therefore be estopped to raise such a defense.\textsuperscript{24}

The remainder of the insurance cases turned on the Court’s construction of various policies. In a case\textsuperscript{25} which raised the question of whether a particular business interruption policy was an “open” as opposed to a “valued” policy, the Court reiterated the definition to which it had previously adhered,\textsuperscript{26} a definition approved by Couch,\textsuperscript{27} and held that under a policy limiting liability to actual loss the insured could recover only what the evidence showed the actual loss to have been. In a case\textsuperscript{28} involving the issue of whether the policy entitled the insured to recover the diminution in the value of her automobile resulting from a wreck, the Court followed the black-letter rule\textsuperscript{29} and held that where the policy limited the insurer’s liability to the actual cash value of the vehicle or to the cost of repairing or replacing the car, the insured could recover only the cost of repairing the vehicle, not the diminution in value. In two other cases, the Court utilized the general rule\textsuperscript{30} that unambiguous terms of an insurance policy are to be construed according to their plain meaning. Accordingly, it gave force to a provision in a fiduciary bond policy which limited the computation of losses\textsuperscript{31} and to a provision in an automobile policy which exempted from coverage as a “substitute” car a vehicle customarily available to the insured.\textsuperscript{32}

\textsuperscript{24}Id. at § 1017.
\textsuperscript{25}National Fire Ins. Co. v. Hutton, 396 S.W.2d 53 (Ky. 1965).
\textsuperscript{26}See Ellis v. Hartford Livestock Ins. Co., 293 Ky. 683, 170 S.W.2d 51 (1943). Apparently Ellis was not cited by the appellant in Hutton, but Stuyvesant Ins. Co. v. Jacksonville Oil Mill, 10 F.2d 54 (6th Cir. 1926), cited by the Court, states a definition and rule substantially the same as that in Ellis.
\textsuperscript{27}1 COUCH, INSURANCE § 1:81 (2d ed. 1959) provides:
An open, or, as it is sometimes called, an unvalued policy is, as its name implies, one in which the value is not fixed, but is left to be definitely determined in case of loss. A valued policy is one in which the parties have agreed upon the value of the property insured in the event of future loss.
\textsuperscript{28}General Acc. Fire and Life Assur. Corp. v. Judd, 400 S.W.2d 685 (Ky. 1966).
\textsuperscript{29}See, e.g., Niagara Fire Ins. Co. v. Huffman, 253 S.W.2d 617 (Ky. 1952) and cases discussed therein; 15 COUCH, INSURANCE §§ 54:139 - 140 (2d ed. 1966).
\textsuperscript{31}Kentuckiana Sales, Inc. v. Security Ins. Co., 394 S.W.2d 744 (Ky. 1965).
\textsuperscript{32}Kentucky Farm Bureau Mut. Ins. Co. v. Kitchen, 395 S.W.2d 769 (Ky. 1965).
XIV. LABOR LAW

The most important labor case decided was *Kentucky State AFL-CIO v. Puckett*, which invalidated a right-to-work ordinance of Shelbyville reading as follows: “The right of persons to work shall not be denied or abridged on account of membership or non-membership in, or conditioned upon payments to, any labor union, or labor organization.” This decision was based on an assertion that Congress intended to preempt the field of labor-management relations when it enacted Section 8(a)(3) of the National Labor Management Act, which permits agreements requiring union membership as a condition of retaining employment. Section 14(b) of the Taft-Hartley Act merely created an exception to this preemption by providing that: “nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”

The words “State or Territory” were emphasized by the Court. It took their use to be indicative of congressional intention to create a power the state had not possessed before the enactment of section 14(b). Since section 14(b) was regarded as a limited exception to the overall policy of preemption, its language was properly given a strict construction. As the Court pointed out, it would have been unreasonable to interpret congressional intent so as to allow any political units smaller than states to determine labor relations policies. Since it is an exception to the overall policy of preemption, these words were properly given a strict construction. Moreover, the Court construed the Shelbyville ordinance as intended, inseparably, to encompass interstate commerce as well as local commerce, thereby affecting more than “that tiny area of purely intrastate activity to which the federal Act does not apply.”

City and county right-to-work ordinances have also been invalidated in California. The decision there was based on an assertion that the state by inaction had preempted the field, and local units of government could not act. The California court said the National

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1 391 S.W.2d 360 (Ky. 1965).
2 Id. at 361.
6 391 S.W.2d 360, 362.
Labor Management Relations Act did not apply to purely local commerce, but the ordinance was nonetheless invalid because of state preemption. Thus, neither California nor Kentucky were willing to let the local ordinance stand, but the Kentucky decision left with local governments the power to legislate on intrastate matters. This power is relatively insignificant, however, since so few businesses now fall in the intrastate category.

*International Bhd. of Firemen & Oilers v. Board of Educ. of Jefferson County* seemed contrary to the general trend of allowing government employees the right to have their representatives present their grievances to their superiors. Appellee school board had agreed to discuss a dispute with certain dissatisfied employees. The employees brought with them to the conference two representatives from their union. The school board thereupon refused to engage in discussion in the presence of the representatives. The Court held that the board acted within its discretion in refusing to meet with the union men.

Of course, public employees do not generally have the right to strike. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those sworn to support it, is unthinkable and intolerable. In fact, an injunction to stop such strikes can be granted even where statutes do not prohibit strikes.

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8 393 S.W.2d 793 (Ky. 1965).
10 Note that this was not a matter of a demand for collective bargaining; the holding was much narrower.
11 Letter from President Roosevelt to the President of the Nat'l Fed'n of Fed. Employees, August 16, 1937 (quoted from 1961 Wis. L. Rev. 601, 604). See also, Norwalk Teacher's Ass'n v. Board of Educ. of City of Norwalk, 138 Conn. 269, 83 A.2d 482, 485 (1951), which states:
   In the American system, sovereignty is inherent in the people... The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare. The answer to the question [the right to strike] is "No."
12 Norwalk Teacher's Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); City of Cleveland v. Division 268, Street, Electricity Ry. and Motor
On the other hand, Federal policy, first laid down by the Civil Service Commission in 1954, and later affirmed by President Kennedy, favors freedom of organization. Over a million of the 8.5 million federal employees were organized in 1960.

A continuing total refusal to deal realistically with government employees can lead to grave results. Kentucky has seen strikes by teachers, policemen, and other governmental employees. Continued narrowmindedness on the part of government officials can only lead to further friction and strife.

Horn Transfer Lines, Inc. v. Morgan, the only other labor case decided by the Court last term, involved the purchase of the assets of the Horn Lines by another company. Horn was operating under a union contract, while the purchasing company was not. After the acquisition, the purchaser executed a health, welfare, and pension fund agreement with the bargaining agent named in the labor contract. The Court held that the jury was able to find that, under the circumstances, the purchaser had become obligated under Horn’s labor agreement. The decision does not represent any departure in the development of the law. However, it is significant in that it serves as a reminder that, in a transaction involving the purchase of a business or a substantial portion of business assets, the labor contract and collective bargaining relationship of the entity to be acquired deserve as much scrutiny as any other major obligations of that enterprise.
XV. MUNICIPAL CORPORATIONS

As demonstrated during this past term, cases pertaining to municipal government involve more than constitutional and statutory interpretation of local governments' powers and limitations. Such cases question the extent to which the municipal government may act in the public interest through its police power when its exercise affects the constitutionally guaranteed rights of the individual. Dealing with these conflicting interests in the past term, the Court has adhered to the approach of looking not only to precedent but also to the results of its decisions. Both the balancing of interests and the approach of the Court were manifest in its decisions relating to financing of urban renewal projects, city renovation programs and public utilities, and to problems of annexation, civil service and procedure.

A. Finance

One of the basic problems confronting municipal governments is the financing of public projects and services. This problem has become more critical in recent years because of rapid urban migration occurring under a rural-oriented constitution, a Legislature too weak to cope with local problems, and executives unable or unwilling to pick up the "gauntlet." Consequently, local officials have devised a variety of methods to finance projects and services.

1. Urban Renewal.—In Watkins v. Fugazzi the Court of Appeals reviewed the constitutionality of the City of Lexington's effort to finance part of its urban renewal plan. The city had encouraged its own independent agency and the United States Housing and Home Finance Administrator (HHFA) to jointly finance the removal of railroad tracks in the proposed urban renewal area, pursuant to the Kentucky governmental inducement statutes. Broadly speaking, these statutes empower municipal corporations to induce governmental agencies to undertake projects in its area. The implicit purpose of these statutes is to increase federal spending in Kentucky. More specifically, in the only other case which has defined the scope of these statutes, the Court recognized the immediate purpose of the statutes as inducement of a governmental agency, which employs personnel

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1 394 S.W.2d 594 (Ky. 1965).
2 KRS §§ 82.105–82.180 (1962).
3 The governmental inducement statutes define the terms, governmental agency KRS § 82.180(3), governmental project KRS § 82.105(4), and the procedure the city must follow in order to use the power delegated to it by the state under these statutes.
4 Grimm v. Moloney, 358 S.W.2d 496 (Ky. 1962) (City of Covington induced the Internal Revenue Service to locate a regional computer center there).
on a continuing basis, to locate in the state. Consequently, there was some question as to whether the Lexington urban renewal program was covered by these statutes, since no federal agency located in Lexington would actually be employing personnel. The Court of Appeals held that the broad language of the statutes indicates that the General Assembly intended the statutes to apply to the Lexington situation.

Additionally, the Court held that the City of Lexington could finance its share of the cost through the issuance of bonds. Furthermore, the bonds could be funded by a mere pledge of an occupational tax without violating sections 157 and 158 of the Constitution. When read together these sections prohibit both the incurrence of indebtedness over a maximum amount and the obligation of future revenues without approval of a two-thirds vote of the people. The Court of Appeals based its decision of constitutionality on the fact that the occupational tax could be withdrawn at any time and, therefore, the city was not obligating future revenues without a vote of the people. From a realistic standpoint, it is submitted that the city has committed future revenues because a city cannot default on its bonds and still expect to borrow money in the current market. The result of the Court’s approach is to further relax the constitutional limitations on the ability of a municipality to borrow money backed by a pledge of revenues from a special fund.

The Court of Appeals redefined its position in Grimm and held that KRS § 82.145(2)(b) does not limit occupational tax to a levy on just “new” money arising from new employment, but on all employment in or directly related to the project area. See Skidmore v. City of Elizabeth, 291 S.W.2d 3 (Ky. 1956) (where the Court of Appeals did not make a distinction between new and old revenues).

KY. CONST. § 157 provides: “No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner . . . without the assent of two-thirds of the voters thereof. . . .” It also sets maximum tax rates, according to the size of the town for municipal purposes except for school purposes.

KY. CONST. § 158 provides: “The respective cities, towns, counties, taxing districts, and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages. . . .”

The Court of Appeals has been slow to recognize the distinction between pledge and debt although other jurisdictions have done so. 49 Am. Jur. States, Territories & Dependencies, 67 (1943). In Curlin v. Wetherby, 275 S.W.2d 934 (Ky. 1955), the Court was reluctant to permit circumvention of the constitution through the pledge technique of financing, but five years later reversed its stand in Turnpike Authority of Kentucky v. Wall, 336 S.W.2d 551 (Ky. 1960). Two years later the Legislature authorized pledging of a special fund in the government inducement statutes, KRS § 82.145(2)(b) (1962).

Acceptance of the special fund theory embracing occupational tax has been slow in evolving. Prior to Grimm and Watkins, only revenues from a use tax paid by an individual who benefited from the project or revenues from rent on school

(Continued on next page)
The significance of Watkins is far-reaching. The Court left no doubt as to the scope of the governmental inducement statutes. The statutes are not limited to inducing governmental agencies employing personnel but provide local officials a means to acquire federal money, thereby enabling them to cope with the problems of slum clearance, modernization of downtown areas and construction of viaducts, rapid transits, and local public buildings. But more importantly, the governmental inducement statutes and Watkins place Kentucky municipalities on a competitive footing with other cities in the country. The General Assembly, in effect, has delegated to the cities power to meet their problems and the Court of Appeals has approved a method by which the municipalities can raise sufficient funds to qualify for federal matching funds programs.

2. City Improvements.—The city of Louisville approached its problem of financing a variety of public projects in the traditional method, pursuant to the Constitution. Section 157 provides that the people by a two-thirds vote can increase the maximum ad valorem tax rate provided for in that section. Section 159 requires that all debts of the current year must be met by sufficient tax revenues in that year. Pursuant to these sections the citizens of Louisville voted by more than a two-thirds vote to incur the indebtedness. After the referendum, the city issued an ordinance stating that the bonds would be paid out of the general sinking fund and if in any year the sinking fund should be insufficient to meet the voted obligation, the city could levy an ad valorem tax to raise additional revenue.\(^\text{10}\)

After the election, but before the issuance of the bonds, House Bill I (1965)\(^\text{11}\) was enacted. The purpose of H.B. I was to place a ceiling on ad valorem tax rates which local taxing units might levy against property evaluated at 100% of its market value. More particularly, the act provides that each local taxing unit in 1966 and there-

\(^\text{10}\) KRS § 91.200(c) (1958) provides that: “Ad valorem taxes for the benefit of the sinking fund shall not be levied unless the income of the sinking fund is otherwise insufficient to meet such requirements.” The other methods referred to are the levy of license taxes, occupational taxes and franchise taxes.

after will be limited to an ad valorem tax rate\textsuperscript{12} which will produce the same amount of revenue the taxing unit collected in 1965, unless the taxing unit shows that it cannot operate within this limit. In that event the tax rate used in 1965 may be increased by 10\% in 1966-67, with a second percent increase permitted in 1967-68.\textsuperscript{13} Since it is a future possibility that the City of Louisville may have to levy an ad valorem tax rate in excess of the compensating tax rate required by House Bill I, \textit{Raque v. City of Louisville}\textsuperscript{14} was instituted to test the validity of the city ordinance and House Bill I.

The Court was faced with a conflict of interests. If it ruled that the Louisville Ordinance violated House Bill I, the Court would be voiding a constitutional right of the people to authorize local government to float a bond.\textsuperscript{15} Conversely, if the Court held that House Bill I, was unconstitutional in \textit{toto}, the Court would deprive Kentucky citizens of the protection they sought in House Bill I. The Court, in its wisdom, “split the baby” and held that it was not the intent of the Legislature to apply H.B. I “to limit the rate at which taxes must necessarily be levied to pay an indebtedness either theretofore or thereafter by authority of the vote of the people under the constitution.”\textsuperscript{16} The Court grounded its reasoning on a sound basis: the purpose of House Bill I was to protect the people from unintended tax burdens,\textsuperscript{17} not from ones which they, themselves, specifically authorize through refer-

\begin{itemize}
  \item \textsuperscript{12}KRS § 132.010(6) (1965) provides: Compensating tax rate means that rate which, rounded to the next higher one-tenth of one cent per one hundred dollars of assessed value and applied to the 1966 assessment of the property subject to taxation by a taxing district for the 1965 tax year, produces an amount of revenue approximately equal to that produced in 1965.
  \item \textsuperscript{13}KRS § 160.470(4) (1965) which permits the school board, upon a proper showing of evidence that its tax revenues are inadequate, to increase its assessment by 10\% for 1965-66 and 1966-67. KRS § 68.245(3) (1965) and KRS § 132.027(2) (1965) provide similar exceptions for the county and city respectively.
  \item \textsuperscript{14}402 S.W.2d 697 (Ky. 1966).
  \item \textsuperscript{15}If the Court had held that the ordinance is violative of H.B. I, the decision would have serious side effects. H.B. I, in effect, would stand as an absolute restriction on the municipal governments’ ability to finance additional projects without sacrificing existing programs (exceptions would only modify the situation by permitting a 10\% increase in revenues for 1965-66 and 1966-67). This is to say nothing of the bind cities would be in as the cost of administration and public services increases while their revenues remains constant. The latter shortcoming provides a prime reason why the General Assembly should find a more accommodating manner to protect the interest of the individual and to preserve the powers of the municipal government.
  \item \textsuperscript{16}402 S.W.2d at 698.
  \item \textsuperscript{17}H.B. I was passed in order to limit the effectiveness of Russman v. Luckett, 391 S.W.2d 694 (Ky. 1965), which held that the Constitution requires all property to be assessed at 100\% its full value.
\end{itemize}
The Raque decision strongly exemplifies the result-oriented approach of the Court because it has interpreted legislation in such a manner as to protect Kentucky citizens from increased taxes levied by local officials and has also given the City of Louisville its bond issue.

3. Public Utilities.—All municipal governments are confronted with the problem of providing and maintaining adequate public services to their inhabitants. The Court decided four cases relating to this problem, two of which approved the city’s financial approach to meet the needs of the people. In the other two cases the Court considered the municipality’s approach unreasonably restrictive of the interest of the individual.

In the first case, the municipal government wanted to consolidate the water districts in its metropolitan area, thereby providing better water services at lower rates to its customers. The Louisville Water Co. contracted to purchase the assets and liabilities of the Preston Street Water Co. and two other local companies by buying the outstanding revenue bonds at a premium. There was, however, some question as to the validity of the contract. The public utility companies to be purchased would, in effect, be dissolved, but Kentucky statutes do not provide any method for dissolution of a public utility. KRS Chapter 74, which defines the powers and limitations of a water district, only provides a method by which “the territorial limits of an established water district may be enlarged or diminished.” The Court reasoned that the intention of the General Assembly was not to create a “corporate creature” for perpetuity, and held that dissolution can be effected when it is “incident to a substantially complete territorial diminution.” The result of the decision is that the Court of Appeals has filled in a gap in the statutes, thereby enabling local officials to meet financial needs of the people through a method overlooked by the Legislature.

18 The Court’s approach of excising unconstitutional portions from the scope of the statute is consistent with the generally accepted constitutional construction that the “legislaure is presumed o be cognizant of the constitution, previously enacted statutes, and the common law, Cook v. Ward, 381 S.W.2d 168 (Ky. 1964) and, therefore, does not pass statutes which are unconstitutional.”

19 It should be noted that there is some question as to the constitutionality of H.B. I because it attempts to set a maximum tax rate below that which is set in section 157 of the constitution.

20 Valla v. Preston St. Water Dist. #1, 395 S.W.2d 772 (Ky. 1965).

21 KRS § 74.110 (1942).

22 395 S.W.2d 772, 774 (Ky. 1965).

23 In addition, the Court held that the 6% per annum limit on the cost of issuing bonds, set out in KRS § 74.290(2), does not limit a public utility from purchasing public bonds from the owners in an open market at a greater rate of interest. Id., at 775.
In a related case, two small communities were faced with the problem of supplying their respective inhabitants with adequate sewage facilities. The two municipal governments contracted to combine their efforts, but a question as to the validity of the contract was raised. The Court of Appeals reaffirmed a prior decision in holding that the two municipalities could constitutionally contract to jointly use the sewage facilities financed and constructed by one and leased to the other.

The next two cases indicate that, while municipal governments can use new methods of financing, they cannot be unreasonable in the application of such methods. In City of Maysville v. Coughlin the Court held that the city could not continue to finance the operation of a sewage system through a tax levy after the bonds had been paid and the ordinance revoked. The Court also held that a resident is not obligated to pay a rental fee for sewage facilities which were supposed to, but did not, extend to his property. In a second case, the city of Corbin claimed that it was too costly to extend a water line to complainant's property when it had had extended the line to a neighbor's. The Court held that the city in operating its own water company must reasonably adhere to fixed standards and not discriminate against persons similarly situated.

An overview of the above four cases indicates that the Court of Appeals has permitted municipal corporations to introduce innovations to meet their increasing problems, so long as the power is exercised in such a manner as not to restrict unreasonably the rights of the individual.

B. Annexation

During the last term, five remonstrance and prohibition suits were instituted to invalidate city annexation ordinances and pro-

24 City of Russell v. City of Flatwoods, 394 S.W.2d 900 (Ky. 1965).
25 Francis v. City of Bowling Green, 259 Ky. 525, 82 S.W.2d 804 (1935).
26 399 S.W.2d 297 (Ky. 1966).
27 The Court looked to the intent of the ordinance and held that although § 1 of the ordinance stated that the revenue was for "the purpose of completing, altering and operating, the sanitary sewer system of the city," § 6, which provides that rental charges are to be collected "so long as the principal and interest of the bonds secured thereby remain outstanding," is controlling.
28 This holding is consistent with Puckett v. Muldrough, 403 S.W.2d 252 (Ky. 1966) decided during the same term, in which the Court held that a landowner is obligated to pay a minimum meter rent on water lines which service his property, even though no water is being consumed at that time, because he is paying for the availability of the water and not for its consumption.
29 Johnson v. Reasor, 392 S.W.2d 54 (Ky. 1965).
30 Remonstrance 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, LAW DICTIONARY (4th ed. 1951).
ceedings. The trend of these and other recent\textsuperscript{31} Court of Appeals decisions indicates the Court’s reluctance to void city annexation programs.

A brief explanation of the theory behind annexation may help in understanding annexation suits. Migration to urban areas has resulted in city suburbs assuming urban characteristics. These outlying areas are, in fact, the outgrowth of cities, but they are not part of those cities. This situation leads to a number of undesirable results. For example, natural borders and incorporated areas surrounding cities cause overcrowding, which results in a decline of health and moral standards. Moreover, industrial concerns and residential inhabitants are reluctant to locate in areas outside of cities because they are unable to get adequate service from public utilities. An inequity also exists in that people living beyond city boundaries take advantage of municipally-sponsored programs without assuming a fair financial burden for their support.\textsuperscript{32} Most importantly, the city is better able to finance and administer public utilities than is the county.\textsuperscript{33}

In considering private interests, a basic argument against annexation is that it takes property in violation of the fourteenth amendment of the federal constitution. Whether or not due process has been violated generally depends upon the facts of the case, the particular annexation statute, and the requirements of the appropriate constitutional provision.\textsuperscript{34} Such decisions turn upon the courts’ balancing of these circumstances. Other arguments against annexation emphasize higher taxes (property, occupational, and the like) and zoning restrictions. Thus, in annexation suits, the Court must weight public welfare considerations against private rights and interests.\textsuperscript{35} The arguments for annexation are strong and usually prevail.

In \textit{Hellman v. City of Covington},\textsuperscript{36} appellee city’s evidence revealed that annexation would result in improved police and fire protection, lower insurance rates, better garbage and sewage disposal, and better water service for the area in question. Appellant, representing more

\footnotesize{\textsuperscript{31} See \textit{Court of Appeals Review}, 53 Ky. L.J. 553 (1964).}
\footnotesize{\textsuperscript{32} Note, 53 Ky. L. J. 154 (1964).}
\footnotesize{\textsuperscript{33} Cities are able to finance programs better than counties because of the sources of revenue the cities are able to collect. Higher city property taxes, occupational taxes, payroll taxes, and programs sponsored through bond issues provide the cities with more finances. The cities are better able to administer these programs because they are able to hire the personnel for technical positions. Furthermore, the compactness of cities renders more effective administration than is possible in counties whose needs vary with the locale in which the individuals are situated. Ky. Const. § 158.}
\footnotesize{\textsuperscript{34} 37 Am. Jur. \textit{Municipal Corporations} § 29 (1941).}
\footnotesize{\textsuperscript{35} 37 Am. Jur. \textit{Municipal Corporations} § 23 (1941).}
\footnotesize{\textsuperscript{36} 393 S.W.2d 889 (Ky. 1965).}
than fifty percent of the resident freeholders, remonstrated against the proposed annexation on the basis that the area was unfavorable for development. He argued also that the residents were content with the present status of the property and did not desire change. In sustaining appellee's evidence, the Court found that failure to annex would result in prosperity retardation for the city and for the owners and inhabitants of the territory sought to be annexed.

The Court's recent adoption of a policy favoring annexation is further indicated by the favorable procedural treatment it bestows upon the city. In City of Shepherdsville v. Gentry the Court adopted a supple approach to the city's failure to comply with procedural requirements. The Court held that it would be inconsonant with justice to enter a default judgment against the city without having a trial on the merits. Somewhat inconsistently, the Court held in City of Danville v. Wilson that the failure of a remonstrantor to follow procedural guidelines voided his action to prohibit annexation. The Court stressed that it was without authority to interpose judicial limitations or conditions inconsistent with those set by the legislature.

Another issue presented to the Court involved partial annexation. Citing precedent, the Court held that the proposed annexation of unincorporated territory by a city should be approved or disapproved as a whole. Such reversal gave the city another chance to annex all of the territory in question.

The policy considerations underlying annexation gave rise to a case concerning the closing of a road. The issue involved the right of the city to condemn property for its use, thereby depriving complainant of a more convenient access to a public highway near his property. The Court held that the road closing neither deprived him of a reasonable means of ingress and egress to public highways nor injured his property interests. This decision parallels the reasoning of the Court in the annexation suits.

Annexation conflicts present a difficult problem. The complexity of interests involved promote the impossibility of obtaining results
satisfactory to all concerned parties. A possible solution to annexation in the larger cities may be the establishment of a metropolitan or city-county combination-type government, in which one body of government administers designated programs. Until solutions are promulgated, the approach of the Court favoring annexation programs will probably remain in effect. In light of the aforementioned policy considerations, such an approach is justifiable.

C. Municipal Civil Service

The needs of smaller cities often require liberal interpretation of statutes in order to provide such areas with personnel capable of performing much needed services. In City Util. Comm'n of City of Owensboro v. City Civil Service Commission of Owensboro, dispute arose as to whether a person appointed pursuant to statute by the utilities commission to a classified position of civil service should be certified by the civil service commission even though he failed to meet certain standards required by statute for the taking of a civil service examination. The Court of Appeals held that it was not the intent of the Legislature in drafting KRS 90.350(6), under which the appointment was made, to make an examination necessary in all situations. This is sound policy, for it enables smaller cities to fill technical positions even though statutory requirements cannot be met for taking civil service exams. If the Court had not reached the result it did, the city of Owensboro would have been without the services of an engineer.

D. Procedure

Aside from the annexation cases which were concerned with the proper procedure in remonstrance suits, the Court of Appeals reviewed four other cases involving procedural issues. The Court, by specifically explaining the impact of the rules, more clearly defined the general powers of cities.

Two cases involving essentially the same two parties concerned the standing of an intervening third party to file a motion under CR 60.02 on behalf of a city. In one case the Court held that the alleged right to intervene on behalf of the city in the purported capacity as special

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43 396 S.W.2d 801 (Ky. 1965).
44 KRS § 90.350(6) (1942) waives the necessity of a "competitive examination" where special qualifications of a particular profession are met.
45 KRS § 90.330 (1942) requires certain age, residency and voter requirements before qualifying an individual to take the necessary examination to be certified for coverage under civil service.
46 City of Manchester v. Keith, 396 S.W.2d 44 (Ky. 1965).
attorney, citizen, taxpayer and legal resident was an insufficient allegation under the Rules. In a subsequent case a week later, it was argued that such an intervening third party may acquire standing by alleging that he has made a demand on the proper city officials to make a motion to set aside judgment or that such a demand would have been futile. In construing these rules, the Court indicated that such standing must be accompanied by the lack of objections as to any irregularities.

The significance of these two cases to municipal corporations is obvious—it reduces a city's control over whether it should enter into litigation. While the procedure may be utilized in some cases to protect the public's interest from dilatory officials, it might also be used as a lever by strong pressure groups to force city officials into undesirable positions.

In another case the Court held that, in tort actions against cities, it is not necessary to give prior notice to the city's officials before bringing suit against the city's public utility because state statute bestows upon the utility a separate legal capacity. Since the public utility may sue and be sued, there is no necessity to give the city government notice of its legal affairs.

In *Kilburn v. Colwell* the Court held that a policeman may be dismissed from his position where there is evidence sufficient to prove that he received gifts and solicited campaign funds for the mayor, not only in violation of a city ordinance preventing officers from accepting such gifts, but also in violation of KRS 95.470, which prohibits political activities by policemen.

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47 City of Manchester v. Asher, 396 S.W.2d 327 (Ky. 1965).
48 McIntosh v. Electric and Water Plant Bd., 394 S.W.2d 471 (Ky. 1965).
49 396 S.W.2d 803 (Ky. 1965).
XVI. PROCEDURE

A. Pre-trial and Trial Procedure

Since 1953, when the Kentucky Rules of Civil Procedure became effective, the Kentucky practitioner has been exposed to a body of procedural law and a spectrum of procedural problems dissimilar in many respects to the pre-1953 code. The cases herein discussed exemplify recurrent problems in the use of the Kentucky Rules, and the discussion when appropriate will refer to the Federal Rules after which they were patterned.¹

1. Statutes of Limitation.—The rule enunciated in Wethington v. Griggs² and Seat v. Eastern Greyhound Lines, Inc.³ materially alters the law concerning statutes of limitation applicable to personal injuries arising from a tort committed in another state. Only Wethington need be described, since it illustrates the fact pattern in both cases. As a result of an automobile accident in Ohio in 1962, suit was filed in Kentucky against defendant Griggs in 1964. The complaint was dismissed since the Kentucky statute⁴ provides a one-year limitation on personal injuries, although the Ohio statute allowed two years in which to bring the action. The Court held under KRS 413.320⁵ that the Kentucky one-year statute is displaced only when the statute of the foreign state stipulates a shorter time. Kentucky’s position now is consistent with the rule in all the other states.⁶

In Commonwealth, Dep’t of Highways v. Ratliff,⁷ the Court was called upon to determine whether a five⁸ or a ten-year⁹ statute of limitations applies to the negligent damaging of a highway bridge. The Court held categorically that the five-year limitation applies to a negligent act as well as to an intentional trespass. Since the Highway Department had filed its action five years and one day after the accident, it was barred from recovery.

² 392 S.W.2d 56 (Ky. 1965).
³ 389 S.W.2d 908 (Ky. 1965).
⁴ KRS § 413.140 (1942).
⁵ KRS § 413.320 (1942) provides that if the foreign state’s statute provides a shorter time period than Kentucky’s, the action shall be barred in Kentucky at the expiration of said shorter period.
⁶ In Seat, the Court restated the majority law that a statute of limitations does not extinguish a legal right, but rather the remedy. Since the forum controls remedies and procedure, the Kentucky statute controls except where KRS § 413.320 intercedes. See generally, Annot., 36 A.L.R.2d 563 (1952); Annot., 75 A.L.R. 208, 231 (1931).
⁷ 392 S.W.2d 913 (Ky. 1965).
⁸ KRS § 413.120 (1942) provides that an action for trespass on real or personal property shall be commenced within five years.
⁹ KRS § 413.160 (1942) is a catch-all statute which allows ten years for bringing suit.
In Wenneker v. Bailey, a girl of fourteen years was injured in an automobile accident in 1955. She married in 1960 at the age of nineteen and brought this action against appellant within one year after reaching twenty-one. Although appellant's answer alleged that appellee was barred from maintaining the action, a jury verdict awarded the girl $3,000, and appeal was taken. The Court of Appeals, citing Hicks v. Steele, reversed and ordered the complaint dismissed, stating that under KRS 413.170 marriage removes the disability of infancy and a personal injury action must be brought within one year after the disability is removed. An interesting point to note is the possible effect of the Kentucky age-of-majority statute on future cases similar to Wenneker. There seems to be ample support in Commonwealth v. Hallahan for the conclusion that appellee would lose her remedy one year after reaching eighteen.

2. Trial Judge.—The appointment of a special judge under KRS 23.230 was the dominant issue in Mills v. Broughton. Appellants contended that a special judge, appointed to try an election contest, could not thereafter determine the measure of damages under the supersedeas bonds, since the later hearing transpired in a subsequent term, leaving the special judge without jurisdiction. Because the appointment made no mention of a special term, the Court held that KRS 23.230 governed and ruled that the special judge had authority to try the case to a final determination including an assessment of damages under the supersedeas bonds.

KRS 23.230 was also construed in Wedding v. Lair. The Court held that a trial judge, having voluntarily disqualified himself, cannot thereafter reassume jurisdiction to appoint an attorney as counsel for an indigent petitioner in the absence of an agreement of the parties.
3. Pre-trial Hearings.—Three cases in this term restated the rule that where no record of the hearing is filed, it is presumed that the trial court's findings were supported by sufficient evidence. At first blush this rule, which gives blanket support to the trial judge's discretion, might seem unjust. However, as pointed out in Richardson v. Eaton, a hearing without transcript is easily remedied through the procedure set out in CR 75.13 and RCr 12.68, by which appellant need only prepare a narrative statement of the evidence or proceedings, serve it on the opposing party, and submit it on appeal.

4. Pleadings.—Generally, the Rules of Civil Procedure provide a method of ascertaining facts and resolving controversies through an orderly judicial process. Furthermore, they also allow judicial discretion within certain limitations as demonstrated by the following cases.

CR 15.01 provides, in effect, that when a party requests the court's permission to file an amended pleading, leave should be freely given. As a general rule, the trial court's discretion is not often upset. However, in Ashland Oil v. Phillips, the Court found that the trial judge had abused his discretion by refusing plaintiff's motion to file an amendment, when defendant's long delay in answering plaintiff's interrogatories had prohibited him from filing his amendment on time and when there was no allegation that defendant would be prejudiced by the amendment.

CR 15.01 further provides that a litigant may amend once as a matter of right and thereafter by leave of the court. In Hisgen v. Hisgen, it was held improper for a party to withdraw his amended answer in favor of a second amended answer, without leave of the court. Consequently, the withdrawal of the first amendment served to reinstate the original answer.

In Taylor v. Nohalty, the Court decided that CR 9.02 (circumstances constituting fraud or mistake must be stated with particularity when pleaded) does not include perjury. And in Massengale v. Lester, the Court recited the rule that it is not incumbent on the trial

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20 Massengale v. Lester, 403 S.W.2d 697 (Ky. 1966) (a motion to quash a summons for improper service); Richardson v. Eaton, 402 S.W.2d 857 (Ky. 1966) (habeas corpus); Turner v. Gentry, 402 S.W.2d 104 (Ky. 1966) (change of venue hearing).
21 402 S.W.2d 857, 859 (Ky. 1966).
23 Lawrence v. Marks, 355 S.W.2d 162 (Ky. 1962).
24 404 S.W.2d 449 (Ky. 1966).
25 400 S.W.2d 231 (Ky. 1966).
26 404 S.W.2d 448 (Ky. 1966).
27 403 S.W.2d 697 (Ky. 1966) (involved a motion to quash a summons on grounds that the service was improper).
judge to hear a motion again on the pleadings when it has already been disposed of before the trial.

CR 13.01 provides that a counterclaim is generally compulsory when it arises out of the same transaction or occurrence as the opposing party's claim.\(^{28}\) Since the rule was specifically designed to end multiple litigation,\(^{29}\) it should follow that failure to raise the mandatory counterclaim precludes a party from subsequently raising it. Notwithstanding the support which this strict interpretation has received in some jurisdictions, such a result does not necessarily follow when the purpose of CR 13.01 is balanced against that of the Civil Rules taken as a whole.\(^{30}\)

Although it is not patently clear what policy, \textit{i.e.}, res judicata or the rule itself, precludes subsequent counterclaims, it is evident that most jurisdictions apply the rule with flexibility,\(^{31}\) holding, in effect, that the rule was intended to broaden the scope of inclusive claims rather than to bar a litigant who has not properly raised his counterclaim.\(^{32}\)

A recent case, \textit{Mullenax v. Lighthouse Realty Corp. of Port Charlotte},\(^{33}\) indicates that Kentucky has adopted a flexible interpretation for CR 13.01 when the first proceeding is based on a default judgment. A Florida real estate broker had sold two vacant lots located in Florida at the request of appellants, Kentucky residents. He sued in Florida to recover his commission and received a default judgment. He then sued on the judgment in Kentucky. At this point and for the first time, appellants raised a counterclaim, presumably compulsory, since no mention of permissive counterclaim was made. In reversing the trial court, the Court of Appeals held that the right to file a counterclaim in Kentucky was not barred by the failure to file the counterclaim in the Florida court.

Although the policy underlying this decision is not discernible, it is clear that, had the compulsory counterclaim rule been given a strict interpretation, full faith and credit\(^ {34}\) would have required that

\(^{28}\) The Kentucky Civil Rule 13.01 and Federal Rule 13(a) are identical in this respect but differ on the second exception.

\(^{29}\) 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 394 (Wright ed. 1960); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 138 (1952).

\(^{30}\) The trend adopted in the Civil Rules is away from penalizing a party who has committed procedural errors.

\(^{31}\) Wright, \textit{Estoppel by Rule: The Compulsory Counterclaim under Modern Pleadings}, 38 Minn. L. Rev. 423, 432 (1954) (only a handful of states have ever barred a subsequent action based on a counterclaim).

\(^{32}\) BARRON & HOLTZOFF, op. cit. supra note 29, at 584.

\(^{33}\) 402 S.W.2d 437 (Ky. 1966).

\(^{34}\) U.S. Const., art. 4, § 1; 28 U.S.C. § 1738 (1948) (the constitutional provision is binding only upon state courts; this statute imposes the same duty on federal courts).
the Florida judgment be given effect as if rendered in Kentucky, since that judgment would have been res judicata on the issue required to be raised. The Court evaded this conclusion by stating with apparent indifference, "The appellants probably could not successfully prosecute a separate suit ... in Florida. If they have a claim against the appellee, they must file it on a counterclaim. The appellants have elected to file their counterclaim in Kentucky." If the Court means by this statement that henceforth compulsory counterclaims will be interpreted as permissive, then it has probably gone too far, even though a strong argument can be made for the proposition that CR 13.01 should have certain limitations.

On the other hand, the Court clearly felt it unjust not to allow the counterclaim in this case. It might also be at least conjectured that our Court was concerned with possible fact situations more blatantly unfair to a Kentucky resident which might arise in future cases. Take, for example, the situation in which a Kentucky resident has a $50,000 claim against a Florida businessman. As a counterclaim, the businessman has a $1,000 setoff. It is readily apparent that, if the Florida businessman can sue first in Florida, he can secure a favorable forum as well as force the Kentucky resident to appear in Florida with what would then become a counterclaim for $50,000 and his failure to appear would bar the subsequent use of his claim.

When viewed in this manner and in light of recent developments in "long-arm" expansion of jurisdiction for entry of personal judgments, the decision seems basically fair to the litigants and consistent with the intent and spirit of the Civil Rules, i.e. flexibility. And, although this is a case of first impression in Kentucky, the decision reflects the prevailing distaste for a preclusive rule barring forever a

35 Riehle v. Margolies, 279 U.S. 218 (1929), holding that a default judgment by a court having jurisdiction of the parties and the subject matter operates as res judicata in the absence of fraud or collusion. See, 1B Moore, Federal Practice ¶ 0.409, at 1024-43 (2d ed. 1965).
36 402 S.W.2d 437, 438 (Ky. 1966). The Court went on to cite Dixie Ohio Express v. Eagle Express, 346 S.W.2d 30 (Ky. 1961) for the principle that a claim could be filed in a state court even though it was not filed as a counterclaim in a federal court. This was clearly not the rule in Dixie since both the federal and state actions were pending, which, under CR 13.01, expressly takes the case out of the rule.
37 Proponents of this theory speak in terms of "estoppel" rather than "res judicata," "merger," or "bar," since it is the litigant's own negligence or culpable acts in failing to raise the counterclaim that precludes its subsequent use. Conversely, the unknowing litigant, very often the product of a subrogation clause, can be excused without injury to the compulsiveness of the rule. Wright, Federal Courts 302 (1963).
38 Auerbach, The "Long Arm" Comes to Maryland, 26 Md. L. Rev. 13 (1966); 73 Harv. L. Rev. 909 (1960); Comment, 40 Tul. L. Rev. 366 (1966); Comment, 35 U. CinC. L. Rev. 157 (1966) (for a list of jurisdictions which have adopted the so-called "long-arm" statute).
claim which was not raised even though perfectly justifiable reasons existed for not doing so at the time.

5. Summary Judgments.—CR 56 provides generally that summary judgment is available to either plaintiff or defendant where there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. This is sometimes referred to as “trial by affidavits” and has been the subject of a notable judicial comment.39

In American Ins. Co. v. Horton,40 the Court was faced with the propriety of granting a summary judgment and, while upholding the trial court’s decision, added the criteria that the movant is entitled to summary judgment when the opposing party can not strengthen his case and the movant would ultimately be entitled to a directed verdict.41

6. Evidence and Instructions.—While problems relating to specific topical areas, e.g., tort, criminal law, etc., are left for consideration in those areas, a few cases raised general points concerning evidence and instructions. The Court upheld the general rule that admissions against interest are admissible42 except where they are made at a prior trial in which the witness was not a party.43 Furthermore, even if a witness has been harrassed, causing him not to testify, the Court will not grant relief without a showing of both what the witness would have said had he testified and the resulting prejudice to appellants absent the testimony.44 Finally with regard to evidence, a witness may testify to a pattern of reckless or wanton driving even though the vehicle, at a point some distance away, was not under continual observation by him.45

In Kentucky-W. Va. Gas Co. v. Burchett,46 the Court reaffirmed the principle that technically incorrect instructions are not grounds for reversal unless clearly prejudicial to the losing party.47

39 California Apparel Creators v. Wieder of Cal., Inc., 162 F.2d 893, 903 (2d Cir. 1947). The admonishment was made by Judge Learned Hand.
40 401 S.W.2d 758 (Ky. 1966).
41 Mario’s Pizzeria, Inc. v. Federal Sign and Signal Corp., 379 S.W.2d 736 (Ky. 1964).
42 Hall v. Turner, 396 S.W.2d 791 (Ky. 1965).
43 Bartman v. Derby Constr. Co., 395 S.W.2d 360 (Ky. 1965); Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (1941) (represents the long established rule that a party to an action is bound by admissions made in a prior action to which he is a party).
44 Kentucky Stone Co. v. Gaddie, 396 S.W.2d 337 (Ky. 1965).
45 Tingle v. Foster, 399 S.W.2d 475 (Ky. 1966).
46 402 S.W.2d 421 (Ky. 1966).
47 Bailey v. Shrader, 265 Ky. 663, 97 S.W.2d 575 (1936).
B. Original Proceedings: Prohibition and Mandamus

Use of the extraordinary writs of mandamus and prohibition in appellate procedure is emerging as a possible alternative to the delay inherent in appellate review of final judgments.48 In general, these writs do not lie unless a judicial tribunal has acted without, or in excess of, its jurisdiction49 and will not be issued against one not a member of the judiciary.50

As a general proposition, the Court will not prohibit a trial court from acting without a showing that great and irreparable injury would result and no other adequate remedy is available.51 However, the Court in Young v. Bertram52 found that appeal was not an adequate remedy where, after petitioner had filed a motion to have the circuit judge vacate the bench for prejudice, he refused to do so.53

Often the writ of prohibition is used to attack discovery orders. An example is Mayer v. Bradley,54 where the Court denied relief on a petition to prohibit a trial judge from enforcing his pre-trial order.

In Turner v. Gentry,55 the Court was asked to prohibit a circuit judge from hearing a divorce case. The judge had previously heard proof relating to the residence of petitioner and had denied her motion to dismiss for want of venue. Although such a petition generally is entertained in a divorce action when the issue of residency is raised,56 the Court would not issue the writ since the venue hearing was not preserved by record or otherwise, and petitioner did not show great need or necessity by specific allegations of fact.

48 Note, 50 COLUM. L. Rev. 1102, 1111-13 (1950). It has been suggested, for example, that the strict use of mandamus and prohibition be reexamined and perhaps a new policy formulated allowing a more liberal approach to the use of extraordinary writs. Feigenbaum. Interlocutory Appellate Review via Extraordinary Writ, 36 Wash. L. Rev. 1 (1961). Indeed, at least one jurisdiction has made extensive use of the writs in this manner in order to provide speedy determination of critical trial issues. Greyhound Corp. v. Superior Ct., 56 Cal. App. 2d 355, 364 P.2d 266 (1961); CAL. CODE CIV. PROC. §§ 416.1-3.
49 Ky. Const. § 110; KRS § 21.050.
50 Barnes v. Taylor, 399 S.W.2d 307 (Ky. 1965) (Mandamus to have an attorney return legal documents).
51 Beachcomber Club, Inc. v. Keith, 402 S.W.2d 689 (Ky. 1966); Wright v. Ropke, 393 S.W.2d 796 (Ky. 1965) (petitioner must plead or show that a remedy by appeal is inadequate).
52 401 S.W.2d 504 (Ky. 1966).
53 The judge neither questioned the sufficiency of the motion nor asserted any reason why he should not vacate.
54 401 S.W.2d 224 (Ky. 1966) (The trial court granted a motion for discovery of defendant’s business records which would show the patents he had treated in violation of a partnership agreement).
55 402 S.W.2d 104 (Ky. 1966).
56 Russell v. Hill, 296 S.W.2d 508 (Ky. 1953).
C. Appeal

While the Court has applied the Civil Rules with flexibility to lower court proceedings, a different approach has been manifested regarding appellate procedure.\(^{57}\) Indeed, the 1965-66 decisions exhibit a strict application of the rules to final judgments, post-trial motions, and final disposition of cases.

1. Post-trial Motions.—Three cases this term concerned the propriety of granting relief under CR 59 (new trial) and CR 60.02 (relief by motion). In Friar v. Webb,\(^{58}\) the plaintiff was awarded damages for medical expenses and upon her motion the trial judge ordered a new trial limited to the question of damages for pain and suffering. The Court of Appeals affirmed this order, pointing out that the injuries giving rise to medical expenses will also support a claim for pain and suffering.

CR 59.05 states that a motion to alter a judgment must be served within ten days. In Cargo Truck Leasing Co. v. Piper,\(^{59}\) appellant, throughout the trial, had maintained that if the jury found the appellee negligent, resulting in verdicts for the other plaintiff's, that he should also be entitled to a verdict as a matter of law. When the jury awarded verdicts to all plaintiffs except appellant, he promptly moved for a judgment n.o.v. The Court held that, the motion, though technically incorrect, should have been treated as a motion under CR 59.05 since it was designed to cover situations such as this.\(^{60}\)

In Robertson v. City of Hazard,\(^{61}\) a circuit court rendered a judgment allowing the city of Hazard to annex part of an unincorporated territory. However, the order was invalid, since under Donovan v. City of Louisville\(^{62}\) partial annexation was unauthorized. Both parties, realizing the error, subsequently moved to set aside the order under CR 60.02 but were overruled since the trial court found its decision to be merely erroneous and not void. In reversing, the Court held that where the parties both agree that there is a mistake in the judgment, it should be set aside, absent some good reason to the contrary.

2. Final Judgments.—CR 73.01 provides that a judgment cannot be appealed until final, and the Court this term dismissed an appeal

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\(^{57}\) This strictness probably results from: (1) overcrowded dockets and (2) a desire to finalize proceedings after the parties have been liberally permitted to present their case at the trial level.

\(^{58}\) 394 S.W.2d 583 (Ky. 1965).

\(^{59}\) 394 S.W.2d 472 (Ky. 1965).

\(^{60}\) See 7 CLAY, KENTUCKY PRACTICE 210 (1963); Moutardier v. Webb, 300 S.W.2d 791 (Ky. 1958).

\(^{61}\) 401 S.W.2d 223 (Ky. 1966).

\(^{62}\) 269 S.W.2d 636 (Ky. 1957).
taken from an order overruling a motion to vacate on the grounds that it was not a final judgment.\textsuperscript{63}

In order to be final, the judgment must be written (CR 54.01), signed (CR 58), and entered in the Civil Docket by the circuit court clerk (CR 79.01); unless these requirements are satisfied, the trial court retains jurisdiction over the proceedings.\textsuperscript{64}

\textit{Ball v. Beatrice Foods}\textsuperscript{65} states the further requirement that where a judgment is entered upon one but not all claims then, for that judgment to be final, there must be a recitation in that order that there is no just reason for delay (CR 54.02). Where such recital is made, and it is reasonably debatable whether single or multiple claims are involved, the trial judge's discretion is conclusive.\textsuperscript{66}

3. \textit{General.—Wright v. Crawford},\textsuperscript{67} is an important and perhaps far-reaching decision. A judgment of $2,526.80 was ordered against petitioner for malicious assault, a civil charge. Throughout the trial, he had acted as his own counsel. Subsequent to the verdict, petitioner filed a "Notice of Appeal and Affidavit for Allowance to Proceed in Forma Pauperis," alleging that he was bankrupt and praying for assigned counsel. This motion was denied, and pursuant to KRS 426.390, a notation made at the foot of the judgment allowing execution, \textit{i.e.}, arrest. In deciding the question for the first time, the Court concluded that a pauper, subject to imprisonment for failure to satisfy a civil judgment, is entitled to assigned counsel to perfect his appeal. However, since assignment of counsel is conditioned on petitioner's being adjudged a pauper, the trial court was ordered to grant him a hearing on that issue.

Although KRS 453.190 expressly provides that an indigent may have assigned counsel to prosecute or defend, it had not previously been applied to civil cases. Indeed, as late as 1961, the Court in \textit{Parsley v. Knuckles}\textsuperscript{68} stated, "There is nothing in the common law that requires counsel in civil cases and any step toward that end must be made by the legislature." Apparently no other jurisdiction has been faced with this precise issue,\textsuperscript{69} and the Kentucky Court has enforced the statute only in criminal proceedings.\textsuperscript{70} Now it seems that at least

\begin{itemize}
\item \textsuperscript{63} McFerran v. Postal Service, Inc., 402 S.W.2d 83 (Ky. 1966).
\item \textsuperscript{64} Murrell v. City of Hurstbourne Acres, 401 S.W.2d 80 (Ky. 1966).
\item \textsuperscript{65} 395 S.W.2d 594 (Ky. 1965).
\item \textsuperscript{66} Jackson v. Metcalf, 404 S.W.2d 793 (Ky. 1966); 6 Moore, \textit{FEDERAL PRACTICE} \S 54.33 (2d ed. 1965).
\item \textsuperscript{67} 401 S.W.2d 47 (Ky. 1966).
\item \textsuperscript{68} 346 S.W.2d 1, 3 (Ky. 1961).
\item \textsuperscript{69} New York legislation provides for appointment of counsel for "poor persons" in civil cases. 7B \textit{N.Y.C.P.L.R.} \S\S 1101-03 (1963).
\item \textsuperscript{70} Moy v. Bradley, 306 S.W.2d 296 (Ky. 1957); Pearson v. Commonwealth, 290 S.W.2d 474 (Ky. 1956).
\end{itemize}
where a pauper is subject to imprisonment in a civil action, the statute is mandatory and extends the use of assigned counsel into the appellate area.

Two cases this term restated the general rule that the Court is confined to matters in the record of appeal.\(^7\)

In *Bailey v. Ashland Discount Assn.*\(^7\) and *Abell v. McGuire,*\(^7\) the Court dismissed appeals on grounds that appellants did not "promptly" serve upon the appellees and file with their respective circuit courts a designation of the records required by CR 75.01. In *Bailey,* 117 days had elapsed before appellant filed the designation of a partial record, while in *Abell* the appellants filed sixty days after notice of appeal. The Court in *Bailey* expressed its sentiments by stating: "The case at bar presents a glaring example of misuse of the pertinent rules applicable to perfection of appeals..."\(^4\) Though CR 75.01 does not set out a specific time for filing a designation of record, the rule of both cases contemplates a "prompt" filing in the literal sense — a filing within the earliest reasonable time.

A second issue in *Bailey* concerned appeal made as a matter of right.\(^7\) The Court held that there must be an affirmative showing that the amount in controversy exceeds $2,500 before the right accrues; since appellant did not establish this by pleadings or final judgment, the error was fatal.\(^7\)

The use of the supersedeas bond in appellate procedure is illustrated in *Berryman v. Ardery.*\(^7\) Under CR 73.04, a supersedeas bond is required upon motion to stay the execution of the circuit court judgment pending appeal. However, when appellant filed his notice of appeal without moving to stay the execution, it was improper for the circuit court to require the bond.\(^7\)

In *Tyler v. Bryant,*\(^7\) the trial court had awarded $3,000 for at-
torney's fees in a divorce suit. The fee was awarded to the wife in-
stead of her attorney and ordered to be paid as court costs. Although
the appellant contended that the fee was excessive, the Court ruled
that the appeal was not properly brought since the attorney involved
was not made a party to the appeal.

The Court, in City of St. Matthews v. Oliva,
was faced with
interpreting its own mandate. In an earlier decision the trial court's
judgment had been reversed and the case remanded "for proceedings
not inconsistent with the opinion." The case was retried over the
city's objection, resulting in another judgment against it. The settled
rule in Kentucky is that when the Court directs a reversal of a judg-
ment rendered without a jury, a trial judge may not retry the case
absent special circumstances. Appellees contended that since the law
concerning proof in zoning cases had been changed while the case
was pending, the trial judge was justified in retrying the case as he
did. In short, it was argued that the court's discretion had been
properly exercised. The Court of Appeals disagreed, stating emphati-
cally that there were no special circumstances allowing the trial court
to do anything other than "enter a judgment consistent with the
opinion, that is, a judgment dismissing the complaint." Although the
result may be sound, it is judicial administration of doubtful wisdom
to allow a trial judge limited discretion to retry a case and then to
chastise him for exercising that discretion, albeit wrongly.

In the case of Wabash Life Ins. Co. v. King,
the Court recited no
facts nor rule of law, stating simply that there was no error in the
proceedings warranting reversal. There may have been good cause for
limiting the discussion as the Court did. Yet in considering this opinion
consisting of a few lines, one might reasonably deduce that the Ken-
tucky Court of Appeals has been afflicted with the appellate disease
common to many courts, i.e., too many cases and insufficient time.

80 392 S.W.2d 39 (Ky. 1965).
81 Unpublished opinion cited in City of St. Matthews v. Oliva, 392 S.W.2d
39 (Ky. 1965).
82 Stephenson v. Burton, 246 S.W.2d 999 (Ky. 1952).
83 City of St. Matthews v. Oliva, 392 S.W.2d 39, 40 (Ky. 1965).
84 391 S.W.2d 685 (Ky. 1965).
Stability and predictability have long been the keystone of the law of property. As one would expect, the decisions of the Court in the past term were based largely on established precedents and principles.

A. Construction of Deeds

The Court was presented with four cases calling for the construction of deeds. In *Berryman v. Elmore*, the plaintiff had acquired a one-half interest in three separate tracts of land. The deed to the third tract contained a restriction and reverter clause. Subsequently, the plaintiff acquired by conveyance the remaining one-half interest in the tracts from their owner, the deed reciting the restriction and reverter clause in such a way as, on its face, to apply to all three tracts. The person with whom the plaintiff had a contract for the sale of the land refused to accept the deed. In an action for specific performance and construction of the deed, the Court held that the deed was not one that called for reformation by the Court and hence the statute of limitations did not apply. The Court concluded that the mistake was not in the wording of the deed but "in the physical position and typed spacing of a particular paragraph." The Court characterized this as a "latent ambiguity" which may be resolved by discovering the intent of the parties, which, in this case, was clearly to apply the restrictions to only one tract.

In another case the owner conveyed the coal rights under a certain tract of land to another. He later conveyed his title to the land to a third party, reciting in the deed that the "mineral" rights had previously been conveyed. Subsequently, this grantee also conveyed, again with the recital in the granting clause that the "mineral" rights had been formerly conveyed. In a contest to determine the owner of the oil and gas rights, the Court held that all the mineral rights were reserved by the first grantor, and not merely the coal rights which he had conveyed. The Court quoted with approval language in a prior case to the effect that "where an exception of minerals is placed in the granting clause it should not be construed as a limited or restricted exemption unless the language is clearly and positively restrictive."

The question of intent in *Letcher County Coal & Improvement Co.*

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1 402 S.W.2d 102 (Ky. 1966).
2 Under KRS §§ 413.120(12), 431.130(3) an action for reformation of the deed had been barred.
3 402 S.W.2d 102, 103 (Ky. 1966).
5 Bartley v. Rowe, 343 S.W.2d 140, 143 (Ky. 1961).
v. Marlowe\textsuperscript{6} stemmed from a contradictory deed in the appellant's chain of title. The wording of this deed first described the land being conveyed in metes and bounds and immediately thereafter declared that such description embraced "all of a fifty acre survey" made in the name of the patentee of the land, the grantor's predecessor in title. The Court, while recognizing the general rule that in a deed containing both general and particular descriptions of the land, the particular must prevail absent language showing an intent to the contrary, relied on the corollary that if "the facts and circumstances surrounding the transaction must clearly reflect the intention of the grantor that the general description was intended," then that will be adopted.\textsuperscript{7} Here, the intention of each grantor in the chain of title was, the Court found, to convey the entire fifty acres.

A case involving the question of implied intent of the parties revolved around the problem of whether a conveyance of land by the grantor to her two daughters was an advancement, or a valid sale.\textsuperscript{8} Generally, an advancement is defined as "a giving, by anticipation, to a child or other relative, of a part of the whole of what the donee would receive on the death of the owner intestate, with the result, generally speaking, that the amount thereof is deducted in determining the share of such donee after the donor's death."\textsuperscript{9} What constitutes an advancement in a particular jurisdiction is determined by the particular statutes therein.\textsuperscript{10} Most statutes provide that the gift must be acknowledged either by the donor or donee to be an advancement, in order for the rules applying to advancements to take effect.\textsuperscript{11} Kentucky's provision, however, is more stringent and applies to "any real or personal property or money given . . . by a parent or grandparent to a descendant."\textsuperscript{12} (Emphasis added.) Thus, to come within the purview of the Kentucky statute, it is necessary to show only that the transfer from the parent or grandparent was in fact a gift. Questions of whether the grantor intended the transfer to be an advancement, or whether the recipient so understood, are irrelevant. In the instant case, the two appellees received from their mother a deed to a farm for a stated consideration of one dollar. After the mother died intestate, the deed was recorded. The two daughters sought to show that the farm was conveyed to them as a result of extraordinary and compensable services rendered by them to their mother, and hence that the transfer was not

\textsuperscript{6} 398 S.W.2d 870 (Ky. 1965).
\textsuperscript{7} McKinney v. Raydure, 181 Ky. 163, 172, 203 S.W. 1084, 1087 (1918).
\textsuperscript{8} Thomas v. Thomas, 398 S.W.2d 231 (Ky. 1966).
\textsuperscript{9} TIFFANY, OUTLINE OF REAL PROPERTY § 386, at 477 (1929).
\textsuperscript{10} Ibid.
\textsuperscript{11} Ibid.
\textsuperscript{12} KRS § 391.140 (1942).
a gift. The Court took the contrary view, and held that, since the daughters had not made a claim on their mother for their services and had no idea of their value, the intent of the parties at the time of the transfer was *not* that the land be a satisfaction for the services. The transfer was made in "appreciation" rather than in "consideration" of the services and was a gift, making the property thus acquired apply toward their share of the intestate's estate under the terms of the advancement statute. The Court's decision is undeniably correct, given the terms of the present advancement statute. But in this and similar cases the intention of the donor may often be thwarted, since the statute defines all such gifts as advancements. If, indeed, the intention of the owner is to prevail in the disposition of his property, it would seem that the Legislature should enact a more realistic statute, one that rests on the intestate's intention respecting his gift.

B. Restrictive Covenants

The single case from last term concerning restrictive covenants also involved the intention of the parties to the deed at the time of its making. A subdivision was laid out in Lexington in 1899. In the deeds conveying the lots facing one street of the subdivision was the covenant that no residence should be placed nearer than three feet to the property line, and that no stable or garage should be erected within seventy-five feet of the street. The appellee had erected an office building on lots outside the scope of the covenant, and a parking lot for the tenants of that building covered two of the lots to which the covenant applied. The appellant's lots adjoined one of these lots. Seeking to have the covenant enforced, she based her argument on the proposition that the parking lot was either a garage or a residence. The lower court issued a summary judgment on the basis of its conclusion that, since the neighborhood was now essentially commercial as opposed to residential, the restrictions were unenforceable. The Court, while not holding the restrictions unenforceable, affirmed on the narrower point that the covenant did not apply since a parking lot is not a "garage" or "residence." It applied the customary meanings of the words, having found that these were the definitions intended by

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14 See Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938) (same restrictions held unenforceable in different section of same neighborhood).

15 See McMahan v. Hunsinger, 375 S.W.2d 820, 822 (Ky. 1964): "We must seek the intention of the grantor from the language used, considered in light of such factors as the general scheme of the subdivision. We may not substitute what the grantor may have intended to say for the plain import of what he said."
the owner at the time of the creation of the covenants. A parking lot was unheard of at the time the covenant was inserted; thus the Court felt the grantor could not have had that in mind.

C. Easements

The Court decided three cases involving easements. One of these concerned the question of prescriptive easements, i.e., easements acquired in the same manner as land is acquired by adverse possession. By analogy to law relating to land and its ownership, the courts have held that easements and other incorporeal rights in land can be acquired by prescription, if the elements requisite for adverse possession are present. The use must be continuous, uninterrupted, actual, visible, and hostile to the owner. A use with the permission of the owner of the right of way or easement over another's land lacks the element of hostility, and hence the prescriptive right cannot mature into a right. In the case dealing with these issues, the Court affirmed the rule that when a passway over another's land has been used continuously and without interruption for a period of fifteen years, the presumption is raised that such use was of right and the burden is on the owner of the estate over which the passway crosses to show that its use was merely permissive. The Court noted that once the prescriptive right is acquired it cannot be defeated by obstruction or interference unless the acts themselves are continuous for the statutory period of fifteen years.

In a similar controversy, a single tract of land having a road running across it was divided and sold as separate tracts. The road provided the only egress for the owner of the second lot. The Court applied the settled rule that in such circumstances the easement will pass by implication upon the division of the land, the same as if the owner of the landlocked tract had a deed to the easement. Such an implied grant is known as an "easement of necessity."

16 "An easement in another's land involves primarily a right or privilege, more or less permanent, of doing a certain class of acts on or to the detriment of such land, or a right against such other that he shall refrain from doing a certain class of acts on or in connection with his own land. the easement usually existing as an accessory to the neighboring land, and for its benefit." TIFFANY, op. cit. supra note 9, at 307-8.

17 Id. § 395, at 492-3.
18 Blue v. Haner, 395 S.W.2d 762 (Ky. 1965).
19 See Snyder v. Carroll, 203 Ky. 320, 262 S.W. 290 (1924).
21 Helton v. Jones, 402 S.W.2d 694 (Ky. 1966).
22 See Delong v. Cline, 302 Ky. 358, 194 S.W.2d 631 (1946).
23 TIFFANY, op. cit. supra note 9, § 274, at 327.
A third dispute involved a situation in which a landowner granted an easement to a city for its water lines in return for water service therefrom. The Court held that, with the subsequent reconveyance of the easement to the grantor, the contract was destroyed and the grantor lost any right he might have had to the water service.

D. Boundary Disputes

Three of the cases involving boundary disputes focused on the issue of whether title had been gained by one of the contestants by adverse possession. To attain title by adverse possession, the claimant must fulfill specific requirements in his relation to the disputed land. Among these are continuous and uninterrupted possession for the statutory period, such possession being actual, visible, notorious, and hostile to the real or true owner. Further, one who is in adverse possession of a tract of land, to all of which he has color of title, is regarded as being in constructive possession of the whole tract, as against an owner who is not in possession of any part thereof. In *Martin v. Kentucky-W. Va. Gas Co.*, the Court decided the dispute under the rule that adverse possession under color of title must be to well-defined boundaries. A second problem of conflicting claims was decided on the special rule applicable between the grantor and his grantee to the effect that the grantor and his successors in title cannot acquire title by adverse possession to the conveyed land as against the grantee and his successors without giving notice by way of an express disclaimer and making a notorious assertion of title.

In deciding cases involving deeds containing conflicting descriptions, courts must seek to find the intention of the parties thereto, and they have formulated certain rules to aid them in this search. Public policy and the avoidance of future litigation dictates that the description of the land which is conveyed be precise and easily capable of identification. The onus of providing a clear description has been placed on the grantor of the land, and ambiguities in the instrument are resolved against him. This rule was applied last term in *White v. Howard*. A similar rule applicable to the discovery of intent is that natural objects will prevail over inconsistent calls for

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24 Bryant v. City of Danville, 404 S.W.2d 20 (Ky. 1966).
25 See Tiffeney, *op. cit. supra* note 9, § 394, at 489.
26 401 S.W.2d 74 (Ky. 1966).
28 See Williams v. Thomas, 285 Ky. 776, 149 S.W.2d 525 (1941).
29 Tiffeney, *op. cit. supra* note 9, § 342, at 418.
30 394 S.W.2d 589 (Ky. 1965).
distances, as such monuments are more likely to be correct than abstract statements on the length of an imaginary line. This rule was sufficient to dispose of the question in *Bowling v. Gayheart*.31

Two cases were appealed disputes on the value of evidence used to determine boundaries. In one,32 testimony of the appellant's expert witness as to the location of an extinct county road serving as the boundary between the two tracts of land conflicted with that of appellee's lay witnesses who testified from personal knowledge of the prior location of the road. The Court held that in such cases the testimony of such competent lay witnesses could overcome that of an expert not acquainted with the locale. In the other case,33 the Court held that because one call of the surveyor's description was in error, such error did not invalidate the whole of his testimony.

E. Mineral Leases

A significant case,34 one of first impression in Kentucky, was decided in the area of mineral leases. The question was whether a city zoning ordinance which prohibited the drilling for oil within a certain section of a city was unreasonable and arbitrary and hence unconstitutional as being a taking of property without due process of law. Oil had been discovered just outside the city limits, adjacent to plaintiff's property, which was within the city and covered by the zoning ordinance. The producing formation, which in all probability extended under the plaintiff's land, was being drained of oil, to the distress of the city dwellers. The situation presented a serious problem for zoning policy because the exploitation of minerals is not commercial enterprise that can be relocated in a more appropriate zone of the city.34a The Court, while recognizing the obvious hardship to landowners in such cases, held that such a zoning ordinance is a valid exercise of the police power of the municipality, that it is not unreasonable or arbitrary, and that hence it is not a taking without due process of law. In establishing the reasonableness of the ordinance, the Court pointed out that such oil operations, apart from destroying vegetation and presenting a general nuisance to the entire neighborhood, could be a serious danger in case of explosion or fire during drilling.

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31 396 S.W.2d 62 (Ky. 1965).
32 Vanhoose v. Williams, 396 S.W.2d 784 (Ky. 1966).
34 Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1966).
34a Blancett v. Montgomery also discussed *supra* Sec. II, *Administrative Law*, notes 39-42.
The result, supported by Kentucky precedents in zoning law\textsuperscript{35} and analogous cases from other jurisdictions,\textsuperscript{36} illustrates the Court's general unwillingness to interfere with ordinances which have any rational basis.\textsuperscript{36A}

If a result fairer to all parties involved is to be attained, the burden is on the city to adopt a more reasonable and realistic zoning ordinance. A compromise, involving stringent safety and waste disposal restrictions on the drilling operations to preserve the integrity of the residential area, would obviate the undesirable after-effects of the operations and, at the same time, give the landowners the right to profit from the wealth of their property. The city could recoup the expenses of inspection and administration through appropriate licensing fees.

Another case\textsuperscript{37} in this area dealt with the time at which a mineral lease expires. The terms of the lease in question provided that it would remain in force for five years and as long thereafter as oil or gas was produced. The five years had been exhausted at the bringing of the suit, and it was no longer possible to raise the oil to the surface by primary method, \textit{i.e.}, without resorting to the more expensive "waterflood" recovery methods. The lease had ceased production in 1961 and after that had only been pumped intermittently for four or five days before the bringing of this suit to quiet title. In considering the case, the Court listed the ways in which a mineral lease can expire.\textsuperscript{38} After citing the general rule that after the primary term of the lease has expired "if production ceases, the lease is at an end, although a temporary cessation of production does not terminate the lease,"\textsuperscript{39} the Court reiterated the Kentucky qualification that the cessation of production must in light of all the circumstances be unreasonable for the lease to be at an end. Applying this rule in the instant case, the Court found that the cessation after the primary term of the lease had expired was unreasonable. The lessee could have foreseen the failure of primary production and should have taken timely steps to begin secondary recovery procedures. However, the Court also indicated a willingness to hold differently in situations

\textsuperscript{35} Fried v. Louisville and Jefferson County Planning and Zoning Comm'n, 258 S.W.2d 466 (Ky. 1953); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 502 (1950); Fowler v. Obier, 224 Ky. 742, 7 S.W.2d 219 (1928).

\textsuperscript{36} Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931).

\textsuperscript{36A} See discussion, \textit{supra.}, Sec. VI, \textit{Constitutional Law}, notes 29-39.

\textsuperscript{37} Heeler & Lemaster Oil & Gas Co. v. Henley, 398 S.W.2d 475 (Ky. 1966).

\textsuperscript{38} The reasons for the expiration of a lease are: (1) forfeiture for breach of condition, (2) abandonment of the operations, and (3) expiration of the lease by its own terms. 2 \textit{SUMMERS, OIL AND GAS} § 305 (perm. ed. 1959).

\textsuperscript{39} See Lamb v. Vansyckle, 205 Ky. 597, 266 S.W. 258 (1924).
where the lessee is diligently working to initiate secondary recovery. The Court's recognition of the delay and difficulty necessarily attendant upon financing secondary recovery projects should be read as clearly limiting the case to its facts. The equity of the decision here lies in the fact that the lessor's only source of income from royalties on the production of oil or gas, and his income necessarily ceased with the cessation of production.

In another case, a coal lease provided that the lessees were to pay twenty-five cents per ton royalty on the coal taken from the land and for ninety percent of the estimated tonnage whether it was mined or not. The parties agreed the ninety percent referred to coal which could be taken from the land at a reasonable profit using sound mining practices. The trial judge, in arriving at the quantity of coal that was minable, deducted from the estimated coal under the tract only a certain area which was unminable. The Court held that this deduction was not extensive enough. Not all of the estimated coal in minable areas can be extracted because many factors, such as burnouts, washouts, and the fact that pillars must be left standing to support the mine, all combine to reduce the quantity of minable coal.

F. Wills

Kentucky has no statute of limitations which by its terms applies expressly to the time within which wills must be probated. However, there is a statute which provides that "an action for relief, not provided for by statute, can only be commenced within ten years after the cause of action accrued." A long line of Kentucky cases beginning in 1842 have applied this statute or its predecessor to the probate of wills. Two legatees were confronted with this statute when they attempted to probate a twelve-year-old will in Second Nat'l Bank & Trust Co. v. First Security Nat'l Bank & Trust Co. The will was found by an heir at law who had received a larger share of the estate through intestacy than she would have under the will. The legatees asserted the statute should be tolled by virtue of concealment or obstruction to probate. In order to toll a statute of limitations, concealment must be clearly proved. The Court held there was no

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40 Bishop v. Howard, 403 S.W.2d 690 (Ky. 1965).
41 KRS § 418.160 (1942).
42 Allen v. Froman, 96 Ky. 313, 28 S.W. 497 (1894). Other cases in this "line" are: Hoagland v. Fish, 238 S.W.2d 135 (Ky. 1951); Allen v. Lovell's Adm'r, 303 Ky. 258, 197 S.W.2d 424 (1946).
44 398 S.W.2d 50 (Ky. 1965).
45 54 C.J.S. Limitations of Actions § 395 (1948).
evidence of fraud or intentional concealment and thus probate of the will was barred.

Generally, “the object of the court, or its duty, in construing a will is to arrive at the testator's intention as expressed in the language used, and the testator's intention as shown by the will itself must govern.” However, because of ambiguous terms or unforeseen events, it is often difficult for a court to ascertain the true intent of a testator. In Sandidge v. Kentucky Trust Co., the will in contention provided that two sons by the testator's first wife were each to receive one-eighth of the estate at testator's death. The remaining six-eighths were to be held in trust for the testator's second wife. Upon her death the testator's two sons by her were to receive a sum sufficient “to make them equal” with the other two sons. Whatever then remained of the estate was to be divided among all four sons equally. The source of difficulty lay in the fact that between the time the two sons received their one-eighth shares and the second wife's death, the estate had more than doubled in value. Thus, the question was whether the second sons were to be made equal by receiving the same number of dollars, or the same percentage of the estate as received by the first sons. The Court chose the latter alternative, stating that “it is quite clear that the testator intended his four sons to fare equally with but one exception... [the first sons] were to be deprived of the use of only half of their shares.”

In order for a will to be set aside on the grounds of mental incapacity, the testator must lack testamentary capacity. This capacity exists when the testator has sufficient memory and mentality to understand and remember the nature and purpose of the transaction, the extent of his property, and those who have a claim to his remembrance. Undue influence is a related ground for invalidating a will. While difficult of definition it means basically that a testator was under some duress which caused him to act as other than a free agent and express a will other than his own. The case of Creason v. Creason involved both of these elements. The testator simultaneously executed a will and a deed, the effect of which were to give the bulk of his estate to one grandson and significantly smaller shares to three other grandchildren. The trial court gave instructions on undue influence and

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46 95 C.J.S. Wills § 591 (1957).
47 402 S.W.2d 105 (Ky. 1966).
48 Id. at 106.
49 Ibid.
51 Ibid.
52 Ibid.
53 392 S.W.2d 69 (Ky. 1965).
mental incapacity as to the will only. After the jury found for the plaintiff, the court ruled that both the will and the deed were invalid. In affirming this ruling the Court noted that the mental capacity required to execute a deed is basically the same in kind as that needed to make a will, but that, in Kentucky, the law requires a greater degree of mental capacity for a deed. Therefore, since the jury found that the will was invalid, the trial court could properly strike down the deed as well.

The only other case of significance in this area was *Ryburn v. First Nat'l Bank of Mayfield*, where the testator left his entire estate to a charitable association. The Court had reviewed this will several times previously, and as a result of this litigation the testator's brother and nephew had signed a waiver of their rights to contest the will for a consideration of $50,000. The present action involved a contest of the will's validity by the testator's grandniece and grandnephew. As a general rule, in order to contest a will one must be in a position to receive a distributive share were the will to be invalidated. Under Kentucky's descent and distribution statute both the testator's brother and nephew stood before the plaintiffs in the line of descent. The plaintiffs contended that the waiver by the brother and nephew elevated them to heirs at law, thus allowing them to contest the will. The Court would not accept this contention and held that rights as heirs at law are created by statute and cannot be contracted away. The plaintiffs were not descendents within the legal meaning of that term.

To contest the appointment of an administrator of an estate the person so contesting must have an interest in the estate. In a case applying this rule, the Court of Appeals held that a testator's children do not have sufficient interest in his estate to challenge the appoint-

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54 26 C.J.S. Deeds § 54(b) (1956).
55 *Ibid.* The reason for this rule being that in executing a deed one must deal with another person, thus increasing the possibility of undue influence, fraud and the like. See n.99.
56 399 S.W.2d 313 (Ky. 1965).
58 Rogers v. Leahy, 296 Ky. 44, 176 S.W.2d 93 (1949).
59 KRS § 391.010 (1956).
60 “[D]escendant” designates or connotes the issue of a deceased person, and does not describe the children of a parent who is still living. . . .” 36A C.J.S. Descendant § 504 (1956). This is the rule in Kentucky. See Collis v. Citizens Fid. Bank and Trust Co., 314 Ky. 15, 234 S.W.2d 164 (Ky. 1950).
61 33 C.J.S. Executors and Administrators § 57(b) (1942).
62 Williams v. Ratcliffe, 403 S.W.2d 432 (Ky. 1966).
ment of an administrator de bonis non by the county court. The
testator had left his entire estate to his wife and appointed her ad-
ministratrix. Although a final report had been filed before the wife's
death, the county court appointed an administrator de bonis non. Up-
holding this appointment, the Court reasoned that the challengers did
not have sufficient interest in the estate to challenge the appointment.

Three cases affirmed general rules. First, opinion evidence as to a
forged signature on a will when supported by other suspicious cir-
cumstances creates a factual issue for the jury. Secondly, a verdict
directed solely on the basis that evidence regarding undue influence
tended to be self-serving is error. The third case involved an attor-
ney who was employed on a fee basis by the executor of a lost will.
The Court held that this was not such a personal interest as to pre-
clude him from testifying on the contents of the will, especially since
he already had employment as attorney for the administrator ap-
pointed prior to the finding of the will.

G. Future Interests

There were two significant developments in the area of future inter-
est during the past term. The effect of these developments was to
imbue the contingent remainder with a more substantial status as
property. While these developments can hardly be regarded as start-
ling, they nonetheless represent a refreshing change in some concepts
long settled in Kentucky law.

The early case of Leppes v. Lee enunciated the rule that one who
receives a contingent remainder can convey or devise it, but if he dies
before the contingency occurs nothing passes to the grantee or devisee.
This rule was applied to a contingent remainder in personal property
in a later case, but the Court had found no other occasion for its
use until this term. That the rule is unsound is not doubted. "It is
everywhere held that remainders, whether vested or contingent . . .
descend in the same manner and to the same persons as possessory
interests in land. . . ." Thus the death of the remainderman does not
affect the interest he holds. The Court in Saulsberry v. Second Nat'l
Bank of Ashland overruled Leppes and joined the majority of
jurisdictions in permitting the contingent remainder to descend in the
same manner as a possessory interest.

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63 Reffett v. Hughes, 396 S.W.2d 786 (Ky. 1965).
64 Hall v. Childress, 392 S.W.2d 450 (Ky. 1965).
65 Phelps v. Waddle, 400 S.W.2d 524 (Ky. 1966).
66 92 Ky. 16, 17 S.W. 146 (1891).
67 Roy v. West, 194 Ky. 96, 238 S.W. 167 (1922).
68 Smith & Smith, Future Interests § 1893 (2d ed. 1956).
69 400 S.W.2d 506 (Ky. 1965).
The other development in future interests law involved conveyances by deed which reserve in the grantor a right to convey. In such situations the grantees should take at the grantor’s death, if he still owns the property. The rule in Kentucky had been that this type of conveyance, reserving a right to convey in the grantor, is testamentary. Basic to this determination was the concept that such a deed does not pass a present interest. (This is reminiscent of language in Leppes to the effect that a contingent remainder does not pass a present interest.) Once again the Court aligned itself with the bulk of modern property law by holding in two cases that a grantor’s reservations, including that of a right to convey, are to be considered only as part of the circumstances in determining whether there was an intent for an interest to pass presently.

It is believed that these cases represent the better view. The primary purpose in interpreting any instrument is to carry out the dominant intent of the grantor. This purpose can only be frustrated by setting up rigid standards for the interpretation of conveyances.

The Court reiterated this desire to give effect to the grantor’s dominant intention in Franklin Real Estate Co. v. Music. Here a deed, for the stated consideration of $3,000, contained the following provision: “The intention of this deed is to convey to the said Laura B. Music and her bodily heirs the foregoing described tract of land, which deed shall be in full force and effect at the demise of the said Grantor herein, D. Mart Hager.” It is clearly the rule in Kentucky that “whether an instrument is a deed or a will is to be determined by the intention of the one who executed it.” The Court felt the grantor’s intent here was to postpone the enjoyment of possession and not postpone the vesting of the estate; thus the instrument was a deed.

In another phase of the law of future interests, the Court was called upon to determine the meaning of the word “children” in a will. They felt it “well settled that the word ‘children’ does not include grandchildren unless it plainly appears that such was the meaning from other provisions of the will, or that such a construction must necessarily be given to the deed or will so as to give effect to the

71 Ibid.
72 Leppes v. Lee, 92 Ky. 16, 17 S.W. 146 (1891).
74 Dewese v. Arnett, 402 S.W. 2d 859 (Ky. 1965); Witherspoon v. Witherspoon, 402 S.W. 2d 899 (Ky. 1965).
75 392 S.W. 2d 86 (Ky. 1965).
76 Id. at 87.
77 Glocksen v. Holmes, 299 Ky. 626, 629, 186 S.W. 2d 634, 636 (1945).
78 Cooper v. Cooper, 392 S.W. 2d 662 (Ky. 1965).
grant or devise.”

The will in this action devised the testator’s property to his four children and stated that, if any of these children should die without issue, his portion was to go to the survivors or “their children should the parents be dead.” Some years later only one of the four children was living. Of the other three, two had died without issue, and the other had died leaving two sons. These two sons together with their uncle attempted to convey a fee simple interest in the property. This conveyance was challenged on the grounds that “children” was a class that could be fixed and ascertained only if and when the uncle died without issue. This contention was held to be without merit. It is well accepted that the word “children” is commonly used to denote issue of the first generation only.

The only other case in this area involved a will in which the testator left all of his property to his wife but “advise[d]” her to leave anything that was left at her death to one Edith Lee. The Court held this provision did not create a life estate with the power of disposition, but rather a fee simple interest.

H. Miscellaneous

In the five other property cases decided last term, the Court merely applied well-established rules to the facts before it. Where a discrepancy in a map used to mine coal and allocate royalties is pointed out by a later map showing that most of the coal belonged to an adjoining lessor, there is sufficient evidence to support an award for unjust enrichment. An owner may dedicate part of his land to public use by taking appropriate acts, and his grantee has no claim to the part dedicated; signing an instrument reciting dedication and informing purchasers of a priori dedication and use of land as a street by the public are sufficient for a valid dedication. Actual possession of a junior patent of land is insufficient to acquire title to an overlap of a senior patent which has never been occupied by the owner when the overlap itself is not actually possessed adversely by the junior patent holder or his predecessors. A mortgagee must accept a check from a mortgagor although it is marked “paid under protest.” Lastly, in Cooper v. Sarros, the Court was able to reconcile a will and a codicil, although the language appeared ambiguous.

70 Id. at 664.
71 Id. at 663.
81 RESTATEMENT, PROPERTY § 295, comment d (1940).
82 Kirk v. Lee, 402 S.W.2d 338 (Ky. 1965).
83 Bates v. Bates, 399 S.W.2d 716 (Ky. 1965).
84 Good v. Music, 398 S.W.2d 874 (Ky. 1966).
85 J. Walter Wright Lumber Co. v. Baker, 395 S.W.2d 365 (Ky. 1965).
87 391 S.W.2d 389 (Ky. 1965).
XVIII. TAXATION

The Constitution of Kentucky provides that property "shall be assessed for taxation at its fair cash value." However, for many years real property in Kentucky was assessed at a fraction of its true value. The fractional assessment was upheld if it was uniform. As for personal property, some types were assessed at full value while others were assessed fractionally. The fraction used in assessing property for taxation only needed to be uniform in the taxing unit, the county, and then only for the classes of property assessed fractionally.

In 1965, in Russman v. Luckett, the Court struck down fractional assessments and ruled that all property must be assessed at its "fair cash value." In holding that seventy-five years' neglect of the full cash value standard did not abrogate the constitutional provision requiring full value assessment, the Court relied upon the principle that the failure of the executive to enforce a law does not result in its repeal.

In reaching its decision, the Court cited cases from five other jurisdictions, none of which extended the rule of full value assessment as far as Russman, i.e., to all property on a statewide basis. The cited cases applied full value assessment only to a county, or a city, or to that portion of property in the state assessed by the tax assessor. One of the cases held that all realty must be assessed at some uniform percentage of fair cash value; another required the assessor to assess realty at its fair cash value and thereby fix a new ratio between realty

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1 Ky. Const. § 172.
2 See, e.g., Luckett v. Tennessee Gas Transmission Co., 331 S.W.2d 879 (Ky. 1960); City of Lexington v. Cooke, 309 Ky. 518, 218 S.W.2d 55 (1949); City of Louisville v. Martin, 284 Ky. 490, 144 S.W.2d 1034 (1940); McCracken Fiscal Court v. McFadden, 275 Ky. 819, 122 S.W.2d 761 (1938); Eminence Distillery Co. v. Henry County Bd. of Supervisors, 178 Ky. 511, 200 S.W. 347 (1918). See also, discussion of full value assessment problem in 51 Va. L. Rev. 1456-64 (1965).
3 Kentucky Fin. Co. v. McCord, 290 S.W.2d 481 (Ky. 1956).
4 391 S.W.2d 694 (Ky. 1965). The Russman decision was reported too late for inclusion in the 1964-65 Court of Appeals Review. Because of its significance, we are discussing it in this year's survey.
5 Ky. Const. § 172.
8 McNayr v. State, supra note 7; Village of Ridgefield Park v. Bergen County Bd. of Taxation, supra note 7.
10 Pierce v. Green, 229 Iowa 22, 294 N.W. 237 (1940).
and other types of property fractionally assessed. One New Jersey case was an equalization problem rather than a full value assessment problem and required all property in the county to be assessed at full value because equality among taxing units in the county could be achieved no other way. A Florida case likewise applied to only a single county, but the court suggested that the decision could have secondary impact on the assessment and collection of ad valorem taxes throughout the state. Later Florida cases show this prediction is apparently coming true, but still only on a county by county basis.

The Constitution of Kentucky, unlike the constitutions of many states, does not provide for fractional assessment. In some states the assessed value is ascertained as provided by law or the constitution or by the legislature, or in proportion to the property's true cash value, or at thirty-five percent of its true value, or according to its true value. All such provisions require that the actual cash value of the property be used in establishing the assessed value, which may be a fraction of the true value. The Kentucky Constitution does not provide that property be assessed in proportion to or according to fair cash value, but specifies that it be assessed "at" fair cash value.

According to earlier decisions of the Court, the definition of the "fair cash value" at which the constitution requires property to be assessed is the price the property would bring at a voluntary sale, free of encumbrances, on the date of assessment. Property may not be assessed at what it would bring in more normal times, nor may it be assessed at its ultimate productive worth, but it must be assessed

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14 McNayr v. State, 166 So. 2d 142 (Fla. 1964).
15 Schooley v. Sunset Corp., 185 So. 2d 1 (Fla. 1966); Townsend v. Grey, 181 So. 2d 612 (Fla. 1966).
16 CALIF. CONST. art. XIII, § 1; TENN. CONST. art. II, § 28; TEX. CONST. art. VIII, § 1; UTAH CONST. XIII, § 2; W. VA. CONST. art. X, § 1.
17 ARK. CONST. art. XVI, § 5.
18 MICH. CONST. art. IX, § 3.
19 OKLA. CONST. art. X, § 8.
20 MISS. CONST. art. IV, § 112.
21 KY. CONST. § 172.
22 Evans v. Allen, 305 Ky. 728, 205 S.W.2d 514 (1947); Atlantic States Coal Co. v. Letcher County, 246 Ky. 549, 55 S.W.2d 408 (1932); River Coal Corp. v. Knott County, 245 Ky. 822, 54 S.W.2d 777 (1932).
23 Lynch v. Kentucky Tax Com'n, 333 S.W.2d 257, 262 (Ky. 1960) (defines "fair cash value" in a decision on the Kentucky inheritance tax); Commonwealth ex rel. Reeves v. Sutcliffe, 287 Ky. 809, 155 S.W.2d 243 (1941).
24 Atlantic States Coal Co. v. Letcher County, 246 Ky. 549, 55 S.W.2d 408 (1932).
25 Ibid.
26 Kentucky River Coal Corp. v. Knott County, 246 Ky. 822, 54 S.W.2d 377 (1937).
at its value at the time of assessment. Generally, the word "fair" adds nothing to "market value" except to indicate what the seller would have received had there been a sale.\textsuperscript{27} The fair cash value of property is determined by the County Tax Commissioner. Since he is responsible for his assessment, he has discretion in selecting the method he will use in making the determination.\textsuperscript{28} So long as the method used in assessing property is designed to reach, and reasonably tends to reach, an approximation of the fair voluntary sale price, the tax assessment cannot be held invalid because of the method employed in making it.\textsuperscript{29}

One meaning suggested for "fair cash value," which would have avoided the decision in \textit{Russman}, is that the phrase be taken to mean an adjusted fair price rather than current price. Such a definition would permit an adjustment by different fractions of different classes of property to take account of inflation. By the adjustment of value, current economic trends such as a "boom" in real estate would be dismissed, and the inflated value would be adjusted to the pre-boom value with the result that the owner of property with inflated value would have no tax increase when the owners of property with stable values did not.\textsuperscript{30} It would seem that the Court in defining the phrase as it traditionally has been defined properly left the construction of the tax scheme to the Legislature.

As a result of the Court's mandate that property be assessed at its actual value, the base for the ad valorem tax has been increased approximately three-fold.\textsuperscript{31} This new assessed base would increase tax burdens and revenues by the same amount, if the pre-\textit{Russman} tax rates were maintained. However, to allay the fears which the \textit{Russman} decision provoked, the Legislature in extraordinary session limited increases in property tax revenue as a result of \textit{Russman}. This

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\textsuperscript{27} John P. Dant Distillery Co. v. Pabst, 72 F. Supp. 619, 623 (W.D. Ky. 1947) (action on agreement to convey property). The Supreme Court has defined "fair cash value" as the amount that would be paid were the property condemned and taken by eminent domain. Great No. Ry. Co. v. Weeks, 297 U.S. 135 (1936).

\textsuperscript{28} Borders v. Cain, 252 S.W.2d 903, 905 (Ky. 1952) provides:
Tax assessors have always received advice and counsel on the valuation of property. That advice might come from a friend, a neighbor, the owner of the property to be assessed, or even from the personnel of the State Revenue Department. One assessor might use one method and another a different method in arriving at the same result. . . . Nor do we know of any law which gives the taxpayer the right to object to the method used so long as the assessment is fair and equitable.

\textsuperscript{29} Fayette County Bd. of Supervisors v. O'Rear, 275 S.W.2d 577 (Ky. 1955).


\textsuperscript{31} The statewide median real estate assessment ratio was approximately 27 percent of fair cash value. Russman v. Luckett, 391 S.W.2d 694, 695 (Ky. 1965).
was accomplished through legislation requiring cities, counties, and school districts to adjust their tax rate in inverse proportion to the increase in assessment. Thus each of the taxing units was directed to apply a compensating tax rate which, when applied to its total tax assessment in 1966, would produce revenue approximately equal to that produced in 1965. The compensating rate may be increased as much as ten percent by cities and counties for 1966 and 1967, and by school districts “for the school years 1966-1967 and 1967-1968.”

In response to this legislation, fifty-four counties which had reported to the State Local Finance Officer on October 4, 1966 had levied tax of from $.09 to $.26 per $100 of assessed value, as opposed to $.50 per $100 of assessed value in nearly every county prior to Russman. As of November 10, 1966, 149 school districts had levied the ten percent increase in the school tax, forty-four had not, and ten districts were undecided.

The legislative limits on taxation were designed to provide for an immediate emergency and are temporary. The compensating rate is only for the years 1966 and 1967. Should the Legislature in 1968 fail to enact new provisions, the only limit on the local tax rates applied to property assessed at full value would be the constitutional limits. The local units then could, but would not be compelled to, set rates at the constitutional limit.

The Court in Russman did not usurp any taxing power of the Legislature. It simply allowed the Legislature and local taxing units to exercise the full extent of the constitutional power to tax. It is always the duty of the Legislature and the local taxing units to select the tax rate or acquiesce in the selection of the existing rate.

The Court of Appeals recently held that the compensating rate applies to the total tax revenue of a county and is not to be restricted to general fund revenues. The controversy arose when a county which, prior to the enactment of the compensating rate, had voted a special levy for the retirement of a bonded indebtedness; the revenue produced by the special levy had been insufficient for the purpose, and the deficit had been made up from the general fund. The school district was not permitted to collect both a general fund equal to that

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32 KRS § 132.032 (1965). Where the officials of a taxing unit refuse to collect a tax, the compensating rate is determined on the amount that would have been collected had the officials collected the tax. Boggs v. Reep, 404 S.W.2d 24 (1966).
33 KRS § 132.027(2) (1965).
34 KRS § 68.245(3) (1965).
35 KRS § 160.470(4) (1965).
36 Fayette County Bd. of Education v. White, S.W.2d — (Ky. 1966); Cf. Holmes v. Walden, 394 S.W.2d 458 (Ky. 1965) (school tax levy in excess of constitutional limit).
of 1965 and a special fund sufficient to meet the full obligation of the bonds, but was restricted to the compensating rate in the special levy as well as in the general levy. In the Court's opinion, KRS 160.477 requires that bond and rental payments be met and that tax revenues be sufficient for the purpose. In an extraordinary situation the rate must go beyond the compensating rate in order that those payments be made, but in the ordinary situation where the bond and rental payments are being met, it is the purpose of the compensating rate legislation that the total tax burden not be increased except by the permitted ten percent increase.

Thus events since Russman indicate that this decision poses not a threat, but an opportunity for more uniform and equitable distribution of tax burdens. The assessment of property at 100% of its fair cash value can have more than fiscal consequences. For example, the appraisal of property for both public and private use in such diverse areas as real estate transactions, financing, planning of property utilization, economic analysis, and compensation in condemnation could be simplified. In particular, the most obvious effect for the immediate future could be on eminent domain valuations: property assessed at full value for tax purposes could be presumed to have the same value for condemnation.

Additionally, Russman holds that when a taxpayer who is the parent of a schoolchild has no other adequate remedy, a justiciable controversy is presented by the taxpayer's prayer for injunctive relief in the nature of mandamus to rectify the violation of the constitutional provision discussed above. McDevitt v. Luckett, a later case which incorporated the Russman opinion, stated the rights of property owners to demand compliance with the constitutional provisions requiring assessment of property at its fair cash value. Clearly, Russman v. Luckett is one of the most significant decisions rendered by the Court in recent years.

37 Ky. Const. § 172. Because of the extreme circumstances of the long prevailing, though illegal, custom of fractional assessment, the county tax commissioner and other public officials were not removed from office for misfeasance as provided by KRS § 132.370(3) (1942), although an official will be subject to the penalties of the statute for such misfeasance committed after January 1, 1966. Miller v. Layne, 391 S.W.2d 701 (Ky. 1965).

38 391 S.W.2d 700 (Ky. 1965).

39 Soon after deciding Russman, the Court held the requirement of full value assessment does not apply to a deduction of the assessed value of tangible property from the total valuation placed on the shares of bank stock. Because the deduction is a matter of legislative largess, only the assessed value of the tangible property is deducted if that amount is less than the fair cash value. Owensboro Nat'l Bank v. Commonwealth, Dep't of Revenue, 394 S.W.2d 461 (Ky. 1965). KRS § 136.280(2) (1942) was amended, Ky. Acts 1966, ch. 159, § 2, so the deduction is no longer allowed.
An important tax decision during the 1965-66 term was *Thomas v. Elizabethtown*, where the definition of ad valorem tax was expanded to include the use tax. Concluding that a use tax, levied at three percent of ninety percent of an automobile's purchase price, was an ad valorem property tax rather than an excise tax, the Court held that an automobile, purchased by a city and considered property used for a public purpose, was exempt from the use tax.

Other jurisdictions have generally held that use taxes are excise and not property taxes, although dicta to the contrary is occasionally found in some decisions. The Court in *Thomas* held that the use tax is not excised from or by reason of a transaction (as is the sales tax) but is a tax on the use and enjoyment of property. One court has indicated that a use tax may be a property tax when laid upon consumables such as gasoline, toilet goods, gun powder, dynamite, solvents, chemicals, and lubricants used in mining and manufacturing in which the only material use of the item is its consumption; but that court says nothing concerning the nature of the use tax when laid on durables such as automobiles. The tax on the use or enjoyment of property certainly affects the property, but a tax which affects property is not necessarily a property tax. "The owner of an automobile in Virginia pays a tax for the privilege of operating his car. In a sense this tax affects the car, but it is universally conceded that this is a license or privilege tax and not a tax on the property concerned, to wit, the automobile."
In 1961 the Court held in *George v. Scent*\(^{50}\) that "It [the use tax\(^{51}\)] is an excise and not a property tax or fee for regulation."\(^{52}\) This opinion described the use tax as a complement to the sales tax, designed to form a comprehensive tax system applicable to motor vehicles.\(^{53}\) The result of *Scent* is that a man who has purchased an automobile and paid sales tax in a state which has reciprocity with Kentucky for payment of such a levy is not required to pay the Kentucky use tax upon registration of the automobile in Kentucky, on the theory that to do so would be a kind of double taxation. If *Thomas* does not overrule *George v. Scent*\(^{54}\) (which was not cited in the *Thomas* opinion), a strange result follows: cities are exempt from the use tax because it is a property tax, and the out-of-state buyer is exempt because it is an excise tax.

If the Court truly intended that all use taxes are to be regarded as property taxes, it neglected important distinctions between the two. "A property tax is ordinarily measured by the amount of property owned by the taxpayer on a given day, and not on the total amount owned by him during the year. It is ordinarily assessed at stated periods determined in advance, and collected at appointed times, and its payment is usually enforced by sale of the property taxed and, occasionally, by imprisonment of the person assessed."\(^{55}\) The use tax differs from the ordinary property tax in that the use tax is not assessed on a given day, but whenever the property is acquired during the year. It is not assessed periodically, but only once; and it is not enforced by a sale of the property, but by non-issuance of license tags by the clerk until the tax is paid.\(^{56}\)

Furthermore, when the use tax and the ordinary ad valorem property tax are levied concurrently on an automobile in the year of its purchase, an unconstitutional classification of automobiles may be created. The imposition of both taxes in the year of an automobile purchase results in a greater total rate of tax than is levied on a similar automobile which was not purchased that year. One jurisdiction has held unconstitutional a use tax which is in fact an ad

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\(^{50}\) 346 S.W.2d 784 (Ky. 1961).
\(^{51}\) See note 40 supra.
\(^{52}\) 346 S.W.2d at 788.
\(^{53}\) Ibid.
\(^{54}\) The Court in Ashland Oil & Ref. Co. v. Commonwealth, Dep't of Revenue, 256 S.W.2d 358, 361 (Ky. 1953) stated: "it is well to keep in mind the rule that an opinion [of the Court] will not be construed as overruling all former precedents and establishing a principle never before recognized unless expressed in plain and explicit terms."
\(^{56}\) KRS § 138.460(3) (1942).
valorem property tax imposed upon a class of automobiles. The levy of only the use tax, as an ad valorem tax, may also be unconstitutional, since the use tax rate exceeds the ordinary ad valorem tax rate by which cars of similar value are taxed.

The Court of Appeals decided a few other cases of minor import during the past term. In Boggs v. Reep the creation of a special taxing district for the establishment of a local library was held constitutional. Because a county collecting a library tax does so as agent for the library district, the library tax may increase the total tax collected by the county beyond the constitutional maximum. The Court went on to say, “We have previously observed that districts for specific purposes may be created without the consent of the residents affected.” The cases cited as authority for the principle—both overruled on another point—dealt with districts which collect fees rather than taxes; but there is apparently no distinction between fees and taxes for this purpose.

Turning to the question of the classification of property for purposes of taxation, the Court required in Burge v. Marcum that the classification be related to some permitted end of government. Because there was no such relationship in Burge, a transfer tax on all shares of stock in Kentucky corporations belonging to United States citizens domiciled in a foreign country fails to be a permissible classification under section 171 of the Kentucky Constitution. The defense of the classification was based on the theory that citizens of other states in the union are subject to taxes on capital stock in the home State, foreign domiciled citizens are not taxed for similar stock by the foreign country. The tax burden is thus equalized, and double taxation is avoided. The Court disposed of this argument by saying that no authority for non-taxation by a foreign country was found and that the possibility of double taxation exists whether one lives in another state or in a foreign country.

An occupational tax was distinguished from an income tax in

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68 404 S.W.2d 24 (Ky. 1966).
60 Boggs v. Reep, 404 S.W.2d 24, 26 (Ky. 1966).
61 Farley v. Beaver-Elkhorn Water Dist., 257 S.W.2d 536 (Ky. 1953); Rash v. Louisville & Jefferson County Met. Sewer Dist., 309 Ky. 442, 217 S.W.2d 232 (1949).
62 394 S.W.2d 908 (Ky. 1965); The test to be applied to classifications is, first, to determine the purpose of the act creating the classification and, second, to determine whether the classification can reasonably be said to be related to that purpose. Markendorf v. Friedman, 280 Ky. 484, 133 S.W.2d 516 (1939).
Batten v. Hambley.\(^6^3\) The occupational tax in question was levied by a fourth class city’s ordinance, which required employers to withhold the tax from wages, to declare anticipated receipts, and to pay in advance the estimated tax due. The Court held that the occupational tax was not an income tax and could be levied by a city. It further held that it was unnecessary for the ordinance creating the tax to spell out in minute detail the administrative procedures for its enforcement.

\(^6^3\) 400 S.W.2d 683 (1966).
XIX. TORTS

A. Negligence: Standard of Conduct

1. In General (Automobiles Excepted).—This term's landlord decisions seemingly go no further than affirming previously articulated principles. Landlords and store owners have a duty to use ordinary care to maintain stairsteps in a reasonably safe condition on behalf of business invitees. A jury can properly find that duty was violated if the only stairwell light source is placed so that a descending tenant's shadow obscured the steps in an apartment building. But negligent maintenance of stairs must in fact be proved; a mere showing of invitee's injury on the premises is not sufficient to take the case to a jury. Landowners, or the persons legally in control of the property, need not furnish notice to social or business invitees of dangers which should be observed in the exercise of ordinary care, such as an upside-down bathmat in a shower stall, or a terrazzo sidewalk, which became more slippery than concrete when wet but had been in (apparently) accident-free service for twenty-five years.

The terrazzo case was Weathers v. Morris's Estate. Affirming a directed verdict for the defendant storekeeper, the Court noted that twenty-five years of pedestrian traffic, including perhaps the plaintiff, had passed over the sidewalk. Therefore it was evident pedestrian plaintiff should have known of the danger presented. Plaintiff's leather sole and heel footgear was a persuasive factor in the decision. The Court indicated that wearing leather shoe bottoms in the rain charged the plaintiff with a higher degree of care for his own safety. Finally, even though the terrazzo was graded at a degree greater than the maximum prescribed in city building regulations, the plaintiff would have had to show that the grade actually created a dangerous condition, over and above the violation, before a jury issue was presented.

The opinion presents several problems. Evidence of previous safe passages over the terrazzo is relevant as to whether not only the pedestrian but also the storekeeper had notice of the dangerous condition. The Court should have stated explicitly whether the twenty-five years' history of the sidewalk had seen similar accidents, rather than leave it to inference, in order to determine which party was supported by the evidence of previous passage. Where wet terrazzo is obviously dangerous, other states have placed a duty on

1 Urban v. Walker, 403 S.W.2d 11 (Ky. 1966).
2 Hannin v. Driver, 394 S.W.2d 750 (Ky. 1965).
3 Keown v. Keown, 394 S.W.2d 915 (Ky. 1965).
4 Weathers v. Morris' Estate, 397 S.W.2d 770 (Ky. 1965).
5 Ibid.
storekeepers to provide safety devices. There are no cases from any states which hold contributorily negligent a person who slips and falls on a dangerous sidewalk because of the type of shoes he was wearing.

The major weakness of the opinion is the Court's treatment of the building regulation. A definite decision should have been made whether the regulation applied to the defendant, and whether his was the type of accident the regulation was designed to prevent. If so, then the modern Kentucky rule is that the defendant's violation was negligence per se. The Court's apparent reasoning was that de-

7 E.g., Ibid. There the storekeeper's duty to provide at least some form of safety mat was based on a neighborhood custom of doing so.

8 Based on research through the entire American Digest system, scanning for cases involving wearing materials in general. Apparently there are no cases which base the contributory negligence of a falling pedestrian on any wearing apparel. The standard case in the area simply decides whether the conditions on the sidewalk which caused the fall were such as to give the pedestrian notice of the slipperiness. E.g., Hansen v. Ware's, Inc., 324 S.W.2d 509 (Tex. Civ. App. 1959); Weighman v. Bettilyous, Inc., 390 F.2d 120 (1964). The case closest to Weathers is Green v. Acosta, 173 So. 2d 291 (La. App. 1965), where plaintiff was contributorily negligent because he hurried across sidewalk known to be slick.

9 All evidence that such a regulation existed was presented in the oral testimony of a civil engineer, who further testified that he could not determine whether the regulations had been in effect at the time the sidewalk was built. The Court simply let the matter stand at that point, although the opinion continues to speak of the regulation as if it were in force.

10 Proximate cause is established upon a showing that the accident was of the class the statute or ordinance was designed to prevent. Greyhound Terminal of Louisville v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1947). It seems there could be no other purpose for an ordinance limiting the slope of terrazzo sidewalks than to prevent falls when the material is wet.

11 The original rule concerning violation of a city ordinance in Kentucky was that it had no bearing whatsoever on the defendant's negligence. The principle originated with Dolfinger v. Fishback, 15 Ky. (12 Bush) 474 (1876). In that case an ordinance of the city of Louisville forbade a driver of a team to be more than ten feet away while on a public street. Defendant driver violated the ordinance by leaving his team to make a delivery to a house, and his unattended team crashed into a wagon passing by. The Court held it was error for the ordinance even to have been read into evidence. The Court reasoned:

The general council of the city has no general power of legislation. It no doubt had the power to pass the ordinance and to enforce it as a mere police regulation, but further than that it had no power. It may be dangerous for a driver to leave his team upon the street, and the city council no doubt had the authority to prohibit such an act; but the simple fact that they did prohibit it does not prove or even tend to prove that the appellant's driver was guilty of such negligence as renders them liable for an injury resulting from their team having been left standing upon the streets in violation of the ordinance. Id. at 480-81.

This rule was strongly affirmed in Louisville & N.R.R. v. Dalton, 102 Ky. 290 (1897) and Ford's Adm'r v. Paducah City Ry., 124 Ky. 488, 99 S.W. 355 (1907). Then the Court of Appeals began to punch holes in the coverage of the doctrine. Violation of city ordinances were held negligence per se when the ordinances were in accordance with a provision of the Kentucky Constitution. Mullins v. Nordlow, 170 Ky. 169, 185 S.W. 825 (1916).

Finally in Pryor's Adm'r v. Otter, 268 Ky. 602, 105 S.W.2d 564 (1937), the (Continued on next page)
defendant should not be liable for his violation because the plaintiff had notice of it. Of course, once a defendant's negligence has been established, it is possible that the facts will demonstrate that the plaintiff was contributorily negligent as a matter of law or that the defendant's negligence was not the proximate cause of injury, thus absolving the defendant of liability. But this was not the Court's conclusion; rather, it decided that "the evidence was not sufficient to authorize a finding of negligence on the part of the defendants. . ."12

This case should have been remanded for a determination of whether the regulation applied to the defendant and, if so, consideration of the question of contributory negligence. When contributory negligence was pleaded as a defense against statutory violation, Kentucky cases decided in both the '64-'65 and '65-'66 terms held that a jury question was presented.13

(Footnote continued from preceding page)

Court broke with the old rule and held a violation of ordinance regulating traffic in Louisville to be negligence per se. The Court stated: "Statutes and ordinances defining duties and regulating traffic are regarded as declaratory of the common law and supplementary thereto . . . a violation of the terms of a statute or ordinance is in this jurisdiction held to be negligence per se." Id. at 606, 105 S.W.2d at 566.

Very closely in point with the case at bar was Greyhound Terminal of Louisville v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1947). A Louisville ordinance provided: " . . . All stairs shall have walls or well secured balustrades or guards on both sides, and except in dwellings shall have hand rails on both sides . . ." Id. at 45, 209 S.W.2d at 479. The plaintiff slipped and fell on stairs in defendant's building which lacked handrails. The Court stated that "if the injury complained of is one which was intended to be prevented by the Statute and Ordinance, supra, the violation of their provision must be considered as the proximate cause of the injury." Id. at 45, 209 S.W.2d at 479. It continued, reasoning that since the fall on the stairs was undoubtedly the type of accident intended to be prevented by the statute and the plaintiff testified to such facts that the jury could have concluded she would not have fallen had there been a handrail, the judgment for plaintiff must stand. The Court clearly stated the rule of the Greyhound Terminal case which must likewise apply to Weathers v. Morris' Estate: "The violation of the terms of an ordinance is negligence per se. . . ." Id. at 45, 209 S.W.2d at 478.


12 Weathers v. Morris's Estate, 397 S.W.2d 770, 773 (Ky. 1965).
13 In Gregory v. Paducah Midstream Serv., 401 S.W. 2d 40 (Ky. 1966), the trial court had directed a verdict for a tugboat operator whose craft had rammed deceased's small fishing boat on Kentucky Lake. The Court of Appeals reversed, primarily because defendant had violated a statute requiring a lookout on vessels operating in navigable streams; such a lookout would have seen deceased's boat, especially in populous waters. Eldridge v. Pike, 396 S.W.2d 314 (Ky. 1966), was a case in which the parties met in a head-on collision on a narrow bridge. The Court held that the questions of negligence and contributory negligence turned on which machine was on the bridge first, and when the evidence was conflicting the case was properly submitted to the jury. In Bruce v. Alley, 391 S.W.2d 678 (Ky. 1965), a case handed down in the 1964-1965 term, the Court reversed a directed verdict for the defendant installer of a gas furnace because of a showing by plaintiff, who had been injured by carbon monoxide fumes produced by allegedly

(Continued on next page)
In Mackay v. Allen the plaintiff entered one of two identical doors beneath a marquee advertising a medical clinic and dropped into a basement. The clinic doctors and the co-tenant drug store were held to be negligent as a matter of law in failing to provide notice, make the basement entrance safe, or lock it. The landlord was not liable because he had turned over his keys and possession of the building to the cotenants. A delivery company whose employees had left the basement door unlocked was also absolved of liability because they had never been instructed to close it: "An ordinary workman employed on a delivery truck can hardly be expected to exercise a great deal of independent judgment beyond what he is told to do."

Dictum in the opinion indicated that the landlord's retention of control over portions of an area leased to two or more common use tenants renders him responsible for the condition of his part, and he is presumed to have retained control over parts used in common by the tenants. In this case absolute control by the tenants conclusively rebutted the presumption. Cleanup visits to the basement every two months were insufficient to render the landlord liable for the condition of the premises. Under Kentucky law he would not be liable even if he had received complaints about the danger, or had otherwise been brought to realize it, and failed to inform the unnoticing tenants.

Electric power company employees who arrive at the scene of a fire and find it already out of control owe no duty to cut off the current to the burning building (a decision from the 1964-1965 term). And where a power company has constructed its lines within an easement and about thirty feet off the ground it will not be liable to the owner of the property through which the lines pass if the owner receives electric shock when the far end of a television cable he is holding is thrown over the power lines by a third person not in the suit.

(Footnote continued from preceding page)
improper installation, that defendant's installation technique violated a state safety regulation.

14. 396 S.W.2d 55 (Ky. 1965).
15. Id. at 60. By the same token the failure of the drugstore tenants to lock the basement door was foreseeable by the members of the clinic and hence was not such an intervening cause or negligence as to neutralize their primary negligence.
16. Id. at 59. Apparently the rule has never been so explicitly stated in Kentucky before; the Court cited Primus v. Bellevue Apts., 241 Iowa 1055, 44 N.W.2d 347 (1950); 32 Am. Jur. Landlord and Tenant § 688 (1941).
17. 396 S.W.2d at 59.
18. Landlord's failure to notify the tenant after receipt of rentals of knowledge of pre-existing defects might be unneighborly but is not such as to render him legally liable. Holzhauer v. Sheeny, 127 Ky. 28, 104 S.W. 1034 (1907).
On a job where conditions are constantly changing as work progresses, such as construction of a barn, an employer is not liable to his employee for injuries caused by hazardous and unsafe conditions of which the employer is unaware.21

In Williams v. Ehman22 the defendant, whose auto had run off a two-lane highway and wrecked, injuring him, made his way to the edge of the road just below the crest of a hill and waved his arms at passing traffic to attract help. One car slowed in response and the auto in which plaintiff was riding crashed into its rear. The Court said the defendant was injured, dazed, and in an emergency situation; it concluded, "we cannot say that he had a duty to not stand there; nor can we say that he was under a duty to refrain from attempting to obtain assistance by waving his arms and calling out for help."23

Pemberton v. Commonwealth, Department of Mental Health24 is the first action of its type to be reported in Kentucky. A state mental patient escaped from the institution, stole a car, and negligently collided with plaintiff's car. The suit was brought in the Board of Claims for negligent failure to keep the escapee in maximum security. Certain privileges given the escapee had led to his opportunity to flee. The Court decided that the defendants could not be held liable for a "mistake in judgment."25 The Court noted the importance of granting privileges as an element of therapy, then reviewed the institutional record of the escapee and concluded the doctors could reasonably have decided the escapee deserved the privileges granted.

Curing mental patients is as much art as science; it is difficult to protest the standard of good faith judgment established in the case. Yet it is highly important that the case was decided on the question of standard of care because the doctrine of sovereign immunity has prevented most cases of this nature from ever going to trial.26 Two Louisiana cases held for the state by relying primarily on the lack of proximate cause between the institution's negligence and the ultimate injury.27 Pemberton raises two questions which must remain unanswered for the present. The escapee had been classified by hospital

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21 Mitchell v. Franklin, 398 S.W.2d 707 (Ky. 1966). The Court also found that a servant who pried his support boards out from under him was contributorily negligent in producing his own fall.
22 394 S.W.2d 905 (Ky. 1965).
23 Id. at 907.
24 398 S.W.2d 487 (Ky. 1966).
25 Id. at 490.
26 52 C.J.S. Prisons § 23 (1951).
27 Webb v. State, 91 So.2d 156 (La. 1956); Green v. State, 91 So. 2d 153 (La. 1958). In Green the court held that the state was not liable for injury to persons hit by an escaped inmate in a stolen car because of the remoteness of the causal connection between the breach of duty by the state employee and the injury to the plaintiff.
officials as a violent type who belonged in a penitentiary. In future
cases should officials be held liable for negligent failure to secure a
transfer of the patient?28 And since the Pemberton suit was brought
under the Board of Claims Statutes,29 will the Court allow a similar
action against a private institution?30

In one other case the Court held that the jury could properly
find a driver of complex farm machinery liable to a stranger riding on
the machine on the ground that the driver was negligent in failing to
warn of his inexperience at the task.31

2. Automobile Drivers.—One of the many situations in which the
hypothetical reasonable man is expected to anticipate and guard
against the conduct of others is that where a small child suddenly
darts into the street in front of his car. If the child is in a position
near the street where a motorist in the exercise of ordinary care
should see him, the motorist must anticipate that the child may sud-
denly dart into the street. In Thomas v. Gates32 the court applied
this principle, known as the “small child doctrine.” While there was
conflicting evidence as to which side of the street the child darterd
from and as to whether the child came from a concealed position, in
the court’s opinion the preponderance of the evidence indicated the
child was in a position where she should have been seen. Of course,
this case is not the first application of the “small child doctrine” in
Kentucky,33 nor is it uncommon in other jurisdictions.34 It joins other
Kentucky precedents35 in saying that if a child is concealed and the
place of concealment is such a distance from the path of the vehicle

28 Research reveals no authority which indicates an answer to this question.
Yet no reason is evident why this would not be actionable negligence.
29 KRS § 44.070(1) (1946) provides: “A Board of Claims . . . is created and
vested with full power and authority to investigate, hear proof, and to compensate
persons for damages sustained to either person or property as a proximate result
of negligence on the part of the Commonwealth, any of its departments . . .”
30 Kentucky has no cases which would serve as precedent to answer this
question. Two reasons exist for believing action against a private institution
would be permitted. (1) The principles in Pemberton are easily extended to
private as well as public institutions, and (2) private institutions have an additional
area of judgment—admittance—beyond that of public hospitals, which must
accept anyone committed by the courts, whether there is “room” or not.
31 Hurst v. Sanders, 399 S.W.2d 470 (Ky. 1966).
32 399 S.W.2d 689 (Ky. 1966).
33 Petts v. Krey, 362 S.W.2d 726 (Ky. 1962); Golubic v. Rasnick, 239 Ky.
355, 39 S.W.2d 518 (1931).
34 Greene v. Willey, 86 A.2d 82 (Me. 1952); Crowe v. Havens, 277 App.
Div. 812, 96 N.Y.S. 2d 760 (1950); Pavone v. Merion, 242 N.C. 594, 89 S.E.2d
108 (1953); Green v. Mitchell County Bd. of Educ., 237 N.C. 336, 75 S.E.2d 129
(1953); Doyen v. Lamb. 49 N.W.2d 882 (S.D. 1951); Read v. Daniel, 197 Va.
853, 91 S.E.2d 400 (1956).
35 Benton v. Parks’ Adm’r, 272 S.W.2d 466 (Ky. 1954); Dixon v. Stringer,
277 Ky. 347, 126 S.W.2d 448 (1939).
that the child should be noticed before he reaches the street, the motorist is under a duty to see and avoid him.

Dean Prosser recognizes the "small child doctrine" and the policy upon which it stands. He says the motorist's duty,

becomes most obvious when the actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things. Therefore, when children are playing in the vicinity much is necessarily to be expected of them which would not be looked for on the part of an adult. It must be anticipated that a child will dash into the street in the path of a car. 38

Although most agree with Dean Prosser on the soundness of protecting children in residential areas, the Court over-extended the small child doctrine in Modern Bakery v. Brashear. 37 The Court took a doctrine, which has ordinarily been used where children were in or near the street in residential, low-speed zones, and applied it to a motorist who saw a child walking parallel to a rural, high-speed highway. While the burden of stopping or slowing in a residential area when a child appears at the side of the street is not unreasonable, this burden is much greater if a driver must stop or slow to a snail's pace every time he sees a child treading a well-beaten path parallel to an out-of-town highway. In Brashear the Court said the same rule applies in the country as well as in town, but it said nothing about the seriousness of placing such a burden on the highway motorist. Either the court possessed no insight into the problem, or it neglected to express its rationale for imposing the same standard of care in both rural and residential settings. If the latter, perhaps the underlying policy of the "small child doctrine" was regarded to be protection of children in all traffic situations. However, it bears repeating that Prosser mentions "children" who are "playing." 38 In Brashear the boy was alone, walking a well-beaten path along the side of the road opposite the driver. At any rate, the "small child doctrine" now rides with us on the open highway.

While the defense of "sudden appearance" is often raised by the driver in small child cases, the court this year in Brown v. Wilson 39 said such defense presupposes the defendant's exercise of ordinary care. Thus, Kentucky would now hold the driver of an automobile to the duty of keeping a lookout for children on the road and sidewalks. He must use ordinary care to avoid injuring anyone and to discover

36 Prosser, Torts 175 (3d ed. 1964).
37 405 S.W.2d 742 (Ky. 1966).
38 Prosser, Torts 175 (3d ed. 1964).
39 401 S.W.2d 77 (Ky. 1966); See also Dixon v. Stringer, 277 Ky. 347, 126 S.W.2d 448 (1939).
that someone is in a dangerous position. If, after all this, a child still gets in the way of the car, then the motorist is entitled to the sudden appearance defense.

Another possible defense was provided the motorist by *Williamson v. Garland*, where an eleven-year-old child was struck by a car. If a child appears to be in the "darting age group," but is in fact older and is found by the jury not to have exercised the care of an ordinary prudent child of his age and experience, then recovery should be denied due to contributory negligence.

*Mackey v. Spradlin* presented the novel question of the duty of care owed child customers by a mobile ice cream vendor. The Court reached a sound and logical result by drawing an analogy to, but not actually applying, the "attractive nuisance" doctrine and imposing a duty to warn children of approaching traffic. It said further:

In this particular type of situation the danger is enhanced by the sense of haste that is purposely aroused in the children of a neighborhood by the tinkling of bells and flashing of lights heralding the imminent arrival of an attraction that will stay but a moment and be gone unless they come at once. The responsibility of one who knowingly provokes into action the natural recklessness of irresponsible children ought surely be proportionate to the degree of danger he thereby creates.

This case also made use of the "small child doctrine" in saying that the propensity of young children to dart or run into the street must be anticipated. It held that a dump truck driver proceeding along a street on which was parked an ice cream wagon attended by young children should have anticipated that some child momentarily hidden from view by the ice cream wagon might suddenly emerge from behind it, and that it was the driver's duty to stop or to proceed so

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40 402 S.W.2d 80 (Ky. 1966); For a fuller discussion of this case see text at notes 71-77 infra.

41 397 S.W.2d 33 (Ky. 1965).

42 Kentucky accepts the *Restatement* version of attractive nuisance. *Fourseam Coal Corp. v. Greer*, 282 S.W.2d 129 (Ky. 1955). This version says:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if:

(A) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(B) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(C) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(D) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

43 397 S.W.2d at 87 (Ky. 1965).
carefully as to minimize the chance of hitting children. The Court sanctioned a finding of concurrent negligence, making both driver and ice cream vendor liable.

This was a 4 to 3 decision. The dissent felt that the speed of the truck was not shown to be unreasonable and that to find liability would be to make ice cream vendors insurers of the safety of children. It criticized the majority for applying attractive nuisance principles when, admittedly, this was not an attractive nuisance case.

Last year saw a number of cases concerning the standard of care in various traffic situations. For instance, a motorist who drove onto a through highway after failing to come to a full and complete stop at a stop sign, when a second motorist was approaching so closely as to constitute an immediate hazard, was held negligent as a matter of law. In another case the Court said violation of a statutory duty is negligence per se, but does not bar recovery unless the violation was the proximate cause of the injury. Here the Court found sufficient evidence to prove that the failure of the appellant to have a turn signal was the proximate cause of the accident and therefore the appellee’s violation of his statutory duty in failing to sound his horn when passing was not contributory negligence.

_Brockie v. Shadwick_ answered a question of great confusion among the motoring public when it held lawful a motorist’s entry into an intersection under a yellow light. It said the yellow light merely warns the motorist that a red signal is imminent and that he must be prepared to stop. While the court tried to distinguish _Bryan v. Battoe_ on the facts, _Shadwick_ in effect overrules that decision, which made it the motorist’s duty to refrain from entering intersections on a red or yellow light. The American Law Reports cites _Bryan v. Battoe_ as indicative of the general view that a motorist approaching an intersection with the green light in his favor must bring his vehicle to a stop, upon appearance of the yellow light unless he is too near the intersection to be able to stop safely. It is difficult, however, to ascertain if this is still the general view, because the courts of other jurisdictions have taken widely divergent positions on the question of duty to stop when the light is yellow. In _Tilford v. Garth_, the

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44 Riggs v. Miller, 396 S.W.2d 69 (Ky. 1965).
45 Jewell v. Oglesby, 403 S.W.2d 499 (Ky. 1966).
46 396 S.W.2d 63 (Ky. 1965).
47 209 Ky. 47, 160 S.W.2d 369 (1942).
49 290 Ky. 47, 160 S.W.2d 369 (1942).
51 405 S.W.2d 6 (Ky. 1966).
the Shadwick case was cited for the proposition that the yellow light is nothing more than a warning that the signal is about to change, but Tilford added "unless there is a statute or ordinance to the contrary." The ordinance in question belonged to the City of Louisville, and provides: "yellow alone or 'caution' when shown following the green or 'go' signal: Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection." While the Court of Appeals felt the ordinance should be amended for purposes of uniformity, it was unwilling to say the ordinance was so unreasonable as to be void. One interesting suggestion on the yellow light problem is the new "countdown" traffic light that has been tested in Abilene, Texas. Twelve seconds before the light is due to change, the amber light blinks a countdown from nine to one in numerals that are visible for 200 feet. It then glows steadily amber for three more seconds before turning red. Over an eight-month period it resulted in a 44% cut in traffic accidents at a busy intersection.

A Kentucky statute concerning proper following distance was applied in Propane Transp. Co. v. Edelen. There an empty tank-trailer, going up a hill on a wet country highway, was held to be following too close to the vehicle ahead when it observed a following-distance of only forty feet.

In a number of other decisions the Court dealt summarily with cases which reaffirmed existing precedents. Where a motorist who skidded off the road had notice of the hazard of mud and water on the highway, she could not claim that the negligence of the highway department caused the accident as a matter of law. Another case found a driver deservedly guilty of negligence when he got into his parked car with the windows fogged up, backed up 35 to 40 feet, and hit plaintiff's parked automobile. In two cases, the Court upheld

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52 396 S.W.2d 63 (Ky. 1965).
53 405 S.W.2d at 8 (Ky. 1966).
54 LOUISVILLE KY., ORDINANCE § 323.01(b).
56 KRS § 189.840(6) (a) (1942) provides: "The operator of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having regard for the speed of the vehicle and the traffic upon and condition of the highway."
57 400 S.W.2d 697 (Ky. 1966).
58 Brown v. Commonwealth, Dep't of Highways, 397 S.W.2d 163 (Ky. 1965).
59 Lee v. Dutli, 403 S.W.2d 703 (Ky. 1966).
60 Metcalfe v. Hopper, 400 S.W.2d 531 (Ky. 1966) (where one driver may have pulled out of a secondary road onto a highway without yielding the right of way to another driver who may have been traveling at an excessive rate of speed, the jury could properly find concurrent negligence); Crabtree v. Guthrie, 405 S.W.2d 82 (Ky. 1966) (where evidence was conflicting as to whether a truck driver gave the required signal of his intention to turn, and as to whether an

(Continued on next page)
jury verdicts which found both parties concurrently negligent. Another opinion said a vehicle coming up behind a left-turning car may not proceed as if the left-turn and the passing process will be precisely synchronized. The court also reiterated existing precedents as to jury instructions in two cases.

3. Governmental Liability.—Shearer v. Hall presented an important question concerning the personal liability of public officials for damages resulting from negligent omission to perform their duties. Plaintiff sued the members of the fiscal courts of Shelby and Oldham counties, which were jointly responsible for maintaining a bridge which collapsed under the plaintiff. He alleged (1) that the fiscal courts' members knew or, by exercise of ordinary care, should have known of the dangerous condition of the bridge and should have warned the public, and (2) that it was their duty to repair and maintain the bridge for the public's safety but they willfully and wantonly failed to do so. The Court of Appeals held it was error for the circuit court to dismiss for failure to state a cause of action. The underlying problem was interpretation of a statute providing that the fiscal court "may" erect, keep in repair, and superintend bridges and other structures, and provide for the good condition of highways in the county. While the majority opinion saw the duty as ministerial, the dissent believed it was discretionary. It is commonly held that if the duty is ministerial the officials may be liable. The crux of the problem is deciding how to classify the duty. The majority opinion noted some early Kentucky cases ruling that the duty of maintaining roads under this statute is discretionary rather than

(Footnote continued from preceding page)

automobile driver sounded her horn before attempting to pass and as to her keeping a proper lookout, the jury could logically decide that both parties were negligent).

61 Townsend v. Stamper, 398 S.W.2d 45 (Ky. 1966).
62 Miller v. Quaife, 391 S.W.2d 682 (Ky. 1965) (an instruction which set forth general duties applicable to drivers, including the duty to operate their automobiles to the right of the center line, was not objectionable); Pritchett v. Herber, 398 S.W.2d 473 (Ky. 1966) (an eastbound motorist whose automobile was struck by a southbound vehicle as it entered a through street, on which the south-bound vehicle was traveling, preparatory to making a left turn in order to travel 40 feet northward along a dog-leg turn and to there turn right on the street was improperly refused an instruction on right-of-way at an intersection).

63 399 S.W.2d 701 (Ky. 1966).
64 KRS § 67.080 (1942).
66 Hardwick v. Franklin, 120 Ky. 78, 85 S.W. 709 (1905); Sinkhorn v. Lexington, H. & P. Turnpike Road Co., 112 Ky. 205, 65 S.W. 556 (1901); Wheatly v. Mercer, 72 Ky. 704 (1873).
ministerial, but said that a later case\textsuperscript{67} clarified the meaning of ministerial. It said discretion in the manner of performance of an act arises when the act can be performed lawfully in more than one way and the performer has discretion to decide the manner of performance; however, an act is not necessarily taken out of the class styled "ministerial" because the officer performing it is vested with a discretion respecting the method to be employed. Although not cited by the Court, other Kentucky cases\textsuperscript{68} recognize that, while "may" usually denotes discretion, it can be construed as mandatory. The Court did cite dicta from a 1902 case which said:

We are of the opinion that under the statutes above quoted the duty of keeping the public highways of a county in repair is primarily imposed upon the members of the fiscal court. . . . The responsibility, if any, for a willful failure to discharge this duty, would rest upon the members individually and not on the county.\textsuperscript{69}

The Court, in finding that a cause of action was stated, may have been influenced by a realization that the county's legal status is difficult to define. A 1959 case\textsuperscript{70} held that no recovery for the negligence or misconduct of county officers could be had against the county, since it is an arm of the state. According to this decision, claimants must seek redress from the individuals. The strongest argument against this rule is that capable men will not serve as county officials if they know they will be personally liable for negligent misfeasance or nonfeasance. But while this places county officials in a position where they must risk their individual wealth, it should cause them to be more alert to the responsibilities of their offices. Perhaps bonding is the best solution for quieting the fears of public officials and still allowing recovery to injured claimants.

B. Negligence: Defenses

1. Contributory Negligence.—While the Court reaffirmed a number of established contributory negligence rules during the recent term, it also overturned precedent and made it easier to find children con-

\textsuperscript{67} Upchurch v. Clinton County, 330 S.W.2d 428, 430 (Ky. 1959). An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature.

\textsuperscript{68} Hart v. Central City, 289 Ky. 481, 159 S.W.2d 18 (1942); Davidson v. Board of Educ., 225 Ky. 165, 7 S.W.2d 1056 (1928); Hays Ex'r x v. Burns, 216 Ky. 827, 288 S.W. 764 (1926).

\textsuperscript{69} Commonwealth v. Boyle County Fiscal Court, 113 Ky. 325, 68 S.W. 116, 118 (1902).

\textsuperscript{70} Upchurch v. Clinton County, 330 S.W.2d 428 (Ky. 1959).
tributorily negligent. In *Williamson v. Garland,* the Court expressly overruled *Baker v. Sizemore,* which held that for a child between the ages of seven and fourteen there is a rebuttable presumption of incapacity for contributory negligence. Due to the burden of overcoming such a presumption, the practical effect of *Sizemore* had been to prohibit a finding of contributory negligence as a matter of law. The *Garland* case did hold the plaintiff, an eleven year old, contributorily negligent as a matter of law.

Having abandoned the rebuttable presumption, it was of course incumbent upon the Court to establish a standard of care for this age group. The Court said:

[W]e consider it appropriate in cases involving such litigants that they be charged with contributory negligence to the extent that their acts may be deemed violative of the degree of care usually exercised by ordinarily prudent children of the same age, intelligence and experience under like or similar circumstances.

Just two months prior to the *Garland* decision, the Court had been faced with a similar case, *Lareau v. Trader,* where apparently it was not prepared to take the step advanced in *Garland.* But in the earlier case the Court did uphold the lower court's finding that a child of thirteen years and eight months had sufficient judgment "as a matter of law" to be held negligent, possibly with an eye to the impending change. Regardless of whether *Trader* or *Garland* was responsible, the presumption of incapacity for contributory negligence, which is the general rule followed by most states, has been abandoned in Kentucky.

The Court handled a number of cases involving acts which the Court thought were so imprudent as to constitute contributory negli-
gence as a matter of law. These cases involved conduct such as walking across a railroad track without looking,\textsuperscript{78} crossing the street between intersections and not in the crosswalk,\textsuperscript{79} failing to see a power line which was in plain view,\textsuperscript{80} continuing to ride in an automobile with a driver who was known to be intoxicated,\textsuperscript{81} and stepping into a bucket of lye which was in plain sight.\textsuperscript{82} Such conduct as failure to maintain a constant lookout by a person whose employment duties require him to work in the street\textsuperscript{83} and reliance on railroad crossing signals without looking when the view is substantially obstructed\textsuperscript{84} was held insufficient to to establish contributory negligence as a matter of law. The latter of these two cases, Shewmaker v. Louisville & N. R.R.,\textsuperscript{85} modified an earlier case\textsuperscript{86} which held that a person could not rely on these signals. The Court, overruling only to the extent of the inconsistency\textsuperscript{87} between the cases, stated: "We do not say that in every such instance he may rely absolutely on the signals, but we are of the opinion that whether and to what extent ordinary care would demand any further or additional lookout on his part is definitely a question for the jury to decide."\textsuperscript{88}

The Court upheld findings of contributory negligence by juries where evidence showed that an eighteen-year-old bicycle rider could not stop or steer the bicycle which was weaving from one side of the

\textsuperscript{78} Cincinnati, N. O. & Tex. Pac. Ry. v. Wood, 392 S.W.2d 437 (Ky. 1965) (a pedestrian, who was killed by a locomotive while walking across a public crossing on a clear day, who had a clear view for at least 500 feet, but who did not look toward the area from which the train was approaching, was contributorily negligent as a matter of law).

\textsuperscript{79} Clements, Adm'v v. Peyton, 398 S.W.2d 477 (Ky. 1966).

\textsuperscript{80} Goetz v. Green River Rural Elec. Co-op Corp., 398 S.W.2d 712 (Ky. 1966) (failure of a property owner who had been on the premises three times, to thereafter observe power lines before or during climbing of a television tower to install an antenna which was blown onto the wire with the result that owner fell constituted contributory negligence as a matter of law). For further analysis see 55 Ky. L. J. 192 (1966).

\textsuperscript{81} Noble v. Jones, 392 S.W.2d 449 (Ky. 1965).

\textsuperscript{82} O.K. Tire Store No. 3, Inc. v. Stovall, 392 S.W.2d 43 (Ky. 1965) (plaintiff who came to a tire store to have an automobile tire checked and who, while watching a store employee check the tire for a leak, stepped backward into a five-gallon bucket of cleaner containing lye and received burns was contributorily negligent as a matter of law).

\textsuperscript{83} Lobred v. Mann, 395 S.W.2d 778 (Ky. 1965) (a gas and electric company cable splicer, who was struck by an automobile after he emerged from a manhole, was not contributorily negligent for failure to keep a lookout).

\textsuperscript{84} Shewmaker v. Louisville & N. R.R., 403 S.W.2d 283 (Ky. 1966).

\textsuperscript{85} Ibid.

\textsuperscript{86} Southern Ry. Co. v. Feldhaus, 261 S.W.2d 308 (Ky. 1953).

\textsuperscript{87} In Shewmaker there was an obstruction which made it difficult to see, while in the Southern Railway case the view was clear. In Southern Railway the Court said the signals could not be relied on, and Shewmaker says that when the view is substantially obstructed the driver may rely on the signals.
road to the other and collided with defendant's truck, and where a defendant's truck was struck from behind while preparing to make a left turn.

2. Assumption of Risk.—"In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has expressly given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or to leave undone." Where a plaintiff went down the highway to flag oncoming automobiles on a wet and misty night to help the defendant extract his mired automobile, the Court held that as a matter of law he assumed the risk of being struck by an automobile. In another case, for eighteen months the plaintiff had been opening an elevator door by using a wire hook and putting his weight against it. The Court upheld a directed verdict for the defendant but did not decide whether plaintiff was contributorily negligent or had assumed the risk of his fall into the empty shaft. In barring recovery it said: "There may be debate whether nomenclature labels appellant's conduct as 'contributory negligence' or 'assumption of risk,' but in either instance the result is the same."

3. Last Clear Chance.—The "last clear chance doctrine" is actually a defense to contributory negligence because contributory negligence will not bar recovery if plaintiff can show that the defendant had the last clear chance to avoid the accident. In three cases, the Court

59 Commonwealth, Dep't of Highways v. Mason, 393 S.W.2d 133 (Ky. 1965). Three boys on one bicycle riding down a steep and tortuous mountain road collided with a highway truck approaching from below. The plaintiff claimed to be on the right side and alleged that the truck was straddling the middle of the road. Testimony of the truck driver and a passenger indicated that the bike was swerving from side to side and the boys were dragging their feet to try to stop the bike.

50 Quackenbush v. Lamker, 398 S.W.2d 875 (Ky. 1966).

51 FROSSE, TORTS 450 (3d ed. 1964).

52 Baker v. Willett, 393 S.W.2d 605 (Ky. 1965).

53 Wimsatt v. J. Bacon & Sons, 401 S.W.2d 581 (Ky. 1966). The plaintiff who was employed by a package delivery business and who made regular calls at the defendant's store to obtain package for delivery to defendant's customers could not recover for injuries sustained when he fell into the shaft of a converted elevator in the store. This was because he was either contributorily negligent or had assumed the risk, where for eighteen months he had been opening the elevator door from the outside by using a wire hook made from an ordinary coat hanger and by putting his weight against the door.

54 Id. at 582.

55 Rogers v. Burden, 397 S.W.2d 153 (Ky. 1965) (evidence which indicated that a collision took place between an automobile traveling west on the north half of a blacktop highway and a boy on a bicycle coming south from a dirt road into intersection at a point six inches to one foot from the north edge of the

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decided that the facts did not warrant a last clear chance instruction. In both, the important factor was lack of time for the defendant to avoid the accident. In another case\footnote{a} a lower court's determination that a railroad had the last clear chance to avoid the accident was overturned because it was not shown that it could have done anything to avoid it.

C. Proximate Cause

The decision whether a given defendant's action was a proximate cause of an injurious result answers the question whether the actor who is assumed to have been a physical cause may be held legally responsible.\footnote{b} Proximate cause involves the length to which courts will go to find liability in a given chain of causation; it concerns the scope of liability. Since the proximate cause decision determines legal responsibility rather than physical cause, the question does not enter the case unless defendant's act was in fact one of the physical causes of the plaintiff's injury. This elementary point was brought home in a case where the plaintiff employee claimed that a defendant employer had supplied him with a tractor that had defective steering. Since the plaintiff failed to prove the steering was actually defective, the employer's negligence could not have been the proximate cause of plaintiff's injury resulting from a wreck involving the tractor.\footnote{c} The plaintiff must produce "evidence of substance which would . . . tend to tilt the balance of causation as between an unavoidable accident, a

\footnote{\textit{(Footnote continued from preceding page)}}

blacktop surface did not justify last clear chance instruction). Feistritzer v. Lister, 401 S.W.2d 49 (Ky. 1966) (where a motorist, proceeding south on a two-lane highway and making a left-hand turn across the northbound lane, had at most two seconds from the time he commenced the turn to the time of impact, last clear chance instruction was properly refused). Skees v. Whitaker, 398 S.W.2d 715 (Ky. 1966) (plaintiff opened his car door and it was struck by defendant; he was entitled to last clear chance instruction since evidence disclosed that the accident occurred in the twinkling of an eye).

\footnote{a} Cincinnati, N. O. & Tex. Pac. Ry. v. Wood, 392 S.W.2d 437 (Ky. 1965). The railroad was not liable on a last clear chance theory for the death of a pedestrian, who was killed by a locomotive while walking across a public crossing on a clear day, and who had been contributorily negligent in failing to look toward the area from which the train was approaching. There was an absence of any showing that operators could have done anything to avoid the accident after the pedestrian's inattentiveness was realized.

\footnote{b} Klingenfus v. Dunaway, 402 S.W.2d 844 (Ky. 1966). The Court said, at 845:

There were some 'wobbly' marks in the surface of the gravel road, extending a number of feet back from the point where the tractor came to rest . . . The appellee argues that the 'wobbly' marks justify an inference that the tractor went out of control by reason of the claimed defect in the steering mechanism. We think the marks are no more indication of a cause of the tractor's going out of control than of a loss of control from some other cause. (Court's emphasis.)
defective condition [in the machinery involved in the incident] . . . , or negligent activity on the part of . . . [defendant]." Even if it can be shown that defendant negligently produced dangerous conditions, the claimant must show that those conditions, rather than, for example, his own negligence were actually the cause of his accident. The Court of Appeals noted that to hold the defendants liable in such cases would make them absolute insurers, which it is unwilling to do.

On the other hand, even if the plaintiff's injury would not have occurred but for the defendant's act the defendant will not be liable if his act was too remote from the ultimate result as traced along the chain of causation. And there will be no liability if the injury "cannot be considered a reasonable consequence of the [defendant's] acts." The Court of Appeals wrestled directly with intervening cause in two other cases. In Pence v. Sprinkles the defendant, whose car was parked so as to extend several inches onto a blacktop highway, was not liable for injuries inflicted upon the plaintiff, who was sitting on the hood of his car parked immediately to the rear of the first car, when a third car swerved off the road to avoid a pedestrian and went out of control into the first (defendant's) car. Defendant's car's extending onto the blacktop was "not the proximate or a contributing cause of the collision . . . [because] the accident resulted from an

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99 Highway Transp. Co. v. Daniel Baker Co., 398 S.W.2d 501, 502 (Ky. 1965). Defendant's employee was filling a reservoir tank from his gasoline truck when the whole operation was obliterated by an explosion. Numerous equally credible theories were advanced as the cause of the explosion, only a few of which indicated negligence. Reversed with directions to direct a verdict for defendant. See also Scott v. Patterson, 400 S.W.2d 526 (Ky. 1966). In Scott the plaintiff's decedent was killed in a gas explosion. Two theories of causation were presented: decedent lighting his cigarette lighter near leaking gas, and some unknown third party plugging in a defective extension cord in the same vicinity. A jury verdict for defendant and directed verdict against defendant gas company's cross claim were affirmed where the evidence introduced tended to support both parties.

100 Williams v. Courier-Journal & Louisville Times, Inc., 399 S.W.2d 467 (Ky. 1965). Delivery man pouring oil into a receptacle in a room whose floor was dotted—probably negligently—with ink puddles slipped and was injured. However, he could produce no evidence as to why he slipped other than the fact that there was ink on his shoe soles. The Court of Appeals stated he could not recover without showing the defendant's act of leaving the ink puddles actually caused his fall, rather than perhaps oil splashing from the receptacle as he filled it. Affirmed a directed verdict for defendant.

101 Id. at 469.

102 Williams v. Ehman, 394 S.W.2d 905 (Ky. 1965).

103 Williams v. Ehman, 394 S.W.2d 905, 907 (Ky. 1965). It may be that the use of this "reasonable consequence" rule would result in much the same findings of proximate cause as the usual Kentucky test of "foreseeability." See Mackey v. Allen, 396 S.W.2d 55 (1965). But in tort law one must play the proper linguistic games. The Williams opinion leaves the meaning of "reasonable" entirely to conjecture. There is indication it is tied up with the "reasonably foreseeable" test employed in relation to intervening causes. 394 S.W.2d at 907. But that is a phrase of a different dialect.

104 394 S.W.2d 945 (Ky. 1965).
intervening or superceding cause . . .”\textsuperscript{105} namely, the loss of control by the drunken third party, which the Court stated was “unforeseeable.”\textsuperscript{106} The point is finely drawn: even if the defendant had been parked so as to constitute a traffic hazard he would have been liable only for damages suffered in a collision with the car behind him if the initial accident causing that collision were a direct product of the traffic hazard.\textsuperscript{107} A suggested statement of the rule in the case is as follows: The creator of a traffic hazard is not legally responsible for accidents which are caused entirely by conditions unrelated to the hazard, even though the accidents may involve it.\textsuperscript{108}

\textit{Smith v. Akers,}\textsuperscript{109} a case from the 1964-1965 term, presented a fact pattern wherein the defendant secured a stairway he had built with a cleat which extended twelve to fifteen inches onto a walkway. After the structure had been in place nearly three months a state park employee pulled the board away and later the stairs fell while plaintiff was attempting to descend. The opinion states that the hazard defendant created was that pedestrian traffic might collide with the brace; the risk created by the hazard was not that a manipulation of the protrusion by a third party would cause injury to the plaintiff who was on the stairs rather than the walkway.\textsuperscript{110} While removal of the hazard was within the risk set up by the defendant, it was not foreseeable that it would be removed in such a way that another different dangerous condition would be established.\textsuperscript{111}

The \textit{Smith} decision contained a questionable inculcation of one of Professor Prosser’s concepts into Kentucky tort law. The problem was to find a method of determining whether the intervening cause was of such nature as to absolve the defendant from liability as a proximate cause. In a paragraph of dicta the Court introduced a new test: “. . . [Prosser] states that it is not always accurate to inquire whether the intervening cause was foreseeable, since liability has been imposed despite unforeseeable intervention if the intervention could be said to be ‘normal.’”\textsuperscript{112} But then the Court proceeded to administer

\begin{itemize}
  \item \textsuperscript{105} \textit{Id.} at 947. The Court continued: “Stated somewhat differently, there would have been no accident but for Root’s inability to direct the course of his [the third] automobile.”
  \item \textsuperscript{106} \textit{Ibid.} Any collision is rationally foreseeable on a two-lane blacktop road with cars parked along it. This is an illustration of the fact that proximate cause means “legal cause” and foreseeable means “legally foreseeable.”
  \item \textsuperscript{107} \textit{Ibid.} The Court notes that the third car would have collided with plaintiff’s parked car even if defendant’s auto had been absent and that the third car had had ample room to pass down the road despite defendant’s vehicle.
  \item \textsuperscript{108} \textit{Ibid.}
  \item \textsuperscript{109} 893 S.W.2d 882 (Ky. 1965).
  \item \textsuperscript{110} \textit{Id.} at 885.
  \item \textsuperscript{111} \textit{Ibid.}
  \item \textsuperscript{112} \textit{Id.} at 885. Citing \textsc{Prosser, Torts} 267 (2d ed. 1955).
\end{itemize}
this "normal" test by considering that the park employee had special 
training as an engineer and was governed by certain procedural 
policies of his employer.\textsuperscript{113} The conclusion was that the intervening 
cause was not normal because his act was contrary to the behavior 
to be expected from his training and was in violation of the employer's 
policies.

Unfortunately, the Court has confused the test\textsuperscript{114} of "normal" with 
that of "extraordinary."\textsuperscript{115} Prosser used the "normal" test to refer to 
those intervening causes which were the results of an initial negligent 
act which could not possibly be foreseeable in the ordinary sense of 
the word, but which were held by courts not to relieve the original 
negligent actor of liability because they were "foreseeable."\textsuperscript{116} As the 
Court's statement, above, indicates, normal was simply thought to be 
a more realistic term to use in inquiring whether the intervening 
cause would relieve the original cause of liability.\textsuperscript{117} Prosser's idea of 
the test is whether the intervening acts are "closely and reasonably 
associated with the immediate consequences of the defendant's act; 
and form a normal part of its aftermath. . . ."\textsuperscript{118} In the \textit{Smith} context 
this ought to translate into whether the pulling loose of the brace by 
anyone or by any means was a reasonably associative consequence of 
the way defendant set up his structure. But the Court's "normal" test is 
whether the pulling loose of the brace by the specific park employee-
engineer involved was a reasonably associated consequence. Limita-
tion to the particular person automatically restricts the scope of 
"reasonable consequences," with the result that the "normal" test 
yields liability for intervening causes in a narrower spectrum than the 
foreseeable test, rather than in a broader number of cases as intended 
by Prosser.\textsuperscript{119}

\textsuperscript{113} \textit{Id.} at 885. Evidence in the case shows clearly that state employees were 
not, as a matter of state policy, to bother the work of contractors.

\textsuperscript{114} There is serious doubt as to whether Prosser ever intended the term as a 
test. He introduces it and gives his primary discussion of it at \textit{Prossen, ToRts} 315 
(3d ed. 1964). A reading of that page indicates the term was intended only as 
an analytic device. However, the Court has clearly picked it up as a test.

\textsuperscript{115} "Normal" does not mean usual or customary, but rather it denotes the 
antithesis of abnormal or abnormal or extraordinary. \textit{Restatement (Second), 
ToRts} \textsuperscript{443} \textit{comment b} (1965).

\textsuperscript{116} \textit{Prossen}, \textit{ToRts} 315 (3d ed. 1964). Prosser felt many cases had extended 
"foreseeable" to cover consequences of an original act which in a realistic sense 
could not reasonably have been expected by the actor at the time of the act.

\textsuperscript{117} \textit{Cf. Restatement (Second), ToRts} \textsuperscript{443} (1965). "The intervention of a 
force which is a normal consequence of a situation created by the actor's negligent 
conduct is not a superseding cause of harm which such conduct has been a sub-
stantial factor in bringing about." Normal, meaning "foreseeability plus," has 
replaced foreseeable.

\textsuperscript{118} \textit{Prosser, op. cit. supra} note 116, at 315.

\textsuperscript{119} \textit{Prosser, op. cit. supra} note 116, at 311, where Prosser notes that the 
(Continued on next page)
Ultimately the debate between the various names for the tests to be administered in order to determine defendant's liability for an intervening cause may be, as Prosser suggests, a "pointless quibble." At base the tests are all different methods of determining whether the intervening cause was within the risk created by the initial negligent action. The broad rule for both the cases just discussed is that intervening causes which are not consequences of the situation (or, not within the risk) created absolve the defendant from liability. This indicates the main point: the whole question is how far back along the chain of causation between the defendant-created initial situation and the ultimate injury the courts should travel to levy liability. Any device which enables the courts to make a more realistic analysis is worth the pain of creation.

D. Strict Liability

Until 1966 the Kentucky consumer who sued for negligent manufacture or bottling had to become an expert industrialist overnight in order to show in minute detail how the defendants were using careless production techniques. In the vast majority of cases he found the Court unsympathetic to his attempts. For example, one plaintiff was told:

What was shown was that all bottles, after being washed, passed in front of a strong light at the rate of forty-eight per minute, at which time an inspector checked them to see if any foreign matter had survived the washing process. Plaintiff contends that there should have been two inspections. However, she introduced no evidence to show that such was the usual procedure in bottling plants, or that two inspections were

(Footnote continued from preceding page)

practical application of the distinction between foreseeable and normal undoubtedly has involved a considerable element of hindsight. See 2 Harper & James, Torts § 20.5 at 115C (1956). Use of the word "normal" as a test invites a broad view of what is foreseeable.

120 Prosser, op. cit. supra note 116, at 311: "It is perhaps a pointless quibble over the meaning of a term to debate whether such normal intervening causes are to be called 'foreseeable.'"

121 Prosser, op. cit. supra note 116, at 309:

On its face, the problem is one of whether the defendant is to be held liable for an injury to which he has in fact made substantial contribution, when it is brought about by a later cause of independent origin, for which he is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation.

See, e.g., Rane v. Atlantic Works, 111 Mass. 136 (1872); Gilman v. Noyes, 57 N.H. 627 (1876). Both of these leading cases on intervening cause used the foreseeable approach to determine what was for them the basic question, whether the intervening cause fell within the defendant's risk.

122 In fact, the Court actually stated in Smith v. Akers, 393 S.W.2d 382, 385 (Ky. 1965): "that 'definite hazard' was not a risk that the stairs would fall—it was a hazard that some person would trip and fall."
necessary to guard adequately against foreign matter in the bottles. It is very doubtful that negligence was shown.\textsuperscript{123}

In the midst of such a prevailing attitude it was patently meaningless to require of the bottlers a high degree of care to prevent entrance of foreign substances.\textsuperscript{124} Dealers Transport Co. v. Battery Distributing Co.\textsuperscript{125} changed all that. In one stroke the requirement of privity between an ultimate consumer and a remote manufacturer was severed, so that the consumer could now sue the latter both for negligent manufacture and breach of implied warranty. And even more stunning, recovery in such a suit would thenceforth be based on the principle of strict liability.

The remote manufacturer, also a defendant, had supplied acetylene in metal tanks to the ultimate consumer (Dealers) through jobber (Battery). During normal use in consumer's business the tanks caught fire and exploded. The only possible explanations were rough handling by the consumer, extreme heat conditions in the consumer's building, or defective construction of the tanks. The consumer sued both the manufacturer and the jobber on alternative theories of negligence or breach of implied warranty. The Court of Appeals reversed a summary judgment for the manufacturer and a jury verdict for the jobber. The Court noted that suits by an ultimate consumer against a remote manufacturer in negligence had already been allowed in Kentucky,\textsuperscript{126} and that while a previous decision had ruled explicitly that privity was necessary in a suit based on express warranty,\textsuperscript{127} Kentucky law in regard to the essentials of a suit based on implied warranty was confused. The Court concluded it was "unable to perceive a valid basis for requiring privity of contract in a products liability claim based on a breach of implied warranty and disregarding privity in such claims based on negligence."\textsuperscript{128} It then recognized that privity is not a prerequisite for maintenance of actions for breach of implied warranty in products liability in Kentucky.\textsuperscript{129}

Furthermore, recovery in such cases could henceforth be founded on strict liability. That is, a seller of any product

\begin{itemize}
  \item \textsuperscript{123} Davis Red Rock Bottling Co. v. Alsip, 287 S.W.2d 594, 595 (Ky. 1956).
  \item \textsuperscript{124} Nehi Bottling Co. v. Thomas, 236 Ky. 654, 33 S.W.2d 701 (1931).
  \item \textsuperscript{125} 402 S.W.2d 441 (Ky. 1965).
  \item \textsuperscript{126} The Court cited C.C. Herme, Inc. v. R.C. Tway Co., 294 S.W.2d 534 (Ky. 1956).
  \item \textsuperscript{127} Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907).
  \item \textsuperscript{128} Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 445 (Ky. 1965).
  \item \textsuperscript{129} Id. at 446.
\end{itemize}
in a defective condition unreasonably dangerous to the user... [is liable for physical harm thereby caused to an ultimate consumer or his property if] (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold... although... (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.  

Also, the consumer is not under any duty to make a “full blown inspection” of the product to check for dangerous defects, although his acceptance of the product with readily apparent flaws might prevent the warrantor’s liability.  

Allen v. Coca-Cola Bottling Co. applied the Dealers Transport Co. holding to a case involving a plaintiff who sued the bottler of a soft drink for injuries received when she swallowed a piece of glass from one of the bottler’s products. By doing so the Court relieved the plaintiff in such cases of his Superman’s burden of proving lack of due care in the bottling process. The quotation which began this section will echo nevermore. But Kentucky’s long line of soft drink impurity cases contains another regrettable element which strict liability did not dissolve: Plaintiff must still prove that the impurities could not have been added after the bottles left the defendant’s plant. Only Hercules could vanquish such monsters in his path since:

Human experience has forced us to the conclusion that the presence of foreign objects in bottled soft drinks may in the ordinary course of things be the result of a prank or a deliberate wrongful act equally as well as being the result of negligence on the part of the bottler. There-

120 Id. at 446-47. The Court is quoting Restatement (Second), Torts § 402A (1964).
121 The jury verdict for the wholesaler in the case was reversed by the Court because the jury had been instructed in regard to “readily apparent” defects, while the flaws in the acetylene tank were more or less concealed.
122 403 S.W.2d 20 (Ky. 1966).
123 Royal Crown Bottling Co. v. Smith, 303 S.W.2d 270 (Ky. 1957); Royal Crown Bottling Co. v. Morgan, 299 S.W.2d 596 (Ky. 1957); Davis Red Rock Bottling Co. v. Alsip, 287 S.W.2d 594 (Ky. 1956); Coca-Cola Bottling Works v. Bingham, 277 S.W.2d 468 (Ky. 1955); Glasgow Coca-Cola Bottling Works, Inc. v. Wilson, 264 S.W.2d 872 (Ky. 1954); Ewing Von Allmen Dairy Co. v. Miller, 264 S.W.2d 862 (Ky. 1954); Ashland Coca-Cola Bottling Co. v. Byrne, 258 S.W.2d 475 (Ky. 1953); Paducah Coca-Cola Bottling Co. v. Reynolds, 258 S.W.2d 474 (Ky. 1953); East Ky. Beverage Co. v. Day, 248 S.W.2d 923 (Ky. 1952); East Ky. Beverage Co. v. Stumbo, 313 Ky. 66, 230 S.W.2d 106 (1950); Coca-Cola Bottling Works, Inc. v. Curtis, 302 Ky. 190, 194 S.W.2d 375 (1946); Seale v. Coca-Cola Bottling Works, 297 Ky. 450, 179 S.W.2d 598 (1944) (a bright spot, as plaintiff was able to show that the slivers of glass he consumed had been in the bottle at the time it left defendant’s plant); Coca-Cola Bottling Co. v. Creech, 245 Ky. 414, 53 S.W.2d 745 (1932); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930).
for we are unwilling to apply the presumption of negligence... in the absence of proof of lack of opportunity for pranks or tampering.\textsuperscript{134}

In keeping with its strict liability rule, Kentucky should drop the "Integrity of the Bottle" doctrine. The policy behind imposing upon the remote manufacturer liability for defective products sold to consumers\textsuperscript{135} calls for an emphasis on the responsibility of the manufacturer for delivering a non-defective good to the consumer and a de-emphasis of the possibility that a handful of those thousands of products might be the subject of contaminating pranks. In the case cited by the Court in Dealers Transport Co. as being persuasive in the decision to abolish the privity requirement in implied warranty suits, the plaintiff was not required to carry the tremendous burden of proving the integrity of the allegedly defective automobile, although it had been serviced several times.\textsuperscript{136} Urged by leading authorities,\textsuperscript{137} several jurisdictions have refused to engage in "mere conjecture" as to the possibilities of tampering, in recognition of the plaintiff's difficulty in proving the negative.\textsuperscript{138} Their reasoning has been attractive.

\textsuperscript{134} Ashland Coca-Cola Bottling Co. v. Byrne, 258 S.W.2d 475, 476 (Ky. 1953). Thus, while plaintiff need not be a superman, he should at least be a Hercules.

\textsuperscript{135} I FRUMER & FREDMAN, PRODUCTS LIABILITY 1 (1966). Madison Avenue glorifies the products of the expert-run, industrialized modern world and directs its appeal to the ultimate consumer. \textit{Id.} at 4:

[Just as the advertising modes have done so much for distribution of products, so other media [e.g., consumer research organizations] have educated the consumer to the possibility that someone may be liable for the harm which is caused by a product... And that public which has been persuaded to buy with enthusiasm is just as eager to impose liability if the product does cause harm. In this the public is justified. Manufacturers and other suppliers do have duties to the public. They have no greater right to place on the market a product which may foreseeably cause harm than does a drunken driver to operate an automobile. And, as a matter of public policy, even if the manufacturer exercised due care, who should bear the risk of injury or, perhaps more accurately, who is in better position to distribute the risk?

\textsuperscript{136} Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 98 (1960). The court stated that "there is nothing in the proof to indicate in the slightest that the most unusual action of the steering wheel was caused by the [plaintiff's] operation of the automobile on this day, or by use of the car between delivery or happening of the event." Thus the question of breach of warranty was submitted to the jury. The automobile had been in the plaintiff's possession ten days at the time of the accident and had been serviced several times. As the quotation indicates, the plaintiff was not required to prove that there had been no opportunity for a prankster to loosen the steering with his wrench, as he would have had to do under Kentucky's integrity doctrine.

\textsuperscript{137} See, e.g., 2 FRUMER & FREDMAN, PRODUCTS LIABILITY 269 (1966).

In common experience deleterious foreign substances do not find their way unaided by intentional human acts into bottles after they are properly covered with "crown" caps frequently enough to amount to more than a discountable possibility of such an occurrence. . . . General experience shows that in combination, the safety measures of bottlers are not perfect enough nor the number of tamperers great enough for the courts to require consumers to negative by affirmative proof a reasonable opportunity for tampering, or tampering, before a judge can consider the case, or reach a proper verdict. The burden of such a rule on plaintiff would be wholly disproportionate to any benefit to a defendant.  

And is it good logic to require proof of the integrity of bottles but not of milk cartons in open coolers?  

Congratulations are in order to the Court of Appeals for removing the burden of privity and adopting strict liability for manufactured goods. But the praise must be dampened by two comments. In Dealers Transport Co. the Court remarked, "the pragmatic view impels us to recognize that recovery against a remote vendor in this type case, even when based on implied warranty, truly sounds more in tort than in contract." Why? There is good authority that an action for breach of warranty is a hybrid born of both tort and contract parents. By providing for such an action with the application of strict liability, is not the Court simply giving the consumer a recourse similar in result to that given him earlier under the Uniform Sales Act and its successor, the Uniform Commercial Code? In any event, the Court of Appeals should have discussed together the elements of the tort action involved and the relevant actions which may be brought under the Sales Act and the Code on ostensibly contract grounds. The doctrinal distinction is not an idle one: the statute of limitations runs against tort actions in one year, while plaintiffs under the Uniform Commercial Code are allowed four years.

Finally, the authorities agree that the concept of privity has no

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139 Miami Coca-Cola Bottling Co. v. Todd, 101 So. 2d 34, 36 (Fla. 1958).
140 Chappells Dairy v. Walters, 269 S.W.2d 187 (Ky. 1954).
141 402 S.W.2d at 445.
143 The Uniform Sales Act was in effect at the time the case was originated.
144 The area of contract warranty versus tort warranty versus strict liability in tort is an obscure one. But understanding is not increased by ignoring the problem. Prosser suggests that if courts would inquire into the area they might well find it more realistic and effective to drop what he believes is a fictional approach and admit that all these actions, when appearing in the tort field, are simply strict liability in tort. Prosser, TORTS 681 (3d ed. 1964).
145 KRS § 355.2-725(1) (1958) (limitation of action for breach of sales contract); KRS § 413.140 (1942) (limitation of action for tort).
place in product liability actions. In Dealers Transp. Co. the Court of Appeals concluded there was no reason to retain the requirement of privity in suits for breach of implied warranty. What reason does the Court have for retaining the privity requirement in suits for breach of express warranty? And at least in the case of express warranty, if the courts will not remove privity as a requirement, then privity (if not technical contractual privity) should be found to exist between the manufacturer and consumer. The New York Court has reasoned persuasively as follows:

The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer’s denial of liability on the sole ground of the absence of technical privity.

E. Intentional Torts

1. Fraud and Deceit.—Occasionally a case is significant for what is not in the opinion rather than for what is. Walser v. Glenn is such a case. The plaintiff bought a subdivision lot from the defendant real estate developer. While the plaintiff was viewing the lot prior to sale, a salesman had told him that dirt fill had been placed on the lot in order to comply with a regulation that there be six feet of fill over any rock if a lateral system for a septic tank were to be maintained. After purchase it developed that the fill was insufficient and the Louisville and Jefferson County Department of Public Health required the plaintiff to add dirt. He brought suit against the real estate developer for expenses incurred on the theory of fraud and deceit. The defendant showed he had relied upon the opinion of his engineers that the lot in question satisfied health regulations. The Board of Health had actually

146 2 Harper & James, Torts § 28.16, at 1571 (1956):
Where commodities are dangerous to life and health, society’s interest transcends that of protecting reasonable business expectations. It extends to minimizing the danger to consumers and putting the burden of their losses on those who best can minimize the danger. . . .
Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099, 1127 (1960): “If Warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise between parties who have not dealt with one another.”; Jaeger, Privity of Warranty: Has the Tocsine Sounded? 1 Duquesne University L. Rev. 1 (1963): “A veritable revolution against the artificial strictures of privity of warranty. . . .”
147 2 Frazer & Friedman, Products Liability § 3-39 (1966).
149 400 S.W.2d 223 (Ky. 1966).
approved the subdivision via telephone on the basis of the written
descriptions of the engineers. The Court of Appeals held that there
was no actionable fraud and deceit because the misrepresentation was
not made with knowledge or suspicion of its falsity. Since the de-
fendant lacked the necessary scienter, the Court found no reason to
discuss the issue of whether there had been a misrepresentation of
the condition of the fill or a reliance thereon.

The case was decided exactly in line with well established
and Kentucky precedents of fraud and deceit. Yet in
regard to the overall result, it is impossible to approve. Caveat emptor
oozes from between the lines of the opinion. Courts have practically
ceased applying caveat emptor to the sales of chattels. Why is the
doctrine still thrown in the face of vendees of realty? The same
commercial situation which the Court last term ruled as justifying
strict liability on the part of manufacturers in Dealers Transport Co. v.
Battery Distributing Co. exists in real estate transactions. In modern
times large corporate subdivision developer-vendors use every avail-
able Madison Avenue technique to sell the man-in-the-street a pack-
age deal complete with landscaping, sewer works, dream house, and
lot. Surely it is time to recognize that a vendee of a new subdivision
lot may reasonably expect it to meet all regulations imposed on it.

What are the alternatives for allowing the vendee to realize this
expectation? A warranty approach seems promising at first glance, but
on examination proves to be impractical. The Uniform Commercial
Code warranty sections deal only with chattels. Only one United
States decision has ever been reported allowing recovery on an implied
warranty theory in a case involving a sale of realty. Actions on
express warranty have been successful, but because the parol

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151 Church v. Eastam, 331 S.W.2d 718 (Ky. 1960); Livermore v. Middle-
borough Town-Lands Co., 106 Ky. 140, 50 S.W. 6 (1899) (to establish actionable
fraud a misrepresentation must be made with knowledge of its falsity).
153 Beaman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the
Rule, 14 VAND. L. REV. 541 (1961); Cf. Hamilton, The History of Caveat Emptor,
40 YALE L.J. 1138 (1931).
154 402 S.W.2d 441 (1965).
155 Support for the proposition advanced is given in PROSSER, TORTS 409
(3d ed. 1964), in discussion of "sadly needed improvement in bargaining business
ethics." See 2 HARPER & JAMES, TORTS § 27.18, at 1576 (1956). The porcupine
problem of liability for latent construction defects is avoided. The case does not
justify entering that ticklish question—a regulations warranty seems much more
readily justifiable.
156 UNIFORM COMMERCIAL CODE § 2-102.
158 Beaman, supra note 153, at 548. In these cases the express warranty has
been in the deed.
evidence rule limits these actions to written warranties, they are of negligible aid to the commonly trusting vendee, as Walser demonstrates. The answer, in the absence of special legislation, is to allow an action for non-negligent misrepresentation, thus applying strict liability to vendors for their representations. Kentucky would be joining a list of eighteen states which already recognize the action, including neighboring Ohio, Indiana, Virginia, and West Virginia. If Walser and his fellow vendees were sufficiently vocal in the political arena, there could be two reasonable legislative solutions. Statutes could provide that every sale of land would render the vendor liable for certain implied warranties which could be enumerated in the bill. Or, in the alternative, vendors could be required to specify each representation about the property in writing, preferably in the deed, so that an action for express warranty could lie.

As for other possible relief, an action may already be maintained against a Board of Health member where his actions display gross and willful carelessness in the exercise of his authority. If the duty to examine a new subdivision before certification were sufficiently emphasized it might even be possible to bring an action against the person who okayed Walser's lot on this theory, since he had certified merely on the basis of reading a letter of descriptions. And by analogy to Shearer v. Hull it might well be feasible to impose a higher standard of care on the members of administrative boards with control over property.

2. Malpractice.—Physicians are held to the standard of skill, knowledge, and care of other doctors in the community, and in the usual malpractice case other doctors from the area must testify as to whether the physician in question violated the standard. But the testimony of other physicians is not necessary where the subject matter is within the common knowledge and experience of laymen, such as the question of whether a physician has satisfied his duty to give all necessary and continued care as long as the case requires. This question may go to the jury without the aid of expert testimony. And a jury may decide on their own knowledge whether there is negligence where a physician operates on plaintiff for a uterine tumor which is found to be a pregnancy instead, when the doctor did not first ad-

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159 PROSSER, TORTS 727 (3d ed. 1964).
160 Id. at 726.
162 399 S.W.2d 701 (Ky. 1965).
163 Dean v. Griffith, 402 S.W.2d 855 (Ky. 1966). The doctor did not tell patient at time of release that his broken facial bones required resetting.
minister a simple pregnancy test. These Kentucky rules are in keeping with a national trend toward relaxing the requirement of expert testimony. However, the jury may not consider the question of whether the operation caused a later miscarriage without benefit of the testimony of other physicians.

3. Nuisance.—Lynn Mining Co. v. Kelly, decided this term, contains a definitive statement of nuisance law. The questions in a nuisance case are whether the defendants maintained or operated their equipment or buildings in such a manner as to damage plaintiff's property, and whether the nuisance created was temporary or permanent. The difference between the two types of nuisance plus the separation of nuisance from a negligence base was clarified as follows:

[In determining whether a nuisance is permanent or temporary, the question is not whether the defendant failed to exercise due care in the construction, maintenance or operation of a structure. It is whether the cause of the nuisance results from some improper installation or method of operation which can be remedied at reasonable expense.]

An exception is an action for nuisance consisting of blasting vibrations, in which instance negligence must be proved. The correct measure of damages for a temporary nuisance is diminution of use value of the property.

Ruling on a permanent nuisance action based on noise from aircraft, the Court of Appeals reversed a jury verdict and rendered judgment for the appellant air board in Louisville and Jefferson County Air Board v. Porter. The Court stated that although Lynn Mining Co. marked the end of requiring a plaintiff in nuisance to prove negligence, he still must show unreasonable intrusion on property and such grave harm that an overall inequity to him is demonstrated. The opinion reiterated the policy that public transportation agencies have an advantageous position in law because they are directly important to progress and public welfare. Finally and conclusively, at the time plaintiff moved into his present location, Standford Field had been planned.

164 Jarboe v. Harting, 397 S.W.2d 775 (Ky. 1965).
165 2 Harper & James, Torts § 17.1, at 968 (1956).
166 Jarboe v. Harting, 397 S.W.2d 775 (Ky. 1965).
167 394 S.W.2d 755 (Ky. 1965).
168 Id. at 759.
169 Lynn Mining Co. v. Kelly, 399 S.W.2d 701 (Ky. 1965).
170 Nally & Gibson v. Mulholland, 399 S.W.2d 299 (Ky. 1966); Jarboe v. Harting, 394 S.W.2d 755 (Ky. 1965).
171 397 S.W.2d 146 (Ky. 1965). The Board was chosen as defendant on the basis of Griggs v. County of Allegheny, 369 U.S. 84 (1962).
172 397 S.W.2d 146, 150 (Ky. 1965).
and building had already begun with the purpose of handling a large volume of air traffic. "It is fundamental that a buyer of property assumes the risk of changing community conditions" which are expectable and avoidable at the time of his purchase.\textsuperscript{173}

4. Malicious Prosecution.—An action for malicious prosecution may lie only when the defendant had no probable cause on which to base his action, notwithstanding the fact that the original action may have been motivated by a desire for vengeance.\textsuperscript{174} If the plaintiff in the malicious prosecution action can show that the defendant's prior suit against him was without probable cause, the suit may be maintained despite defendant's successful motion to dismiss his original action.\textsuperscript{175}

In contrast, motivation is an element of the tort action for abuse of process, the gist of which is an attempt to use the legal process as a means to secure collateral advantage. Causing the arrest of a credit manager for practicing law without a license in order to obtain a bargaining point against the credit manager's suit to garnish the instigator's wages is abuse of process as a matter of law.\textsuperscript{176} The rule stands regardless of whether there was probable cause for the improperly motivated suit.

Advice of counsel is a defense to an action for malicious prosecution, but may only be considered in mitigation of damages when the action is abuse of process.\textsuperscript{177}

5. Libel and Defamation.—The rule that publication of a police judge's delinquency in paying personal and property taxes is not an actionable invasion of privacy\textsuperscript{178} was derived from the larger principle: "One who holds public office subjects his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands."\textsuperscript{179} As authority for the principle the Court cited an out-of-state case.\textsuperscript{180} It is, of course, sound policy for the public to

\textsuperscript{173} Id. at 152.
\textsuperscript{174} Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966). Causing arrest of corporate creditor's credit manager for practicing law without a license is not malicious prosecution if instigator of action believes credit manager did so, regardless of fact that arrest was instigated as a countermove to credit manager's garnishing against wages of instigator.
\textsuperscript{175} Bybee v. Singer, 404 S.W.2d 14 (Ky. 1966). Defendant had caused plaintiff's arrest on grounds of malicious destruction of property for a merely negligent act.
\textsuperscript{176} Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966).
\textsuperscript{177} Id. at 495.
\textsuperscript{178} Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d 84 (Ky. 1966).
\textsuperscript{179} Id. at 495.
have information of the performance of elected officials. But unlimited extension of the principle could create a problem if a newspaper began publishing details of the private life of a public official or candidate against whom its editor-in-chief was vigorously campaigning. Kentucky limits such comment to being reasonable, truthful, and in good faith.\textsuperscript{181}

The Supreme Court is currently dealing with the problem of what limits should be placed on publications concerning public figures. The recent developments in this area merit discussion at this point. In 1964, \textit{New York Times Co. v. Sullivan}\textsuperscript{182} settled a conflict among libel and defamation rules\textsuperscript{183} with this holding:

\begin{quote}
The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.\textsuperscript{184}
\end{quote}

The reasoning supporting the rule proceeded as follows:

\begin{quote}
[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, . . . [citing case], and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . . [citing cases].

[Erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'. . .

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.\textsuperscript{185}
\end{quote}

The Supreme Court indicated in \textit{New York Times} and a companion case, \textit{Garrison v. Louisiana},\textsuperscript{186} that proving the publisher of an article guilty of reckless disregard of whether a statement therein was false

\textsuperscript{181} Clark v. Bullock, 234 Ky. 683, 28 S.W.2d 991 (1930).
\textsuperscript{182} 376 U.S. 254 (1964).
\textsuperscript{183} Prior to \textit{Sullivan} a majority applied the "fair comment" rule in permitting defamatory statements regarding public officials or other persons only where the statement was purely opinion. 1 HARPER & JAMES, \textit{TORTS}, § 5.29 (1956); Paossera, \textit{Torts} 812-816 (3d ed. 1964). A minority opinion had created a "public official" rule which held that any defamatory statement of opinion or of untrue fact was privileged if it referred to a public official and could be the subject of a libel action only if published with actual malice. See, e.g., Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1905); Paossera, \textit{Torts} 814 (3d ed. 1964).
\textsuperscript{185} \textit{Id.} at 269-72.
\textsuperscript{186} 379 U.S. 64 (1964).
would require proof of a genuine recklessness; mere showing of failure to exercise ordinary care to ensure truthfulness would not be sufficient.  

The *New York Times* holding contains two elements: "public issue" and "public official." Whether the plaintiff will be required to show actual malice on the part of the publisher in future cases where one or both of the two elements are absent is a question of immediate relevancy to the problems of publishing standards suggested by the Kentucky public official decision.

The first issue raised is whether the *New York Times* rule applies to the publication of false and defamatory statements concerning the private lives of public officials. The most persuasive arguments lead to a negative conclusion. Sullivan was an elected Commissioner of Public Affairs in Alabama whose duties included supervision of the Police Department. The allegedly defamatory statement concerned his supervision of police in attempting to control a nationally publicized Negro demonstration. The objects of criticism in *Garrison* were the eight judges of the Criminal District Court of Orleans Parish, Louisiana. Defendant District Attorney stated they had hampered his efforts to enforce vice laws by refusing to appropriate funds for the purpose, thus raising "interesting questions about the racketeer influence on our eight vacation-minded judges." Thus the facts of the two cases dealt only with obviously public acts. The reasoning in *New York Times*, quoted above, is phrased exclusively in terms of "public

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187 In *New York Times*, the defamatory material appeared in a full-page advertisement. Neither the statement of the Times' Secretary that he thought the material was "substantially correct" nor the failure of the Times to print a retraction upon request constituted malice. The Secretary's statement did not indicate reckless disregard of probable falsity. The failure to check the material with news stories of the event in the Times' own files did not indicate reckless disregard when the editors relied on the reputation of the persons who signed the ad and had no knowledge to give them a reasonable belief of the article's falsity. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court stated at 79 that "the test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

Two cases have recently been appealed to the Supreme Court on the question of exactly what is needed to show actual malice. The question in *Kahn v. Fox*, (Pa. Sup. Ct. 1966), 35 U.S.L. WEEK 3159 (U.S. Nov. 1, 1966), is whether knowledge of falsity on the part of the publisher at the time of publication bars the invocation of the first amendment privilege. In *Driscoll v. Toledo Blade Co.*, 3 Ohio App. 2d 351, 210 N.E.2d 899 (Ohio Ct. App. 1966), 35 U.S.L. WEEK 3159, (U.S. Nov. 1, 1966) the issue is whether proof of actual malice requires more than a preponderance of evidence.


189 *Id.* at 261. The Supreme Court also decided that the evidence was insufficient to support the jury's verdict that the defamatory statements were actually made of, and concerning, the plaintiff.

190 379 U.S. at 70.
institutions," "debate on public issues," "attacks on government and public officials," and "reports of the political conduct of officials." Other language in both New York Times and Garrison likewise explicitly limits the rule to defamatory remarks against "official conduct," and not to such publication against "private conduct." Mr. Justice Goldberg, concurring in New York Times, stated that the Constitution did not protect "defamatory statements directed against the private conduct of a public official or private citizen." In fact, the Court indicates throughout this case that it is speaking with specific reference to criticism of government. One lone statement in Garrison would tend to broaden the permissible area of coverage by defamatory articles still allowed to come under the New York Times rule:

The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

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192 In New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964), the Court stated:

We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. (Emphasis added.)

In Garrison v. Louisiana, 379 U.S. 64, 76 (1964), the Court indicates that the Sullivan rule would not have applied had the statements been "an attack upon the personal integrity of the judges, rather than an official conduct." (Emphasis added.)

193 Mr. Justice Goldberg, joined by Mr. Justice Douglas, concurring in New York Times Co. v. Sullivan, 376 U.S. 254, 301-02 (1964), explicitly distinguished private conduct from the holding of the case:

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and speech insure that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech.

194 Among many statements in the opinion which might be cited for this proposition is this sentence which appears near the end of the opinion (376 U.S. at 292):

Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.

See also the language quoted from New York Times appearing at the beginning of the discussion of that case, note 119 supra.

196 Id. at 77.
This is the same principle which Kentucky has now adopted. (Although Bell did not apply it to defamatory material, the rule was used to define an area of privacy which could be permissibly invaded.) This principle would permit comment and report on more private matters than would a more factual and "public issue" oriented interpretation of the two Supreme Court decisions. It puts immediate significance on Justice Goldberg's warning that a gray area exists between private and official conduct. The boundary between acts of a public official which are and are not sufficiently relevant to his fitness for office is indeed obscure. Mr. Justice Goldberg's statement that, "in most cases . . . there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct," would be accurate only if the New York Times rule were applied solely to comments on those personal attributes relating directly to the official's performance of official duties. Stated in another manner, remarks relating to an official's fitness for office must, in fact, be so relevant to his actual performance of the office's duties as to qualify as a public issue.

The second question denoted by the New York Times rule is whether it applies to public figures who are not officials. The Garrison and New York Times decisions place great value on free dispersion of information relevant to public affairs. The Court said in Garrison: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government." Thus, despite the frequent appearance of the term "official," the cases as a whole must be taken as supporting the principle that the Constitution affords protection for the maintenance of a free forum for the debate of public issues.

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197 Mr. Justice Goldberg, concurring in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), stated at 302 note 4:

In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly, of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind.

198 Ibid.


200 See Mr. Justice Black, concurring in New York Times Co. v. Sullivan, 376 U.S. 254. He wrote at 293-94:
The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. . . . The half-million-dollar verdict does give dramatic proof . . . that state libel laws threaten the very existence of an American (Continued on next page)
concurring in *New York Times*, presented the view that the factor which should be given prime consideration in determining if actual malice must be shown is whether the subject matter is of public concern.\(^{201}\) Adoption of “public issue” as the test would automatically eliminate the problem of whether non-officials could be included under the *New York Times* rule. As suggested, “public issue” may already be the ultimate determinant as between public and private conduct of officials.

The “public issue” approach seems to have been utilized in several lower court decisions since *New York Times*. These cases refused to extend the rule to a comedian on a variety show,\(^{202}\) a druggist,\(^{203}\) or a former governor,\(^{204}\) where the subjects of defamation were not closely associated with or acting in the public arena. The three cases indicate that, in order to come under the *New York Times* rule, the action of the subject has to be connected with issues which are not only public but also political.\(^{205}\) This requirement is further demonstrated in a recent

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(Footnote continued from preceding page)

press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.

Mr. Justice Douglas joined in this opinion.


The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious.

See *Id.* at 302 note 4, *supra* note 197, where these same Justices speak of the public versus private acts standard.

\(^{202}\) *Mason v. Sullivan*, 271 N.Y.S.2d 314 (1966). The court said that despite public adulation for figures of the entertainment field it could hardly be said that the reaction of a master of ceremonies to the antics of a comedian constitute a public issue. *New York Times* was, therefore, not applied.

\(^{203}\) *Afro-American Publishing Co. v. Jaffer*, F.2d (D.C. Cir. 1966), 95 U.S.L. Week 2117 (Aug. 23, 1966). The man about whom the comments were made was a druggist who occupied a non-public role and had never mounted a public rostrum; he made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activity by members of the public. *New York Times* not applied.


\(^{205}\) A comparison of *Mason* and *Afro-American Publishing Co.* indicates that lower courts require both that the issue involved be the subject of a high degree of public concern and that the plaintiff who was mentioned in the defamatory material be acting in the public political arena. This political type of arena does not mean necessarily an involvement in elective politics; rather, the requirement is that the actor-plaintiff be in the political arena in the sense that he is trying to influence public opinion, social processes, or more technically, political mechanisms.

Compare the conclusion reached in *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1965), that an assistant deputy chief of detectives is within the province of the *New York Times* rule; that is, the actual malice rule applies to appointed, as well as elected, public officials.
Kentucky federal district court case, which held that a retired, politically prominent army general came under the actual malice rule insofar as his actions connected with a nationally-publicized race riot were concerned.206

On the Supreme Court's 1966-67 docket are four cases which present important questions about the scope and the application of New York Times v. Sullivan. In two of the three cases which have already been granted certiorari, the lower courts found libel per se in publications concerning the actions of General Walker during race riots207 and accusations that a university athletic director gave valuable game information to the coach of a forthcoming football opponent.208 Certiorari has also been granted to a case in which the publisher of an article of some "social value" contends that the Times doctrine gives his article first amendment protection against an action for invasion of privacy.209 Certiorari has yet to be granted to the fourth case, in which the lower court held that the Times rule applied to a prominent scientist who thrust himself into public discussion of controversial foreign policy questions.210

Before the actual malice rule is applied to a private citizen, the issue in which he is involved must clearly be of concern to the community. The decisions of the Supreme Court in the four cases on its docket will determine whether, as suggested by several lower federal courts,211 the scope of New York Times is limited to actors and issues in the political arena. The matters presented in the publications were of public interest in all four cases. However, while the areas of involvement were obviously political in the cases of the retired army general and the prominent scientist, the question in the other two cases is whether the mere "social value" of the articles justifies their inclusion within the Times rule. If the Supreme Court, in deciding these four cases, emphasizes the public-issue-of-a-political-nature rationale of New York Times and Garrison, it will establish a sound approach to

211 Note 205, supra. The political orientation of both New York Times and Garrison is evident throughout the opinions. The special focus on debate about government was pointed out in note 194, supra.
the problem of finding proper limits for publications concerning public figures.

Another case handed down last term by the Kentucky Court of Appeals involved the rule that a complaint in a federal court is privileged matter and does not lose its character as such when published in a newspaper. Thus, while a publication falsely charging an attorney with unprofessional conduct is libelous per se, an attorney, wrongfully named in a complaint alleging the offense and printed in a newspaper, has no action against the complainant.\footnote{Massengale v. Lester, 403 S.W.2d 701 (Ky. 1965).}

An important decision in the 1964-65 term was \textit{Ashton v. Commonwealth of Kentucky}. In 1966, the Supreme Court reversed the Court of Appeals and struck down Kentucky's common law libel as being unconstitutional on grounds of vagueness.\footnote{384 U.S. 195 (1966).}

6. \textit{Trespass}.—The fact that an allegedly trespassing party disputed the ownership of the property at the time of his entry did not absolve him of liability for his damages to the land when the party claiming the land protested the entry and proved himself to be the rightful owner of the land at trial. This rule, presented in a case from the 1964-1965 term, is well established.\footnote{Louisville Builders Supply Co. of St. Matthews v. City of Richlawn, 392 S.W.2d 438 (Ky. 1965). See Lebow v. Cameron, 394 S.W.2d 773 (Ky. 1965), where the Court held that defendant, who had reasonable doubt of owner's dominant right, and entered land and began operations on advice of reputable counsel, was an innocent trespasser and could therefore be required to account to owner for net profit from land but not gross profit.}

7. \textit{False Imprisonment}.—The law governing false imprisonment is also well established. One can bring this action for any unprivileged deprivation of his liberty, without his consent, by threats or force. Mere words are insufficient to effect imprisonment if the subject is not deprived of freedom of action, and submission to verbal direction is not deprivation.\footnote{Prosser, \textit{Torts} 57 (3d ed. 1964).} But sometimes the fact situation belies the simplicity of the rule. In \textit{Grayson Variety Store, Inc. v. Shaffer}\footnote{402 S.W.2d 424 (Ky. 1966).} the Court of Appeals decided that, where three girls, ages ten to fifteen, were told to return to a store they had just left in order for the manage-
ment to determine whether they had stolen a compact, there was no false imprisonment when they did return and had their purses searched to prove their innocence. Concentrating on the words of the store manager who asked the girls to return, the Court noted that he had not threatened them, spoken to them in a loud or rough voice or placed them in fear.

But was this really sufficient basis to reverse a jury verdict for the girls and direct that the complaint be dismissed? The problem with the opinion is a matter of emphasis. False imprisonment is a social wrong inflicted in a social surrounding. The people and circumstances involved vary, and with them varies the strength of language necessary to detain a person against his will. Considering the ages of the girls, the accusation of theft, the rural small town setting, and the position of authority of the manager, it is difficult to understand why there was no jury issue.

8. Unfair Trade.—Whether a geographical name acquires a secondary meaning and represents a particular product or business, so that a business employing it first may enjoin a second business from using it, is a question of fact. This rule was promulgated in a decision handed down during the 1964-1965 term; and in applying it the Court decided further that, in order to sustain the injunction, the disputed name need not be specific, but may be general, such as “Falls Motel and Restaurant” near Cumberland Falls. And the injunction is justified if the names of the two businesses are sufficiently similar “as to make it likely that unsuspecting persons would be led to believe that it was the same.”

A trade secret is a novel plan or process, known only to its owner, which has been perfected and appropriated by individual ingenuity. The courts, in an equity proceeding, will protect the possessor of trade secrets from unfair exploitation, and the current development of successful methods of gaining judicial protection of secrets is a vital national issue. The one Kentucky case in this area was tame, however. It held that where the alleged secrets are shown not to be confidential or unique because they are merely applications of basic and

217 Jackson v. Stephens, 391 S.W.2d 702 (Ky. 1965). However, there will be no injunction when the trade name adopts the actual geographic proper name. See Wyatt v. Mammoth Cave Dev. Co., 26 F.2d 322 (6th Cir. 1928), distinguished in Jackson.
218 391 S.W.2d at 703.
219 Id at 706.
well known principles in the industry, and they cannot be shown to have been appropriated in an objective sense, the action will fail.\(^{221}\)

**F. Damages, Contribution**

The damages awarded for a tort were challenged as excessive in two cases during the past year. One of these held there was prejudicial error in an instruction permitting a finding of damages up to $20,000 even though the damages could be readily repaired and the only evidence relating to the cost placed a maximum of $1,764.94 on the repairs.\(^{222}\) The other case\(^{223}\) upheld an award of $1,800 actual damages for removal of 24 pine trees from city property and also held that punitive damages were proper since the removal was accomplished in wanton and willful disregard of the rights of the city.

A question of contribution (reimbursement on a pro rata basis of one who has paid the whole debt or suffered the whole liability by those who are also liable for the damage in question\(^{224}\)) arose in *Martin v. Guttermuth*.\(^{225}\) It was held that one joint tort-feasor who settles with the other is not hereby estopped from asserting against the other a claim for contribution subsequently accruing.

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\(^{221}\) 155 Mid-States Enterprises, Inc. v. House, 403 S.W.2d 48 (Ky. 1966).

\(^{222}\) Kentucky Stone Co. v. Caddie, 396 S.W.2d 337 (Ky. 1965).

\(^{223}\) Louisville Builders Supply Co. of St. Matthews, Inc. v. City of Richlawn, 392 S.W.2d 438 (Ky. 1965) (there was a dispute between the remover and the city as to which one owned the land upon which the trees were located, the trees had been planted by the city, the removal was over the city's specific protest, and the land actually did belong to the city).


\(^{225}\) 403 S.W.2d 282 (Ky. 1966). Where a collision took place between the plaintiff's automobile and the defendant's limousine, and the plaintiff's insurance carrier settled the defendant's claims and those of his passengers and obtained releases, the Court held that this payment did not estop the plaintiff from asserting on behalf of his insurance carrier a claim against the defendants for contribution for one-half of the amount paid to the defendant's passengers on the theory that the defendants were joint tort-feasors.
XX. WORKMEN'S COMPENSATION

A. Arising in the Course of Employment

To determine if an injury occurred in the course of employment, the Court by long-established rule looks to the time, place, and circumstances of the injury.\(^1\) A troublesome problem regarding the "place" aspect of this test arises when the employee is on his way to or from work. The rule in the majority of jurisdictions is that the employee may recover if injured while on the premises of the employer.\(^2\)

In *Ratliff v. Epling*,\(^3\) perhaps the most important workmen's compensation case decided last term, the Court accepted the premises concept, but narrowed the majority rule somewhat by limiting the premises to the "operating premises." In explaining the new test, the Court indicated that the "operating premises" do not include all the employer's property, but are limited to areas which constitute an integral part of the business.

The facts of *Ratliff* are as follows. The employee, while waiting for a ride home, was killed in a rock slide which occurred on a roadway 173 feet from the mouth of the mine in which he worked. The accident took place thirty minutes after quitting time and while deceased was gathering coal for his personal use. The Court, in determining whether *Ratliff* was in the course of his employment when he was killed, overturned its old approach of looking to see whether the accident was an "industrial hazard" and adopted the new test. It held, however, that although the deceased was within the "operating premises," the deviation in both time and activity was enough to take him out of the course of employment.

The operating premises test is a compromise between the highly subjective industrial hazard test and the majority rule. It is not so arbitrary as the majority rule, but it may prove to be as difficult to apply as the test overturned. *Ratliff* held only that a roadway 173 feet from the mouth of an operating mine was within the operating premises of a mining concern; this holding is a weak guide indeed for future application of the rule. Although the Court has yet to clarify the meaning and scope of application of the new test, it would seem that the *Ratliff* decision is a step in the right direction. Since the old test has been abolished and since the details of the new one have yet to be

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\(^1\) Masonic Widows and Orphans Home v. Lewis, 330 S.W.2d 103 (Ky. 1959).

\(^2\) 1 LASON, WORKMEN'S COMPENSATION LAW § 15.11 (1965).

\(^3\) 401 S.W.2d 43 (Ky. 1966).
determined, the effect of Ratliff is at least to clean the slate for a fresh consideration of the problem.4

B. Arising Out of Employment

There are three main lines of interpretation of the phrase "arising out of employment." First, the "increased or peculiar risk" theory finds an injury to have arisen out of the employment if the employment increased the risk of such an injury or if the risk of the injury is peculiar to the employment. Second is the "actual risk" theory, by which an injury is seen to have arisen out of the employment if in fact it was an actual risk of the employment, regardless of whether the risk is increased by or peculiar to that employment. Third, the "positional risk" theory holds an injury to have arisen out of the employment if the accident would not have happened but for the fact thatclaimant's job put him in the position where he was injured.5

Of the three, the positional risk theory is clearly the most generous to the claimant; in fact, it almost does away with the requirement of a causal connection.

In 1964 the Court in Corken v. Corken Steel Products, Inc.6 ostensibly adopted the positional risk theory.7 The opinion, however, was not detailed, and it is possible to interpret Corken much more narrowly. Two cases decided this term which add to the confusion are Black v. Tichenor8 and Gordon v. Jefferson County Fiscal Court.9

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4 Pennsylvania, Connecticut, and Tennessee are the other jurisdictions which use this test. The Pennsylvania court, unlike the courts in the other two states, has dealt with the "operating premises" problem quite frequently. In defining the term that court has held that a parking lot across the street from the place of employment was not within the operating premises (Young v. Hamilton Watch Co., 158 Pa. Super. 448, 45 A.2d 261 (1946); that part of a shipyard 300 to 1000 feet from the particular ship to be worked on was within the operating premises (Wolsko v. American Bridge Co., 138 Pa. Super. 339, 44 A.2d 873 (1945); that a dormitory maintained by a hospital in a wing of the main building was within the operating premises (Hopwood v. City of Pittsburgh, 153 Pa. Super. 398, 33 A.2d 658 (1943); that a house provided for a hostess which was five hundred feet from the main building was within the operating premises (Werner v. Alleghany County, 153 Pa. Super. 10, 33 A.2d 451 (1943)); and that a private drive which was the only entrance to the rear of a mine was within the operating premises (Barton v. Federal Enameling & Stamping Co., 122 Pa. Super. 587, 186 Atl. 316 (1936)).

Since the Kentucky Court looked to Pennsylvania for the test, it is reasonable to assume that it will interpret and apply the test in a similar manner. If so, then perhaps we do have some guidelines to determine where and when the "operating premises" begin and end.

6 385 S.W.2d 949 (Ky. 1964).
7 For a more detailed discussion of the positional risk theory in Kentucky, which includes a discussion of both Black and Gordon, infra notes 8-9, see Note, 55 Ky. L.J. 172 (1966).
8 396 S.W.2d 794 (Ky. 1965).
9 403 S.W.2d 278 (Ky. 1966).
In *Black* an employee of an accounting firm was injured in an automobile accident while on his way from Louisville to Middlesboro. He was riding with a fellow employee, and they were to start work the following morning. The Court cited the *Corken* case in holding that the employee was in the course of employment when injured, but if *Black* reaffirms *Corken*, it does so obliquely. The opinion quotes Larson, the definitive work in this area: "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure or personal errand is shown."10 This is one time that Kentucky is in the majority.11 Perhaps one can validly conclude that, since it could, but did not, base this decision squarely on *Corken* and the positional risk theory, the Court has recognized the potentially wide sweep of *Corken* and has withdrawn some from it.

In *Gordon*, however, an opposite conclusion may be drawn. There the employee, a watchman in a garage, was found dying under the rear end of his own car, the front end of which was on the grease rack. He made no statement concerning his injury before he died. There was, however, a rule that no personal work was to be done on company time. The Court, holding that the death did not arise out of the employment, distinguished *Corken* by the fact that there the deceased had been using his car to further the business of his employer whereas in *Gordon* the deceased was furthering his personal ends. Since the positional risk theory is applicable only to neutral risk cases, *i.e.*, cases where the injury is neither personal to the claimant nor clearly work-related, and since the injury in this case was of a personal nature, the fact that the Court mentioned *Corken* at all seems to indicate that the positional risk theory may be here to stay. The Court must do some clarifying. The positional risk theory has the potential to revolutionize workmen's compensation law in Kentucky.

Few states have been willing to accept the full implications of the positional risk theory,12 and have either limited it to particular situations or rejected it completely. Kentucky, if it is going to follow the theory at all, should limit its application to cases where the injury is caused by a "neutral" risk, *i.e.*, neither peculiar to the employment nor personal to the claimant; to do otherwise distorts the real purpose of the law—to pass on to the public the risk of work-connected accidents.

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10 1 LARSON, WORKMEN'S COMPENSATION LAW § 25.00 (1965).
11 Standard Oil Co. v. Witt, 283 Ky. 327, 141 S.W.2d 271 (1940).
12 1 LARSON, WORKMEN'S COMPENSATION LAW § 6.40 (1965).
C. Total Disability

Determining when a person is entitled to total disability compensation has perplexed courts for quite some time. The definitive cases in Kentucky on this subject are *E. & L. Transport Co. v. Hayes*\(^\text{13}\) and *Leep v. Ky. State Police.*\(^\text{14}\) In these cases the Court said that a workman is totally disabled when he is "[t]otally disabled from the performance of work in his former occupational classification and his capacity to perform other kinds of work is impaired." In applying this test it is necessary, of course, to define the phrases "occupational classification" and "totally disabled from performance of work." A series of cases this term has shed some light on just what is meant by these two phrases.

First to be considered is the meaning of "former occupational classification." In denying compensation, *Everidge v. Nickells Coal Co.*\(^\text{15}\) held that "occupational classification" was not so narrow a term that a distinction could be made between a "low-coal" miner and a "high-coal" miner. The claimant, before his injury, worked mainly in coal mines where he had to squat to mine the coal; after the injury, he could still work as a coal miner but only in "high" mines, *i.e.,* those where he was not required to squat. The Court stated that claimant was "not entitled to claim so narrow a classification" as "low-coal miner."

*Everidge* provides welcome clarification of the leading cases, *Hayes* and *Leep.* In the *Hayes* case, a truck driver returned to work as a "gasser" for the same company, while in *Leep,* a state trooper returned to work as a dispatcher. Total disability was awarded in both cases. In *Everidge,* the change of occupation was much less distinct. *Everidge* then, is a guide to when and where the Court will hold that there is no distinction between two job classifications.

"Totally disabled from performance" is the second phrase to be considered. Two recent cases suggest a new meaning for the phrase. A long line of cases\(^\text{16}\) has held that a person is not totally disabled if he can perform his work, even though he has to suffer some pain while doing it. But this year, in *Harlan Collieries Co. v. Smith,*\(^\text{17}\) the Court

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\(^\text{13}\) 341 S.W.2d 240 (Ky. 1960).
\(^\text{14}\) 366 S.W.2d 729 (Ky. 1963). Two cases which reaffirm the test stated in *Hayes* and *Leep* are Russell Constr. Co. v. Workmen's Compensation Bd., 397 S.W.2d 357 (Ky. 1966) and Methodist Hosp. of Ky. v. Ratliff, 391 S.W.2d 676 (Ky. 1965).
\(^\text{15}\) 394 S.W.2d 449 (Ky. 1965).
\(^\text{16}\) Brock v. International Harvester Co., 374 S.W.2d 507 (Ky. 1963); Stephens Elkhorn Coal Co. v. Tibbs, 374 S.W.2d 504 (Ky. 1963); Bethlehem Mines Corp. v. Davis, 368 S.W.2d 176 (Ky. 1963); Mary Helen Coal Corp. v. Chitwood, 351 S.W.2d 167 (Ky. 1961).
\(^\text{17}\) 396 S.W.2d 67 (Ky. 1965).
held that a person could be disabled even though he had the physical capacity to perform his former work. There was competent medical testimony that if the claimant continued to work it would "kill" him. The Court took a practical view of the problem, reasoning that "the mere fact that the worker may suffer some aches and pains while working does not make him disabled but surely it would strain reason to hold that a man whose work would literally kill him has no disability to work."18 The Court will meet this problem continually, since many occupational diseases, especially silicosis,19 will "kill" the employee if he continues to work. A strong dissent was written by Justice Montgomery. His concern was with reconciling the cases cited above,20 and he felt the problem was one for the Legislature, not the Court, to solve.

The second case throwing light on "disability from performance" is Hopkins v. Wiscombe Southern Painting Co.21 In that case, the Court refused total disability compensation to a construction painter who, after his injury, could still command top wages (higher, in fact, than before his injury) in that occupation, although he could not paint as high as before, hang his own rig, and pull his own weight. The Court indicated that the low supply of skilled workers in that occupation was primarily responsible for allowing the claimant to continue at his occupation, and implied that if these market conditions change there would be a possibility of his being declared totally disabled. Thus it should be noted that market conditions may be of prime importance to the lawyer preparing a total disability case.

Two general rules in this area which were reaffirmed last term were (1) that an employee is entitled to only one award of total disability even though he suffered a personal injury and contracted an occupational disease simultaneously,22 and (2) that in silicosis cases the worker must be actually disabled in order to collect—having the disease is not enough.23

D. Statutory Application and Interpretation

Beth-Elkhorn Corp. v. Thomas24 and Lovell v. Osborne Mining Corp.,25 decided last term, deal with the "immediately next" pro-

18 Id. at 69.
19 Silicosis is a form of respiratory disease caused by the inhalation of stone dust. It is a form of pneumoconiosis.
20 Supra note 16.
21 402 S.W.2d 690 (Ky. 1966).
22 Davis v. Harlan Everglow Coal Co., 392 S.W.2d 62 (Ky. 1965).
23 Osborne Mining Corp. v. Blackburn, 397 S.W.2d 144 (Ky. 1965).
24 404 S.W.2d 18 (Ky. 1966).
25 395 S.W.2d 596 (Ky. 1965).
vision of KRS 342.316(4). The statute provides that in silicosis cases it must be shown that the employee was exposed to the hazards of the disease within the state for at least two years immediately next before his disability. The avowed purpose of the statute is to prevent an influx of silicosis victims into Kentucky from other states where they have been injuriously exposed. The statute accomplishes its purpose, but also, by its wording, commands that any silicotic claimant show that his exposure continued until the very day of his disability. In Thomas, the employee worked steadily for the employer for several years until he voluntarily ceased employment on May 25, 1960. He was injuriously exposed to silicosis for more than two years immediately prior to May 25, 1960, but as of that date he was not disabled, nor had he experienced any distinct manifestations of the disease. He became aware in September, 1963, that he had silicosis and filed his claim soon after. The Court felt it could not construe the statute to mean that a person with a silicosis claim must show that he had been exposed to silica dust right up until the time of disability. It therefore held that KRS 342.316(4) comes into play only when the "injurious exposure" in Kentucky has been interrupted by "injurious exposure" outside Kentucky. The Court overruled Chapman v. Peabody Coal Co. and took cognizance of the fact that rarely, if ever, is the last injurious exposure coincident with the first manifestation of the silicotic condition.

However, in Lovell, the other current case, there was outside exposure (claimant had worked for thirty-three years in Kentucky, then worked in a West Virginia coal mine for three months), and the Court denied compensation. The Court recognized the harshness of the result, but felt it had no choice in light of KRS 342.316(4). Yet, it seems unlikely that the Legislature intended to prevent compensation in this type of case; for the employee worked long enough in Kentucky for one to reasonably conclude that he contracted the disease in this state. It should be noted that this case was decided almost a year before the Thomas decision; perhaps the Court, since it has recognized the flexibility of the "immediately next" provision of the statute, will in the future further limit the provision to cases where one cannot reasonably conclude that the employee contracted his silicosis in Kentucky.

KRS 342.121 provides for the appointment of a disinterested physician to aid the Workmen's Compensation Board in answering medical questions. If no specific objections are made to the report of

Mary Helen Coal Corp. v. Parrot, 290 S.W.2d 477 (Ky. 1956).
385 S.W.2d 78 (Ky. 1965).
the appointed physician within ten days, the report is conclusive. This term the Court somewhat broadened the base for rendering the report advisory by declaring that a thorough cross-examination of the physician is the equivalent of specific objections and will render the report of such physician advisory.\textsuperscript{28}

Other cases were decided in this area,\textsuperscript{29} but they are of minimal significance.

E. Employee Status

A particularly troublesome problem in the employee status area is the employee-independent contractor dichotomy. In \textit{Ratliff v. Redmond}\textsuperscript{30} the Court reaffirmed the standard test used to determine whether a worker is an employee or independent contractor. The factors considered, which are those found in Restatement of Agency, Section 220, are (1) extent of control of the employer over the work done, (2) whether or not the worker is engaged in a distinct occupation, (3) the kind of occupation, (4) the skill required in the occupation, (5) who supplies the tools and equipment, (6) length of time for which the worker is engaged, (7) the method of payment, (8) whether or not the work is a part of the regular business of the employer, and (9) the intention of the parties. This test is used by most jurisdictions.\textsuperscript{31} It must be noted, however, that the Court

\textsuperscript{28}McCown v. Hellier Elkhorn Coal Co., 399 S.W.2d 719 (Ky. 1966).

\textsuperscript{29}Brown Equip. Co. v. Duff, 394 S.W.2d 926 (Ky. 1965) (a motion to reopen in 1964 a referee's hearing which took place in 1958 merely to have certain language deleted from a Board opinion will not be allowed); Kentucky-W. Va. Gas Co. v. Ritchie, 402 S.W.2d 704 (Ky. 1966) (specific objections to the report of the disinterested physician appointed pursuant to KRS 342.121 if made within ten days after such report will render the report advisory only); Marus v. United States Steel Corp., 402 S.W.2d 692 (Ky. 1966) (KRS 342.316(5), which provides that "in case of death where the employe has been awarded compensation or made timely claim within the period provided for in this section, an employe has suffered continuous disability to the date of his death occurring at any time within ten years from the date of disability, his dependents, if any, shall be awarded compensation for his death as provided [by this act] . . . ." does not allow recovery where the employee made a timely claim, but lost the decision); Johnson v. Eastern Coal Corp., 401 S.W.2d 230 (Ky. 1966) (an application for full Board review of an award granted two years previous will not be heard); Kibbey v. General Am. Transp. Corp., 404 S.W.2d 15 (Ky. 1966) (an award for the severance of a limb or for the loss of an eye or ear is limited to the scheduled amount set out in KRS 342.105 even though the severance or loss results in total disability); Brown v. Gregory, 398 S.W.2d 710 (Ky. 1965) (although the Board was remiss in its failure to make specific findings as to the percentage of disability caused by a pre-existing condition, it was not error to do so where the award given was against the employer only); Kiser v. Barley Mining Co., 397 S.W.2d 56 (Ky. 1965) (a compensation claim is limited in time by the statute of limitations in effect at the time of the bringing of the action; not the one in effect at the time of the injury).

\textsuperscript{30}396 S.W.2d 320 (Ky. 1965).

\textsuperscript{31}1 Larson, Workmen's Compensation Law § 43.10 (1965).
liberally construes these factors in favor of an employee status when applying the test.\textsuperscript{32}

Two other cases decided the past term reiterate the well-known rules that (a) the claimant must be an employee of the employer being sued in order to prevail,\textsuperscript{33} and (b) in order for a person to come under the "loaned servant" doctrine there must be some benefit accruing to the employer sought to be charged under that doctrine.\textsuperscript{34}

F. Proof

In a group of cases, which are related in that they deal with the presentation of evidence, certain well-established rules were followed. The cause of death or casual relationship between the injury and the work may be proved by lay testimony.\textsuperscript{35} Speculative evidence, or evidence speaking in terms of possibilities rather than probabilities, carries no weight.\textsuperscript{36} Testimony related to a physician which aids him in his diagnosis is admissible as an exception to the hearsay rule.\textsuperscript{37}

G. Occupational Disease

KRS 342.316(1) provides:

\begin{quote}
Occupational disease as used in this chapter means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is equally exposed outside of employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this chapter.
\end{quote}

In the one occupational disease case decided this term, \textit{National Stores, Inc. v. Hester},\textsuperscript{38} the Court dealt with "ordinary life diseases," and held that tenosynovitis is compensable as an occupational disease. Tenosynovitis is an attritional type of lesion and is created after repeated movement of a tendon doing an unaccustomed type of motion. The medical testimony established that the condition was caused by the employee's continuous use of her right hand in operating a calculating machine. The physician testified that "typewriting, piano playing, writing, washing, wringing out clothes . . ." are tasks which furnish a cause necessary for the production of this lesion.

There are two problems involved in this type of case: first,
whether compensation for a disease is excluded because the general public is equally exposed to it; second, whether the disease is in fact an occupational disease. The Court resolved the first problem by giving a liberal interpretation to the statute:

There is probably no movement of the human body required in the performance of a job which cannot be duplicated in the discharge of household chores or in the pursuit of recreation yet any of these might produce a disease such as we have here. Similarly there are few, if any, compensable diseases induced by germs or inhalation of impurities which could not at some time be contracted by a member of the general public. To accept such a view [which would limit occupational diseases to those which could not be contracted outside of the employment] would give [the statute] a narrow, if not nugatory, effect contrary to the provision of KRS 342.004.39

Important in solving the second problem is the test used to define an occupational disease. The Court cited a New York case40 wherein the test is whether there is a recognizable link between the disease and some distinctive feature of the claimant's job. Applying this test the employee would recover. The Court, though not expressly adopting the New York test, was clearly persuaded by it.

The Court, fully recognizing the sweep that might be given this opinion, forewarned that it did not intend to make the employer liable for wear and tear on the human body and "open the door to recovery for every condition or disease that might be caused or adversely affected by the employment."41

The Court's warning is simply a reiteration of the general rule applicable in all jurisdictions.42 No jurisdiction will award compensation for wear and tear on the body, but many are equally adamant in their opposition to compensation for ordinary life diseases—even if they are caused by the employment. With this decision the Kentucky Court has moved away from the arbitrary rule that if a disease can be contracted outside of employment it is not compensable. Such a disease will be compensable if it passes the test of whether or not there is a link between the disease and a distinctive feature of the job. The approach taken by the Court is the correct one. To do otherwise, i.e., to deny compensation for certain diseases without looking at the causal connection between the disease and the job, undermines the real purpose of the workmen's compensation statute—to compensate employees for job-caused harm.

39 Id. at 604.
41 Supra note 38 at 605.
42 LARSON, WORKMEN'S COMPENSATION LAW § 43.31 (1965).
In a series of cases which concerned more the procedural aspects of a case rather than the substantive law, the Court continued the trend toward interpreting the statutes liberally.\(^4\)

As usual, there were numerous cases\(^4\) reaffirming the well-established rules that (a) the Board is the determiner of the facts, and (b) when there is a conflict of medical testimony, the Board's choice of whom to believe will be conclusive. Of course, the Court may reverse the Board on a ruling of fact, but in order to do so the finding of the Board must be "clearly erroneous." This is a relatively new concept in Kentucky law (the provision calling for this test was added to the statute in 1964).\(^4\)

Under the "clearly erroneous" test, the Court may look to the "rightness" of a decision and reverse it if it finds the conclusion drawn by the Board to be, in its judgment, the wrong one. Under the "substantial evidence" rule, the Court may think one conclusion right and the other one wrong, yet regardless of its view of the "rightness" of the decision, it cannot reverse if the conclusion reasonably follows from the evidence. Thus the clearly erroneous test gives a broader scope of review.\(^4\) It remains to be seen whether the Court will more readily reverse now.

One case this term did mention the 1964 amendment. In Porter v. Cabe v. Dudgeon, 404 S.W.2d 283 (Ky. 1966) (where an injury cannot be conclusively stated to be a result of claimant's last injurious exposure, but is a result of his continued exposure for forty-three years, nevertheless the county wherein the last injurious exposure occurred is a proper venue); Fraley v. Rusty Coal Co., 399 S.W.2d 479 (Ky. 1966) (where employee withdrew his notice of appeal and applied for an additional thirty days to file an appeal on the same day, the two motions are considered inseparable so that a ruling which nullifies the extension of the thirty days also nullifies the motion to withdraw the notice of appeal); Commonwealth, Dep't of Highways v. Parker, 394 S.W.2d 899 (Ky. 1965) (if there is no showing of "bad faith" the fact that appellant served summons on Board by leaving it with the Attorney General rather than the Executive Secretary of the Board, as required by KRS §342.285(1), does not necessitate the dismissal of the appeal).

\(^{43}\) Cabe v. Dudgeon, 404 S.W.2d 283 (Ky. 1966); Belknap Hardware & Mfg. Co. v. Brown, 402 S.W.2d 848 (Ky. 1966); Dobbs v. Inland Steel Co., 402 S.W.2d 88 (Ky. 1966); Simmons Bros. Paving Co. v. Presley, 401 S.W.2d 764 (Ky. 1966); Clay Coal Corp. v. Abner, 401 S.W.2d 56 (Ky. 1965); E. I. DuPont de Nemours & Co. v. Connick, 400 S.W.2d 522 (Ky. 1966); Turner v. Industrial Erectors, Inc., 400 S.W.2d 225 (Ky. 1966); E. I. DuPont de Nemours & Co. v. Whitson, 399 S.W.2d 734 (Ky. 1966); Eastern Coal Co. v. Anderson, 399 S.W.2d 733 (Ky. 1966); Roberts v. Owensboro Milling Co., 399 S.W.2d 466 (Ky. 1965); Lewis v. United States Steel Corp., 398 S.W.2d 490 (Ky. 1965); Green Valley Coal Co. v. Carpenter, 397 S.W.2d 134 (Ky. 1965); Beverly Coal Co. v. Smith, 396 S.W.2d 95 (Ky. 1965); Sullivan v. Foster & Creighton Co., 394 S.W.2d 917 (Ky. 1965); Blaw-Knox Co. v. Knapp, 392 S.W.2d 76 (Ky. 1965).

\(^{44}\) KRS §342.285(1).
Goad, the Court pointed out that the amendment did not affect the test as to the sufficiency of the evidence when the Board finds against the person having the burden of proof, i.e., the claimant. The test in those situations is whether the evidence was so strong as to require a finding for the claimant. This is clearly a much more stringent test than either the "substantial evidence" or "clearly erroneous" rules, and an attorney when considering an appeal on this basis should take cognizance of the fact that as a practical matter the Court rarely makes such a finding.

Two cases this term reiterate the rule that, although functional disability is a medical question, the Board has the duty to translate that functional disability into occupational disability. One case illustrates the fact that an employee can have an action for breach of contract against an employer who has failed to apply for silicosis coverage after having agreed to do so.

47 404 S.W.2d 795 (Ky. 1966).
48 Congleton Bros., Inc. v. Farmer, 399 S.W.2d 722 (Ky. 1966); Kilgore v. Goose Creek Coal Co., 392 S.W.2d 78 (Ky. 1965). There seems to be a frequent mistake on the part of attorneys in these cases in assuming that the proportion of disability should coincide with the proportion of medical disability or disability to the body as a whole. Nothing could be further from the truth, for there is a great difference between the two. For example when a person completely loses the use of one of his arms, the disability to the body as a whole is probably less than 50%. If, however, the worker is a bricklayer, or in any other occupation which requires the use of both arms, he is totally disabled. As a practical matter the attorney should point out the difference to his medical witness before he is put on the stand.
49 Blankenship v. Majestic Collieries Co., 399 S.W.2d 699 (Ky. 1966).