The Second Annual Kentucky Court of Appeals Review

Kentucky Law Journal

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The Second Annual Kentucky Court of Appeals Review

FOREWORD

The Court of Appeals Review is a composite effort of the entire staff of the Kentucky Law Journal. This, the second annual edition, is the result of long hours and much effort in furtherance of our policy of service to the Kentucky practitioner and assistance to legal scholars throughout the nation. The subject matter is the 1963-1964 term of the Kentucky Court of Appeals. The cases are categorized and analyzed in relation to the previous law in the particular field. The purpose of this effort is to draw upon the talents of a staff of dedicated law students to compile and consolidate the product of a full term of the court for the purpose of providing our readers with a ready readable reference work. We hope we have been successful in this end.

The Editorial Board
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I. ADMINISTRATIVE LAW & PUBLIC OFFICIALS

A. MUNICIPAL CORPORATIONS

Although the Kentucky Court of Appeals decided several cases concerning municipal corporations during the last term, most of these involved specific municipal ordinances or state statutes governing the various classes of cities. Therefore, these decisions were limited, for the most part, to statutory construction and interpretation.

1. Annexation

In the first case concerning annexation that the Court of Appeals decided during the last term, *City of St. Matthews v. City of Beechwood Village,* an interesting question was presented. In this declaratory judgment action, the plaintiff city (Beechwood Village) sought an adjudication that a three acre tract of land had been annexed by it. The plaintiff enacted an ordinance proposing annexation of the property in question. However, the description in the ordinance was so inaccurate that it did not encompass the territory proposed to be annexed. Nevertheless, the owners of the property to be annexed did not raise any question concerning the deficient description in their remonstrance suit objecting to the annexation ordinance. Subsequently, a compromise was effected, and a judgment entered that the plaintiff city could annex a part of the property. Later, defendant city (St. Matthews) annexed a large area of territory to the legal boundaries of the plaintiff city, including the property previously annexed by plaintiff. The circuit court found that the annexation proceedings by plaintiff were invalid, but nevertheless adjudged that the owners of the property were estopped to challenge those proceedings, and since defendant city annexed only to the legal line of plaintiff city, which line included the property in question, the defendant had not annexed the territory. The owners of the property and the defendant city appealed. The Court of Appeals reaffirmed the doctrine that a city cannot annex property through the medium of estoppel, since this violates the legislative scheme by which annexation may and should be accomplished. The court stated that even if the lower court were correct in holding the

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1 373 S.W.2d 427 (Ky. 1963).
estoppel doctrine may be invoked against the property owners, it cannot be extended to create legal rights against an unassociated third party (defendant city) or against the public. Therefore, plaintiff did not annex this territory, and since defendant annexed to plaintiff's original boundary line, the property in question is part of defendant city.

In Taustine v. Fleig, the court restated the existing law that an appeal from the circuit court in an annexation proceeding by the remonstrants, does not stay the annexing city's jurisdiction over the annexed territory. The court held that a city, which is the victor in remonstrance legislation to an annexation proceeding in the circuit court, is free to proceed with annexation regardless of remonstrant's appeal thereto. The fact that the appeal is pending at the time of the arrest of appellee for a crime assertedly committed in the territory so annexed, does not deprive the police judge of the annexing city of jurisdiction to dispose of the charge.

The Court of Appeals, in McClelan v. Central City, affirmed the circuit court, and restated the general rule that there must be a substantial excess of burdens over benefits to the proposed annexed territory in order to defeat annexation. In this case, a majority of the resident voters in the territory to be annexed remonstrated against annexation. The court said that although the city has the burden of proving that annexation will not materially injure the landowners of an area to be annexed, a showing of substantial benefits amounts to a negation of material injury which shifts to the remonstrants the burden of proving a "clear and obvious imposition of manifest and substantial burdens," as required by KRS 81.220.

In the case of Voorhes v. City of Lexington, a number of contentions were raised by remonstrants in seeking a reversal of the circuit court's decision against them. To the appellant's contention that the ordinance proposing annexation by the city was void because it was one of eighteen such annexation ordinances adopted on the same day, the court held that each ordinance encompassed one unit area, and this procedure did not split the area to be annexed. In addition, the court reaffirmed the existing

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2 374 S.W.2d 507 (Ky. 1964).
3 375 S.W.2d 823 (Ky. 1964).
4 377 S.W.2d 57 (Ky. 1964).
rule that an ordinance in annexing territory is not repealed by implication when the city passes a subsequent ordinance proposing annexation of parts of the same territory as encompassed in the prior ordinance.

The appellants further contended that more than fifty percent of the property owners remonstrated against annexation, and therefore, the burden of proof was upon the city as provided by KRS 81.110. However, the court averted to the long standing principle that the tax cards of the deputy county tax commissioner and the records of patrons of the city water company were properly admissible into evidence as public documents, and were sufficient to raise a prima facie case in ascertaining the total number of residents in the area in order to determine if fifty percent of them have remonstrated. The testimony of the garbage man in the area as to the total number of residents was insufficient to overcome the prima facie case.

In addition, the lower court's finding that the annexation would be for the interests of the city as required by KRS 81.110(2) was not erroneous as contended by appellants, since the evidence on neither side was so convincing as to preclude another conclusion, and therefore, the evidence supported the finding that the proposed annexation is "for the interests of the city." Also the court restated the existing law that although the responsibilities of the city citizenship are a burden to the annexed territory, they are not a decisive factor in determining whether proposed annexation will produce manifest injury to resident freeholders of the area sought to be annexed.

In the final case on annexation decided during the last term, City of Hickman, Inc. v. Choate,6 the court stated that the policy of the law is toward encouragement of municipal expansion and against a fine weighing of relative benefits and burdens of annexation. This is a slight modification of the general rule. Accordingly, where the residents of the area adjoining the city would not have had water and gas service except for the instrumentality of the city, as in this case, they could not defeat annexation by the city unless it was so unfair to them as to border upon arbitrariness. In this case fifty percent of the residents remonstrated thus throwing the burden on the city to show a

6 379 S.W.2d 238 (Ky. 1964).
prima facie case of benefit to itself and to the property proposed to be annexed. But the court stated that once this has been shown by the city, the burden shifts to the property owners to prove material injury. This is not shown merely by the fact that several residents in the area might not be able to keep farm animals, or that a stockyard in the territory might be closed.

2. **Ordinances**

In the only case decided concerning the adoption of a municipal ordinance, *City of Mt. Vernon v. Banks,* the Court of Appeals reversed the lower court and reaffirmed the existing test that a municipality may adopt any ordinance as long as it does not abuse its discretion. The court held that a city, which is unable to provide improvements reasonably appearing necessary to its water system by means of rates in existence from the time the water system was built about 1937, does not abuse its discretion in raising the rates in the absence of showing that the increased rates were confiscatory, unduly burdensome, discriminatory, economically unsound or unreasonable.

3. **Housing Commissions**

In the first of two cases decided during the last term pertaining to housing commissions, *Marcum v. City of Louisville Municipal Housing Comm'n,* the Court of Appeals was called on to decide whether the Louisville Municipal Housing Commission was exempt from the Kentucky sales and use taxes. The court held that the commission, as an institution of purely public charity, was exempted from the Kentucky use tax statutes (KRS 139.310, 139.340, 139.470) on utilities purchased by it. However, after following the existing statutory interpretation of the Kentucky sales tax statutes (KRS 139.200, 139.210, 139.470), and the cases construing such, the court concluded that in view of the fact that the sales tax was a tax on the retailer and not upon the purchaser, the commission was exempted from it, even though the economic burden would be borne by the housing commission as a purchaser.

The second such case, *Norrell v. Judd,* decided a procedural

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6 380 S.W.2d 268 (Ky. 1964).
7 374 S.W.2d 865 (Ky. 1963).
8 374 S.W.2d 192 (Ky. 1963).
question, but contained important dictum. A taxpayer brought an action to void a television service agreement between a private non-profit corporation and the Frankfort Municipal Housing Commission. The taxpayer had standing to challenge the validity of the agreement on the theory of violation of the conflict of interest statute. The acting director of the housing commission was also director of the corporation, and was paid a fixed fee therefore. The court held that when affidavits raised the fact question of whether there was a conflict of interest under KRS 80.080, prohibiting such for members or employees of a housing commission, a summary judgment was precluded. However, the court went further and stated that if there was a direct or indirect interest in the agreement in question by the director, it would be void. The court followed existing case law on this point.

4. Police

Two cases were decided by the Court of Appeals during the last term concerning actions brought by police officers.

In City of Pikeville v. May, a police officer, who was hired by the city council but never permitted to assume his duties, sued to recover salary due from the city. The court, construing KRS 95.700 which permits a city operated police department and provides that members of such department shall be subject to removal for cause, held that this did not entitle the city council to capriciously and without cause refuse to permit a qualified man to serve after he had been duly appointed. This case is a restatement of the existing law.

An action by a member of the police department of the city of Covington against the chief of police for a declaration of his rights and injunctive relief was instituted in Schrichte v. Bornhorn. The appellant was transferred from detective to a regular line shift with rank of acting first lieutenant without any change in the rate of pay. The court, in affirming the circuit court, and construing KRS 95.450(1) which provides that a police officer shall not be reduced in grade or pay except for cause, held that although a policeman's classification is changed when transferred from one job category to another with comparable authority, his

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9 374 S.W.2d 843 (Ky. 1964).
10 376 S.W.2d 683 (Ky. 1964).
grade is not reduced within the statutory subdivision prohibiting reduction in grade.

5. Zoning

During the last term the court had occasion to decide three cases in the area of zoning. In the first of these, City of Middlesboro v. Billingsley, the plaintiff city adopted a comprehensive zoning ordinance, and sought to enjoin the use of business property allegedly in violation of it. Defendant's business property was being used for storage of construction equipment and supplies when the area was zoned residential. The ordinance provides that no nonconforming use could be changed to any other nonconforming use unless the latter was found to be less detrimental to the area than the existing use. Defendant later changed the use of the property to the repairing and maintenance of buses. The court, following existing law, reversed the lower court, and held that the subsequent use, a noisy activity, was a change contrary to the zoning ordinance prohibiting changes of nonconforming uses unless such uses are less detrimental.

In A. B. Schlalter, Inc. v. Louisville & Jefferson C.P. & Z.C., the Court of Appeals reaffirmed the general rule that on appeal the only question before the reviewing court was whether the findings of the circuit court were supported by substantial evidence. The court found they were adequately supported and affirmed the lower court which denied appellant's application to change the classification of his land, and thus denying the zoning change.

Likewise, in Louisville Timber & Wooden Products Co. v. City of Beechwood Village, the court reaffirmed the existing law that the extraordinary equitable jurisdiction of the courts may be resorted to in attacking the city's refusal to follow the recommendations of the zoning commission to rezone appellant's property, only when the action complained of was arbitrary, capricious or illegal. Accordingly, it was not arbitrary to deny appellant the use of his property in a commercial manner, merely because it was more suitable for such purpose than for a multifamily dwelling to which the zoning ordinance restricts the use of the property.

11 371 S.W.2d 23 (Ky. 1963).
12 374 S.W.2d 861 (Ky. 1964).
1. **Fiscal Courts**

The court decided four cases concerning aspects of county fiscal courts during the last term. In *Commonwealth v. Whayne Supply Co.*,\(^{13}\) only a procedural question was at issue. The action was commenced by appellant and three other taxpayers to recover alleged unauthorized and illegal expenditures of the county's funds which were allegedly used to illegally purchase certain road machinery from appellee and other corporations. The court, reaffirming the existing rule and upholding the trial court, held that the complaint must be dismissed as there was no allegation therein that plaintiffs had demanded that the county or its fiscal court sue defendants, or that such a demand would have been futile.

*Higdon v. Campbell County Fiscal Court*\(^{14}\) presented an interesting question and also contained a procedural point. The fiscal court adopted a temporary ordinance, which by its own terms, was to expire in one year. It provided for the filing of applications by citizens seeking usage of property other than for residential purposes. Seventeen days before the ordinance was to expire, the fiscal court sued to enjoin appellants from using their property for a trailer park in violation of the ordinance. Subsequently, the ordinance expired before the twenty days allowed by defendant to file an answer. The court held the suit must be dismissed, reversing the trial court, since after the expiration of the interim ordinance there was no law prohibiting the use of the land as a trailer park, and therefore the question became moot. This is the general rule, and the court had previously applied it similarly to municipal ordinances.

A very unusual impasse confronted the court in *Pulaski Fiscal Court v. Floyd*\(^{15}\). The fiscal court ordered that the courthouse doors be locked from 9 P.M. until 4 A.M. daily, and authorized the county judge to have a lock and hasp installed on the back door of the courthouse in which the county jail was located. The front door of the courthouse was kept locked at night.

The disenting members of the fiscal court contended that the

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13 371 S.W.2d 26 (Ky. 1963).
14 374 S.W.2d 511 (Ky. 1964).
15 374 S.W.2d 863 (Ky. 1964).
"lock and hasp" terminology of the order connotes a padlocking of the back door from the outside, which would prevent unlocking from the inside, thereby not only imprisoning the jailer, but making it impossible for him to open up for the reception of prisoners being brought in by police officers. In addition, it would seem to conflict with KRS 67.130 providing that the jailer shall be superintendent of all county buildings at the county seat. The dissenting members appealed to the circuit court, which agreed with them.

The fiscal court then appealed to the Court of Appeals which held that the order was broad enough to encompass installation of a locking device that would permit opening of the door from the inside, and therefore, was not an unauthorized invasion of the rights and prerogatives of the county jailer. In addition, the court held that KRS 67.130 was not intended to deprive the fiscal court of the power to regulate and control the fiscal affairs and property of the county as provided by KRS 67.080(6). Although this was apparently the first time this particular question had been decided in Kentucky, the court followed an early Kentucky case as to the relative powers of the fiscal court and a county jailer under these two statutes.

In the last case decided concerning fiscal courts, Pennyville Rural Elec. Co-op. Corp. v. Higgins, the Court of Appeals reversed the lower court and held that the appellant was entitled to compensation for expenses relocating certain of its electric line facilities which had been located on private property. In this case the county desired to relocate certain county roads, and some of the private property needed for such relocation was occupied by appellant's lines. The franchise granted by the county to appellant provided that relocation of such lines from the public property of the county shall be at the expense of the appellant. The court distinguished Southern Bell Tel. & Tel. Co. v. Commonwealth which pertained to public rights of way. The court followed existing law that an easement owned by a utility is property, and it cannot be divested without compensation to the owning utility.

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17 373 S.W.2d 467 (Ky. 1964).
18 269 S.W.2d 308 (Ky. 1954).
2. Conservation Districts

The only case decided by the Court of Appeals during the last term concerning conservation districts, Shelton v. Webster County Soil Conservation Dist.,\(^{10}\) was instrumental in the repeal of KRS 262.790, and the enactment of KRS 262.791.

KRS 262.790 provided that anytime twenty-five or more landowners within a soil conservation district filed a petition with the county board of supervisors praying for discontinuance of the district, and all the obligations of the district have been met, a referendum shall be held under the supervision of the board within sixty days. If a majority of the votes cast favor discontinuance, the board of supervisors shall make a determination that the district shall be discontinued. In the Shelton case, 276 landowners petitioned the board. All other conditions of the statute were satisfied. Nevertheless, the Webster County Board of Supervisors decided it would not hold the referendum. Appellee sued, asking the court to direct the referendum be held. The trial court so ordered and the Court of Appeals affirmed. They held the statute was satisfied and the board had no discretion in determining the soundness of the reasons for discontinuance set forth in the petition. This was the first time this particular statute had been construed.

The 1964 legislature apparently felt that watershed districts could be discontinued too easily under KRS 262.790 and repealed it. They replaced it with KRS 262.791 which makes it more difficult to terminate such districts. Some of the important differences are: (1) a petition can not be filed with the board until at least ten years after the organization of the district, five years longer than the prior statute; (2) a majority of the landowners within a district have to petition, whereas the previous statute required only twenty-five; (3) the word "obligations" is clearly defined, whereas only the word itself appeared in former statute.

C. Schools and School Districts

1. Teacher Dismissals

In the first of two cases decided during the last term pertaining to the dismissal of teachers, Bobb v. Moore,\(^{20}\) the court re-

\(^{10}\) 377 S.W.2d 81 (Ky. 1964).
\(^{20}\) 374 S.W.2d 516 (Ky. 1964).
stated the previous rule that individual county school board members, as well as the board itself, may be liable for the wrongful discharge of a teacher, even though the members acted in good faith.\textsuperscript{21} The board members relied on the Attorney General's interpretation of the teacher tenure statute (KRS 161.740).

However, when the board's action was questioned, it set aside sufficient funds to cover any damages incurred for such dismissal, which were unexpended and available for the payment of damages at the time of the action. This was apparently the first time the Court of Appeals reviewed a case where the board took such precautionary action. The court held that the funds set aside by the board and unexpended should be used to satisfy damages resulting from the wrongful discharge. However, in no event is the board's liability to exceed any sums unexpended for the position of the teacher. Here the board had not hired a replacement.

In \textit{Board of Education v. Chattin},\textsuperscript{22} a hearing was conducted by the appellant school board which resulted in a formal order dismissing appellee, from which he appealed to the circuit court. That court found the charges and proof insufficient to justify the dismissal. The Court of Appeals reversed the circuit court and held that a teacher's failure to comply with his superior official's requirement that the teacher account separately for money received from sales of merchandise and for receipts from contracts and projects was sufficient ground for dismissal under KRS 161.790.

In the \textit{Guthrie}\textsuperscript{23} case, decided previously, the Court of Appeals held that the findings of the trial court in a proceeding of this kind would not be set aside unless "clearly erroneous." But the court in \textit{Chattin} stated that if the dismissal were supported by substantial evidence, it could not be set aside. Hence, to this extent, \textit{Guthrie} was modified.

In addition, the court in an early case, \textit{Bowman v. Ray},\textsuperscript{24} ruled that charges of immorality preferred against a school teacher by

\textsuperscript{21} Moore v. Babb, 343 S.W.2d 373 (Ky. 1960).
\textsuperscript{22} 376 S.W.2d 693 (Ky. 1964).
\textsuperscript{23} Guthrie v. Board of Education of Jefferson County, 298 S.W.2d 691 (Ky. 1957).
\textsuperscript{24} 118 Ky. 110, 80 S.W. 516 (1904).
the county superintendent were insufficient where he failed to allege the dates of the specific acts alleged. In the Chattin case, the trial court held the charges were defective in as much as they did not set forth exact times and places, nor specific acts or omissions. Nevertheless, the Court of Appeals held that charges of this type are sufficient if they give fair notice of their bases and essential nature, and enable the accused to prepare his case. Consequently, to the extent that Bowman conflicted, it was overruled.

2. Compensation

_Board of Education of Nelson County v. Lawrence_ was the only decision of the court concerning compensation decided during the last term. The Court of Appeals affirmed the lower court and restated the existing law that by virtue of KRS 161.760 a teacher with a continuing service status, once promoted in salary, cannot be demoted in salary without such cause as would justify termination of her contract, even though part of her duties or responsibilities are eliminated. The appellee was removed from her position as principal, held by her the year before, with a corresponding reduction in salary. The court also rejected appellant's contention that the Minimum Foundation Law (KRS 157.320(13, 14) and 157.350(8)), which requires that all teachers having the same qualifications are required to be paid the same base salary, based on a single salary schedule, repealed KRS 161.760. The court said the law also provides that the single salary schedule shall be based on training, experience and "other factors," and that KRS 161.760 means the continuation of extra pay is not for extra duties, but for extra qualifications. Therefore, there is no contradiction.

D. Administrative Agencies

Appeals from decisions of state administrative agencies constitute an increasing percentage of the cases which come before the Court of Appeals. The last term was no exception as several cases arose concerning the scope of operations of such agencies, as well as the limitations on appeal therefrom. Most of these cases involved statutory interpretation.

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25 375 S.W.2d 880 (Ky. 1963).
1. Public Service Commission

In the only case decided by the court concerning the Public Service Commission, *City of Covington v. Board of Commissioners*, two questions were presented. The first was whether a certificate of public convenience and necessity is required to be issued by the Commission, where a county water district desires to expand its water plant by slightly less than fifty percent ($424,000) of its original investment ($1,000,000). KRS 278.020 provides that any person who begins the construction of any such plant, must obtain a certificate, unless it is an ordinary extension of an existing system in the usual course of business. The court held that the magnitude of the proposed extension demonstrated that it was not ordinary, and therefore a certificate was required.

Secondly, the court had to decide whether the refusal of the Public Service Commission to grant a certificate was unreasonable. The appellants contended the proposed extension would be a wasteful duplication of the existing similar facilities of the city within the county. The court held the refusal was unreasonable since one facility could not be a duplication of another unless it was an adequate *substitute* for the other. The court stated the word “duplication” carries a concept of exactness of kind and character. This case represents no change in existing law.

2. Department of Motor Transportation

The Court of Appeals had occasion to decide three cases during the last term pertaining to the Department of Motor Transportation. In the first of these, *Red Arrow Delivery, Inc. v. Greyhound Corp.*, the court was engaged to construe the term “regular route” as used in KRS 281.011. Here the Department granted a regular route common carrier truck certificate to the applicant. Deliveries by it were not to be by strict schedule, but only when there were parcels to be delivered. The court held this type operation is encompassed within the term “regular route” as there is a fixed course and fixed termini, and regularity of operations is unnecessary. All that is necessary is that the carrier promptly transport between fixed points such goods as are

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26 371 S.W.2d 20 (Ky. 1963).
27 377 S.W.2d 596 (Ky. 1964).
tendered to him for transportation. This case follows the existing statutory interpretation.

In *Webb Transfer Line, Inc. v. Jones*, the court reaffirmed the existing law that the doctrine of res judicata is applicable to the field of administrative law. In 1957, Jones received a regular route certificate from the Department. The circuit court reversed the order on the ground that the service of Webb, an existing certificate holder, was adequate. The Court of Appeals affirmed. Subsequently, in 1960, Jones again received a certificate based on evidence of Webb’s inadequate service prior to 1957. On appeal by Webb, the Court of Appeals held that the doctrine of res judicata prohibited a finding of inadequacy of service on a later application for a certificate predicated on the previously adjudicated period of time. Moreover, the court followed the existing statutory construction in stating that upon an application for additional motor freight service, a finding of inadequacy of existing service cannot be based on the fact there will be more business in the future than the present carrier is now handling. KRS 281.630, in effect, allows such a finding only when the existing service is inadequate.

The only question presented in *Hazard Express v. Combs Motor Freight Inc.*, was whether the evidence supported the findings of the trial court which upheld the Department and denied the applicant an extension of its common carrier service. The court held this general rule was satisfied where the evidence demonstrated the general unfitness, frail financial status, and inadequate existing service of the applicant.

3. Kentucky Racing Commission

An interesting question was presented to the court in the only case decided by it concerning the Kentucky Racing Commission, *Bobinchuck v. Levitch*. Plaintiff entered a claim for a horse, but when it was delivered, it was discovered that neurotomies had been performed on the horse. Plaintiff refused to accept the horse and the stewards ordered the claiming price returned to plaintiff. The Racing Commission reversed the ruling of the stewards, and the circuit court dismissed plaintiff’s suit because

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28 379 S.W.2d 444 (Ky. 1964).
29 372 S.W.2d 807 (Ky. 1963).
30 380 S.W.2d 233 (Ky. 1964).
it lacked jurisdiction. Plaintiff argued on appeal that KRS chapter 230 limits the power of the Commission to the assessment and revocation of fines, suspensions and licenses, and it has no right to determine controversies affecting private property rights of individuals, since such would be an unconstitutional delegation of authority. The court rejected this reasoning and reaffirmed the existing law that the Commission has authority to make rules and regulations governing horse racing in general in Kentucky, including private property rights. The courts have long upheld the rights of such commissions to perform the functions created by statute.

4. Alcoholic Beverage Control Board

In the first of two cases decided during the last term affecting the activities of the Alcoholic Beverage Control Board, *Moberly v. Johnson*, the Court of Appeals affirmed the lower court which had reversed the decision of the Board refusing to issue a retail beer license to the appellees. The court followed the existing rule that the Board’s conclusions must be justified by the evidence. Here the fact that the unincorporated town had no local police (though it was patrolled by state and county police), that another tavern was located approximately five hundred feet from appellee’s premises, and that a school was located seven-tenths of a mile therefrom, did not justify the Board in refusing to grant the license.

*Carter v. Moberly* presented the question of whether the Alcoholic Beverage Control Board could overrule the decision of its malt beverage administrator who refused to grant a retail malt beverage license to applicants, where sufficient proof was introduced at the hearing before the Board to sustain the administrator’s refusal to issue the license. The court, in affirming the lower court and sustaining the Board, restated the existing rule that the administrator’s refusal did not become a final determination of the matter after a review had been requested with the Board. After conducting a hearing, the Board itself was required to make the final determination of whether the license should be granted.

31 376 S.W.2d 529 (Ky. 1964).
32 376 S.W.2d 518 (Ky. 1964).
5. **Department of Fish and Wildlife**

The Court of Appeals had occasion to decide only one case during the last term concerning the activities of the Fish & Wildlife Department. In *Pritchett v. Marshall*, the court reaffirmed existing law based on statutory interpretation by holding that the Commissioner of the Department may not employ private counsel and pay them out of public funds, even though the Fish and Wildlife Resources Commission approved the order.

KRS 12.210 authorizes a “department” to employ counsel at public expense only upon the approval of the governor. KRS 150.021 specified that the Department of Fish and Wildlife Resources was “a statutory administrative department of the state government” within the meaning of KRS chapter 12. The court, in reversing the trial court, rejected the Department’s contention that because KRS chapter 12 was subsequently amended in some respects without mentioning the Fish and Wildlife Resources Department, a legislative intent was manifested to remove the Department wholly from the purview of KRS chapter 12. The court held the legislative intent was simply to preserve the Department’s status quo, and no more.

6. **Department of Military Affairs**

In *Commonwealth v. Herrell*, the only case decided during the last term concerning the Department of Military Affairs, the court, in affirming the trial court, held that neither the state nor the Department had standing to maintain an action against a defendant to recover amounts allegedly obtained by defendant from veterans who assigned their bonus claims to him. Neither the state nor the Department have any proprietary interest in the proceeds of the bonus checks, and that only a veteran would have such a cause of action. The court rejected the Department’s argument that its legal standing to maintain the action was implied by KRS 40.230, authorizing the administrator of the Department to make rules and regulations for the implementation of KRS chapter 40.

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33 375 S.W.2d 253 (Ky. 1963).
34 374 S.W.2d 834 (Ky. 1964).
E. Public Officials

1. Nomination

The Court of Appeals had occasion to decide one case pertaining to the nomination of public officials. In *Anggelis v. Land*, plaintiff brought a proceeding to direct the county court clerk to issue him a certificate of nomination as the party nominee for office of state senator from the twelfth senatorial district. By the Redistricting Act of 1963, the old thirteenth district was divided in half, thereby comprising two districts—the twelfth and thirteenth. Since only senators in the odd numbered districts were to be elected in November of 1963, plaintiff contended that the new twelfth senatorial district would not be represented in the 1964 senate. However, the court held that the Redistricting Act merely changed the geographic boundaries of the twelfth district, and did not create a vacancy in that district so as to necessitate an election. This was a case of first instance in Kentucky.

2. Recovery and Removal

The court decided one case concerning the recovery from a public official and also one pertaining to the removal of a public official during the last term. In *McKenzie v. Commonwealth*, an action was brought against a former sheriff for the amount of an execution, including penalty and interest, pursuant to KRS 426.350 which provides such relief for the plaintiff in execution. The sheriff made the levy on the judgment debtor’s property, but refused to consummate the sale because he learned the judgment debtor had filed a petition to be adjudged a bankrupt, and letters from the referee and trustee in bankruptcy advised him not to make the sale. However, no order was issued by the federal court to nullify the execution lien, nor had the trustee or referee initiated proceedings to have the lien set aside or to subject the property of the bankrupt to the orders of the federal court. The court, in affirming the trial court, held this did not amount to reasonable excuse under the statute, and therefore the sheriff was liable for the amount of the execution. The interest, nevertheless, should only run from the date of judgment. The court followed federal decisions holding similarly.

35 371 S.W.2d 857 (Ky. 1963).
36 373 S.W.2d 595 (Ky. 1963).
Commonwealth v. Collins was concerned with whether a board of education member, who was also an officer and principal stockholder in a soft drink bottling firm, vacated his office by selling soft drinks to various schools in the system in which the company had placed vending machines. The profits from such drinks were used by the schools to purchase equipment and services, leaving only the remainder to pay the company. KRS 160.180(1)(e)(2) provided that the office of a board member shall be vacated if such member is directly or indirectly interested in the sale to the board of materials, supplies or services for which school funds are expended. The court, in reversing the circuit court, held the appellee's conduct directly violated the statute, and his office was thereby vacated. This case reaffirms a previous Kentucky case that such sales are improper despite the member's motives or the unprofitable nature of the sales to him.

3. Prosecution

The court had occasion to decide only one case relative to the prosecution of a public official—Commonwealth v. Howard. Here a water district commissioner was indicted for receiving a profit on public funds (KRS 61.190) and for taking a bribe [KRS 432.350(2)]. Funds were deposited with the water district by developers of various subdivisions, which funds were disbursed by the district in payment for construction of water distribution and sewerage systems in the subdivisions. In a previous action, the court found there existed an arrangement, among the contractor, appellee and two other commissioners, for the payment of "kickbacks" to the three commissioners, and that these payments were for an illegal purpose. The appellee contended that: (1) such funds were held by the water district only as an escrow agent; and (2) assuming they were public funds, they became private when the contractor obtained possession of them.

In answer to appellee's first argument, the court held that although the funds came from a private source, they became public funds when paid over to the water district, and it in turn became responsible for their proper disbursement. Hence, they are not held by the district as escrow agent but are "public funds"
within the statute prohibiting a public officer from receiving a profit on them [KRS 432.350(21)]. The court followed existing case law on this point.

Likewise, the court rejected appellee's second contention. The court stated that public funds do not become private funds when they are paid to the contractor who allegedly "kicked" them back to the commissioner. Public funds do not lose their public character when paid out for an illegal purpose. The court also followed existing law in holding that a water district commissioner is an officer within the meaning of the statutes prohibiting a public officer from receiving profit on public funds or from taking a bribe.
II. COMMERCIAL LAW

*Home Finance Co. v. Ratliff* was an action arising out of what apparently was thought to be an unreasonable disposition of a repossessed automobile by the secured creditor. The court does not, however, face the issue of commercial reasonableness as would be required by Kentucky's Uniform Commercial Code, since the appeal was directed at the question of damages. The Court of Appeals affirmed a compensatory damages award equivalent to the purchase price in effect four months prior to repossession, and allowed a deduction by defendant of the balance owed by the plaintiff on the note. The court reversed the award of punitive damages on the grounds that "at best the unfortunate incident can be regarded as [ordinary] negligence."

Briefly the facts were: (1) the finance company, subsequent to a default by the purchaser, repossessed his automobile; (2) a public auction was scheduled and the plaintiff was duly notified; (3) before the auction, an automobile dealer took possession in anticipation of acceptance of his standing bid for that particular automobile; (4) at the time scheduled, the defendant contends, "the car was offered for sale--albeit in *absentia*--whereas [plaintiff] ... maintains ... no sale of any kind was had."

The court held that "Ratliff was deprived of the benefit of a public sale of the car under the advertised and normal circumstances [and that] appellant was remiss in its obligation to Ratliff to conduct a proper sale." However, all that the plaintiff is entitled to under the Code is a "commercially reasonable" disposition and reasonable notice, but the court seemingly was reluctant to use that statutory language or even make reference to it. KRS 355.9-503 covers the secured party's right to repossession; KRS 355.9-504 and 355.9-507 cover in considerable detail the secured party's right to dispose of collateral after default and acceptable ways of so doing; KRS 355.9-506 covers the debtor's right to redeem the collateral which apparently the jury below and the Court of Appeals felt was denied him here, *inter alia*; KRS 355.9-507 provides remedies and minimum damages for the

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40 374 S.W.2d 494 (Ky. 1964).
42 Home Finance Co. v. Ratliff, 374 S.W.2d 494, 496 (Ky. 1964).
43 Id. at 495.
44 Id. at 496.
debtor where the creditor has failed in his duty of good faith or commercially reasonable conduct. Proper use of these sections would undoubtedly have cast this case into a somewhat different perspective.46

In G.M.A.C. v. Holbrook46 the court, on the defendant's statement of facts and issues, reversed a Magoffin circuit court jury verdict and judgment for the plaintiff, for wrongful repossession by the defendant finance company. The court said:

it appears . . . that the repossession was valid and proper because the terms of the conditional sales contract had been violated [and] the alleged statement of the repossessing agent, in response to [plaintiff's] offer to pay . . . as soon as the repairs on the automobile were complete, that he 'thought it would be all right,' could not be construed a waiver.47

Note that the rights of a secured party to take possession after a default are adequately covered by Kentucky's version of the Uniform Commercial Code48 although the court again failed to mention same.

45 Uniform Commercial Code § 9-507, comments 1 and 2.
46 375 S.W.2d 698 (Ky. 1964).
47 Ibid.
48 KRS 355.9-503.
III. CONDEMNATION

During the last term, the Court of Appeals decided five cases in the realm of condemnation law which were of major significance and several others which contained restatements and affirmances of existing rules or dealt primarily with procedure. The major cases will be discussed and analyzed individually and those of relatively minor significance from the standpoint of modifications in the existing law will be summarized within specific categories wherever possible.

In Commonwealth, Dep't of Highways v. Fister, the question was which factors the court should consider in its determination of the reasonableness of an award, given the fact that an award of some size should have been rendered. Recognizing the wide disparity between the value estimates of the landowner's witnesses and those of the condemnor's witnesses which existed in the principal case, and generally in most condemnation cases where valuation is in conflict, the court held the jury's verdict to be unreasonable. They then proceeded to set out one test for determining the reasonableness of an award insofar as the testimony of the property owner is concerned.

At one time the property owner was qualified to testify to the value of his property without restriction and then later the rule was qualified so that any basis shown to be irrelevant would be stricken from the evidence and the jury would be told to disregard his opinion on this point as a measure of value. The court adopted a new rule. Now, a property owner must be qualified affirmatively to testify as to present value of his property, just as any other witness must be. Then, after the owner has established prima facie qualifications and expressed his opinion, the qualifications and credibility of the owner's evidence may be further examined just as in the case of any other witness. The new rule should at least provide more uniformity in the rules allowing property valuation estimates and facilitate the jury in reaching a reasonable award.

The court then addressed itself to other contentions raised by the appellant and stated that these issues would be governed at

40 373 S.W.2d 720 (Ky. 1963).
the new trial by the principles set forth in *Commonwealth v. Tyree*, 50 and *Commonwealth v. Sherrod*.51

A case following in logical sequence to *Fister* is *Commonwealth v. Cardinal Hill Nursery, Inc.*, 52 where the court clarified several important cases53 dealing with the admissibility of evidence fixing individual "price tags" on factors which bear on the valuation opinion of an appraisal witness. The court says:

It is the opinion of the court that appraisal witnesses on direct examination may, after proper qualification as to competence, testify to the before and after market value of the property involved. Such witnesses, on direct examination, may relate any pertinent factors considered by them in arriving at the values to which they have testified; in so doing they may state their estimate of the amount by which a major structure enhances the "before" value of the land to which it is affixed, and in support of that estimate may testify as to the cost, original or reproduction, less depreciation, of the structure, upon the conditions and under the limitations set forth in *Commonwealth, Dept. of Highways v. Stamper*.54 . . . However, upon direct examination it is not proper for appraisal witnesses to ascribe an itemized price tag to "damage" factors. But on cross examination it is appropriate to make inquiry of the witness as to whether he has indeed ascribed particular amounts to "damage" factors. This is not to show "after" market value; it is to test the probative value of the evidence in chief from the witness. Some factors are not compensable; they are classified as damnum absque injuria. Certainly it would be fallacious to foreclose the cross-examiner's right to elicit from the appraisal witness admissions that he has priced such factors in his "after" market value testimony.55

50 365 S.W.2d 472 (Ky. 1963).
51 367 S.W.2d 844 (Ky. 1963). A companion case which grew out of the case discussed here is *Commonwealth, Dept. of Highways v. Fister*, 376 S.W.2d 543 (Ky. 1964) in which the court ruled on a petition requesting an amendment to the mandate in the original *Fister* case assessing the cost of the appeal against Fister, the unsuccessful party. The court ruled that it was not an abridgment of §§ 13 and 242 of the Kentucky Constitution to assess this cost against the landowner if he was the unsuccessful party. An explanation of the original *Fister* case is contained in *Commonwealth, Dept. of Highways v. Raleigh*, 375 S.W.2d 384 (Ky. 1964) where the court acts out the transition of this rule from *Barron v. Phelps*, 238 S.W.2d 1016 (Ky. 1951) to the original *Fister* case.
52 380 S.W.2d 249 (Ky. 1964).
54 345 S.W.2d 640 (Ky. 1961).
Therefore, under the existing law, appraisal witnesses may, on direct examination, relate the factors considered by them in arriving at their estimate of the “before” and “after” condemnation values of property but they cannot present particular “damage” factors which are assigned specific amounts. Then, on cross-examination, it is proper for the opposing counsel to elicit testimony as to the “damage” factors merely for the purpose of determining probative values, inasmuch as some of the factors considered may not be compensable.

The court, in *Commonwealth, Dep't of Highways v. Barker*, was confronted with the problem of whether to take jurisdiction over a situation where the condemnor failed to appeal to the circuit court. The county court judgment was for $895.24 and the property owner alone appealed. The circuit court judgment was for 3000 dollars, obviously enough to meet the 2500 dollar requirement for an appeal as a matter of right. But the court held that the condemnor’s failure to appeal the county court judgment amounted to an admission of liability and therefore the “amount in controversy” was the $2104.75 difference between the judgment of the county court and that of the circuit court. This meant that the appeal was governed by RCA 1.180, by virtue of KRS 21.080, which gives the Court of Appeals power to make its own rules in appeals of cases involving less than 2500 dollars. In rendering the decision, the court partially overruled *Greenwade v. Williams*, where it was said that the amount of the judgment against a defendant is the amount in controversy upon an appeal by the defendant. It overrules to the extent it may be construed to apply to a defendant who has conceded liability on a prior judgment. Since the condemnor prosecuted the appeal as a “matter of right” under KRS 21.060, rather than as prescribed by RCA 1.180, governing appeals of less than 2,500 dollars, the appeal was dismissed. The new rule seems reasonable although rather harsh on the condemnor in the principal case.

There is a definite problem of what property to compare to measure the value of that in question and what type of use of the

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56 379 S.W.2d 481 (Ky. 1964).
57 KRS 21.060.
58 KRS 21.070.
59 281 S.W.2d 707 (Ky. 1955).
property compared is the proper criterion in determining the condemned value. *Robinette v. Commonwealth,*\(^{60}\) is helpful concerning both comparable property and use of land. Relating to the subject of comparable property, the court held that even if the property which is put into evidence for comparison is not being used for exactly the same purpose as the condemned land, so long as it sufficiently resembles the condemned land, it may be admitted in evidence to bear on the issue of value and to be of aid to the jury. In the principal case, comparable property located within five miles of the condemnee's land which was sold within three years of the taking was held proper evidence to take into consideration. Finally, the court set out the ultimate test which should be used in determining the highest and best use of the land, which is: "The ultimate test of the type of use which is properly the criterion of market value is the use to which men of prudence and wisdom, having adequate means, would devote the property if owned by them."\(^{61}\) The court qualified this test by stating that where income is derived mainly from the skill of the operator in using the property rather than from the productivity of the property itself, testimony pertaining to that income should be excluded since this is a non-compensable matter.

The last case of primary importance is *Milby v. Louisville Gas and Electric Co.*,\(^{62}\) where the court was presented with a novel situation. The valuation problem dealt with rights to an underground storage space for gas. Although there were no known sales in Kentucky of such rights nor were there any sales of land in which the existence of storage space was a factor bearing on the sale price, the court found a solution. There were a substantial number of leases of underground storage space and it was held "that an established lease value is a fair basis from which to measure market value."\(^{63}\) The court also discussed the rule to be applied when the space is the subject of competitive demand and the demand is only by public service corporations that have the power of eminent domain. Simply stated, the rule is basically the same provided that a number of leases are

\(^{60}\) 380 S.W.2d 78 (Ky. 1964).
\(^{61}\) Id. at 83.
\(^{62}\) 375 S.W.2d 237 (Ky. 1963).
\(^{63}\) Id. at 240.
introduced into evidence to prove this value rather than just a single lease.\textsuperscript{64}

There were five decisions\textsuperscript{65} which dealt primarily with the rights to an appeal. Two of the cases\textsuperscript{66} concerned an appeal where all of the defendants in the original action were not made parties to the appeal. The court ruled that this was not necessary since it would be serving no useful purpose to draw in a defendant who was satisfied with the judgment in the lower court. However, the court held that the non-appealing defendants lost their right to appeal when they failed to appeal a lower court judgment.

*Commonwealth, Dep't of Highways v. Chenault,*\textsuperscript{67} involved a situation where both parties filed an appeal to circuit court but the owner failed to file a copy of the county court judgment within 30 days as required by statute.\textsuperscript{68} The defect was cured by the court having before it the copy filed by the condemnor. The court rejected the argument of the condemnor that they could withdraw their appeal and the copy of the judgment and leave the owner without recourse.

Another case dealing with the right to an appeal\textsuperscript{69} held that when the Commonwealth does not appeal from the award in the county court, the issue of excessive compensation is closed and no longer justiciable in the same proceeding. The court also held that on appeal to the circuit court, if the judgment rendered was smaller than that awarded in the county court and the Commonwealth has not appealed, the appellant is entitled to the county court judgment since not allowing this would have the effect of giving the Commonwealth an automatic cross-appeal.

The last case on the subject\textsuperscript{70} dealt with the failure of the Commonwealth to make a remainderman a party appellee to its appeal. The court held that the remainderman was an indis-

\textsuperscript{64} Ibid.
\textsuperscript{65} Sheffield v. Commonwealth, Dep't of Highways, 376 S.W.2d 688 (Ky. 1964); Commonwealth, Dep't of Highways v. Kelley, 376 S.W.2d 539 (Ky. 1964); Commonwealth, Dep't of Highways v. C. S. Brent Seed Co., 376 S.W.2d 310 (Ky. 1964); Riley v. Commonwealth, Dep't of Highways v. Chenault, 371 S.W.2d 948 (Ky. 1963).
\textsuperscript{67} 371 S.W.2d 948 (Ky. 1963).
\textsuperscript{68} KRS 177.087.
\textsuperscript{69} Commonwealth v. C. S. Brent Seed Co., *supra* note 65.
\textsuperscript{70} Commonwealth v. Kelley, *supra* note 65. The court also stated in this case that they were overruling so much of Big Sandy Ry. Co. v. Dils, 120 Ky. 563, 87 S.W. 310 (1905) that deals with the question of proper appeal.
pensable party and that without him being named specifically in the caption, the appeal should be dismissed. The reason for requiring that the remainderman be named in the caption is that in the statement of the parties to the appeal, the Commonwealth stated that they were named in the caption.

Seven cases\(^7\) were generally concerned with comparable property. Three\(^7\) were from the same circuit court and concerned the same issue in regard to condemnation of land for the relocation of the same highway. The circuit court had affirmed a decision to disallow evidence as to the price paid for comparable property and the Court of Appeals simply held that such an error is reversible.

One case\(^7\) pertained to an exclusion of evidence presented by the Commonwealth’s witness of the sale of another church in the same county, the buildings being of different construction and age. Held: Reversible error. Since church properties sell so seldom, any “reasonably comparable” sale should have been admitted for evidentiary purposes and any dissimilarities brought out by examination of the witness at the trial.

*Commonwealth, Dep’t of Highways v. McCready,*\(^7\) held it is not error to admit a subdivision plat in evidence or to place a subdivision value on an undeveloped tract of land where the land has been purchased for a subdivision long before interstate highways were even conceived, and part of the property has already been developed.

Reaffirmance of a very important rule occurred in one decision,\(^7\) the rule stating that a witness as to value need not be an expert on property but only needs to know the property to be valued and the value of property in the vicinity and have the

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\(^{71}\) Commonwealth, Dep’t of Highways v. Shackleford, 380 S.W.2d 77 (Ky. 1964); Commonwealth, Dep’t of Highways v. Lemar, 375 S.W.2d 678 (Ky. 1964); Commonwealth, Dep’t of Highways v. Howard, 375 S.W.2d 398 (Ky. 1964); Commonwealth, Dep’t of Highways v. Oakland United Baptist Church, 372 S.W.2d 412 (Ky. 1963); Commonwealth, Dep’t of Highways v. Slusher, 371 S.W.2d 851 (Ky. 1963); Commonwealth, Dep’t of Highways v. McCready, 371 S.W.2d 485 (Ky. 1963); and Commonwealth, Dep’t of Highways v. Herndon, 378 S.W.2d 620 (Ky. 1964).


\(^{73}\) Commonwealth v. Oakland United Baptist Church, *supra* note 71.

\(^{74}\) 371 S.W.2d 485 (Ky. 1963).

ability to make a reasoned inference. In another restatement of an existing rule, the court held that it was error to admit evidence or prices paid in other condemnation suits in the area as bearing on the market value of the property and that the property owner has no vested interest in traffic which will be diverted from the old road to another.

*Commonwealth, Dep't of Highways v. Herndon,*[78] held that it is improper for a jury to consider damages from the closing of one road from the property into town where two other roads of like suitability were available; evidence of sale price received by other owners as unwilling sellers; and the price the property was listed for with a real estate broker.

Three cases[77] were concerned with the problem of a change in access to the public highway system after the condemnation. The court decided two cases[78] where the access was less than before the taking, and one case[79] where the access was greater than before the taking. Held: A landowner is not entitled to be compensated for loss of his prior access to the public highway system provided that the condemnor left the landowner with *reasonable* access to the highway. The court also held on the question of enhancement in value as a result of being nearer to interchanges, that it is proper for the condemnor to introduce evidence to prove that this enhancement came about as a result of their taking of the condemned property.

*Commonwealth, Dep't of Highways v. Phillips,*[80] also dealing with an access problem, held that where the condemnor's appraiser admitted that loss of access was a factor, it was not erroneous to admit testimony as to the decreased accessibility of the land remaining and in allowing testimony as to the damages to the entire tract of land where it was not broken down as to the taking and the damage to the remainder.

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[76] 378 S.W.2d 620 (Ky. 1964).
[77] Commonwealth, Dep't of Highways v. Denny, 380 S.W.2d 233 (Ky. 1964); The Cincinnati, New Orleans & Texas Pacific Railway Co., a Corporation v. Commonwealth, Dep't of Highways, 376 S.W.2d 307 (Ky. 1964); and Cartee v. Commonwealth, Dep't of Highways, 374 S.W.2d 560 (Ky. 1964). The court also stated, in the Denny case, that they were overruling so much of Commonwealth, Dep't of Highways v. Carlisle, 363 S.W.2d 104 (Ky. 1963), as attributed controlling significance to the pleadings in condemnation cases.
[80] 379 S.W.2d 435 (Ky. 1964).
There were four cases similar because they involved some factor affecting the value of the property condemned or determination of the recipient directly. In *Whitley City Church of Christ v. Whitley City Christian Church*, the issue was which church was entitled to the condemnation award where they were formally the same organization but prior to the taking, they separated. The court held that the group entitled to recover the award was the one which represented the original church body and that this question would be determined by seeing which one represented the original church in matters of religious doctrine and observances. The church which remained substantially the same with respect to these matters was entitled to the recovery.

One case held that it was error to exclude evidence of the amount of a past appraisal (1956) for mortgage purposes but not reversible error because the existence of the appraisal was known to the jury in the principal case and they had heard enough to realize that it must have placed a lower valuation on the property. The owner had contended that a mortgage valuation is not an indication of market value.

*Commonwealth, Dep't of Highways v. Wood,* held it erroneous to allow evidence of the value of the property taken as of the day of a public hearing which informed the public of the proposed construction, since the correct measure of recovery is the fair market value of the property just before the project is generally known. In *Commonwealth, Dep't of Highways v. Houchins,* it was held that the jury should be sent to view the premises where the alleged damage included destruction of building lot value and the property owner so requested. There was a question of whether the lots were so suited and the condemnee requested under KRS 177.087, and the denial was reversible error.

The court had the opportunity to consider the question of the propriety of the appellee's counsel's statement to the jury in

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81 Commonwealth, Dep't of Highways v. Finley, 371 S.W.2d 854 (Ky. 1963); Commonwealth, Dep't of Highways v. Wood, 380 S.W.2d 73 (Ky. 1964); Commonwealth, Dep't of Highways v. Houchins, 380 S.W.2d 95 (Ky. 1964); and Whitley City Church of Christ v. Whitley City Christian Church, 373 S.W.2d 423 (Ky. 1963).
82 373 S.W.2d 423 (Ky. 1963).
83 Commonwealth v. Finley, supra note 81.
84 380 S.W.2d 73 (Ky. 1964).
85 380 S.W.2d 95 (Ky. 1964).
his opening remarks in *Commonwealth, Dep't of Highways v. Swift*. He included the amount of the county commissioners' award. Held: Such a statement is analogous to a remark by one of the counsel that the opposing party has liability insurance coverage and that such a remark will entitle the opposing party to a declaration of a mistrial.

There were five other significant cases winding up the past term of the Court of Appeals. One decision held it erroneous to refuse a motion for a directed verdict or for a verdict n.o.v. where the condemnor had introduced the only evidence as to value and the jury returned a much larger verdict than the evidence indicated. Another concerned an original proceeding to the court for an injunction to prevent the county judge from issuing a writ of possession, which was denied because the owner had an adequate remedy for injunction in the circuit court. Here, the circuit court had denied an injunction, but the petitioner's action to the Court of Appeals was styled an original proceeding rather than an appeal from the circuit court. In *Commonwealth, Dep't of Highways v. Braham*, the court reaffirmed the rule that it is proper to allow the admission of tax returns as evidence in order to try to establish the value of the property condemned while it was being used for a certain purpose. *Commonwealth, Dep't of Highways v. Frank Fehr Brewing Company*, held that where the opposing party put on as an expert valuation witness, a person who had not been disclosed to the Commonwealth, and the Commonwealth failed to ask for a continuance or a delay in order to examine the new witness, this constituted a waiver of the right to do so and was not proper grounds for a reversal. The last case which will be discussed here, dealt with an original condemnation complaint which described the property incorrectly and an amended complaint which was correct. The appraisers actually inspected the correct property, and it was held not to be grounds for a motion to appoint a new commission to inspect the property.

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86 375 S.W.2d 691 (Ky. 1964).
87 Commonwealth, Dep't of Highways v. Brooke, 380 S.W.2d 77 (Ky. 1964).
88 Stillpass v. Niblick, 378 S.W.2d 794 (Ky. 1964).
89 380 S.W.2d 213 (Ky. 1964).
90 376 S.W.2d 541 (Ky. 1964).
91 Whitesburg Municipal Housing Comm'n v. Hale, 371 S.W.2d 482 (Ky. 1963).
During the 1962-1963 term, there were two cases which are having a profound influence on condemnation law. The two cases are Commonwealth, Dep't of Highways v. Tyree, and Commonwealth, Dep't of Highways v. Sherrod. They established both rules for determining the proper amount of an award and the procedure to be followed in resolving the amount, and their principles have been adhered to this past term.

92 365 S.W.2d 472 (Ky. 1963).
93 367 S.W.2d 844 (Ky. 1963).
94 Commonwealth, Dep't of Highways v. Lanter, 379 S.W.2d 233 (Ky. 1964) (Sherrod); Commonwealth, Dep't of Highways v. King, 375 S.W.2d 638 (Ky. 1964) (Sherrod); Commonwealth, Dep't of Highways v. Brubaker, 375 S.W.2d 404 (Ky. 1964) (Tyree); Commonwealth, Dep't of Highways v. Darch, 374 S.W.2d 460 (Ky. 1964) (Tyree and Sherrod); Commonwealth, Dep't of Highways v. Eston, 371 S.W.2d 869 (Ky. 1963) (Tyree and Sherrod); and Davis v. Commonwealth, Dep't of Highways, 374 S.W.2d 513 (Ky. 1963) (Sherrod).
IV. CONSTITUTIONAL LAW

The Kentucky Court of Appeals rendered nine decisions in the field of constitutional law during their 1963-1964 term. The constitutionality of state statutes was the concern of seven cases and in only one was the statute in question held unconstitutional. A brief summary follows and then each decision will be analyzed and discussed separately.

A petition for mandamus by convicted defendants to compel a judge to supply them with a record of the trial was denied. The Department of Highways was held to be immune from suit both on the contract price for work performed and for damages for breach of contract. The court upheld the constitutionality of the Kentucky Billboard Act, the Junk Yard Act, the Arts and Crafts Loan Fund Act, and the Nursing Home and Personal Care Home Loan Fund Act. A statute authorizing the Commissioner of Finance to enter into agreements with other states or the federal government on joint unemployment compensation programs was held constitutional. Absentee voting provisions covering students and federal employees did not deprive other groups of voting rights, nor did the provisions violate the constitutional requirements for general registration.

95 Schroader v. Bratcher, 380 S.W.2d 249 (Ky. 1964); Commonwealth v. Associated Industries of Kentucky, 370 S.W.2d 584 (Ky. 1963); Foley Construction Co. v. Ward, 375 S.W.2d 392 (Ky. 1964); Hallahan v. Mittlebeeler, 373 S.W.2d 726 (Ky. 1963); Stovall v. Eastern Baptist Institute and Stovall v. Commonwealth, 375 S.W.2d 273 (Ky. 1964); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Cook v. Ward, 381 S.W.2d 168 (Ky. 1964); Moore v. Ward, 377 S.W.2d 851 (Ky. 1964); and American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964).


97 American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, supra note 95.

98 Schroader v. Bratcher, supra note 95.

99 Foley Construction Co. v. Ward, supra note 95.

99 KRS 177.830-990; Moore v. Ward, supra note 95.

100 KRS 177.905-990; Jasper v. Commonwealth, supra note 95.

101 KRS 152.410-480; Stovall v. Eastern Baptist Institute and Stovall v. Commonwealth, supra note 95.

102 KRS 316.750-780; Stovall v. Eastern Baptist Institute and Stovall v. Commonwealth, supra note 95.

103 KRS 341.145(3)(a).

104 Commonwealth v. Associated Industries of Kentucky, supra note 95.

105 Ky. Acts 1962, ch. 120.
of voters. An amendment to a statute providing that funds should be allotted according to the provisions of KRS 177.360(1) was upheld as not being an amendment to a statute by reference to its title only. Finally, a statute which provided for a trial de novo in circuit court on appeal from zoning commission rulings was struck down by the court as an unlawful delegation of power to the courts in violation of the Kentucky Constitution and it was indicated by way of dictum that the same ruling would apply to appeals from board of adjustment rulings under KRS 100.085.

Commonwealth v. Associated Industries of Kentucky dealt with the constitutionality of a statute which authorizes the Commissioner of Economic Security to enter into agreements with other states or the federal government on joint programs of unemployment compensation. It was attacked as an unlawful delegation of power under the Kentucky Constitution which vests powers in the various branches of state government, and as an unlawful distribution of state funds for a purpose other than that for which the funds were collected in violation of the Kentucky Constitution. The court held that the Kentucky Constitution does not by implication prohibit delegation and that other sections of the constitution impliedly recognize the power to delegate. The use of funds collected for the Kentucky unemployment program could be for a joint unemployment program with other states and the federal government and still be within the meaning of "used for the same purpose" as required by section 180. The court distinguished Unemployment Commission v. Savage, where a transfer of funds from the Unemployment Compensation Fund to the federal government for payments under the Federal Railroad Unemployment Insurance Act was

107 Hallahan v. Mittlebeeler, supra note 95.
108 KRS 179.410.
109 Cook v. Ward, supra note 95.
110 KRS 100.057.
111 Ky. Const. § 27.
112 American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, supra note 95.
113 370 S.W.2d 392 (Ky. 1963).
114 KRS 341.145(3)(a).
115 Ky. Const. §§ 27, 28 and 29.
116 Ky. Const. § 180.
117 Ky. Const. §§ 156 and 166.
118 Ky. Const. § 180 provides that an act or ordinance levying any tax must specify the purpose, for which alone the money can be used.
119 283 Ky. 301, 140 S.W.2d 1073 (1940).
held to be an unlawful diversion of funds for a purpose foreign to that for which they were originally collected, stating that a change in the purpose of the fund took place in Savage.

Foley Construction Company v. Ward was an extremely enlightening case on the doctrine of sovereign immunity and its existence and use in Kentucky. The plaintiff sued the Kentucky Department of Highways for damages for breach of contract and for payment withheld on the contract price for the work performed. A plea of sovereign immunity by the Department of Highways as an agency of the state was held to be a valid defense to the suit. No merit was established in the plaintiff's contention that the authorization by the legislature for the agency to enter into contracts impliedly authorizes the right to sue the agency. The court handled this "mutuality of obligation" argument by drawing an analogy to infant-adult contracts which are only enforceable by one of the parties. Sovereign immunity was held not to be relinquished by the legislature's act of granting the right to sue in certain cases.

Watkins, Consulting Engineer v. Dep't of Highways was distinguished because it did not involve the right to sue on a contract but rather a determination of whether to enforce an arbitration agreement. But, the court expressly overruled Derby Road Building Company v. Commonwealth which was based on the mutuality of obligation dicta in the Watkins case. This is indeed a giant's step in reverse to any trend in doing away with sovereign immunity.

The Junkyard Act prohibits unfenced junk yards within a certain distance of public highways and its validity was attacked in Jasper v. Commonwealth. Aesthetic considerations alone were held to be of sufficient public benefit to carry the provision outside the realm of unreasonable exercise of the public welfare power of the legislature. It was further held that the enforcement power granted to the Commissioner of Highways was not an unlawful delegation of power and that the penalties for violation were not unreasonable. The attack by the plaintiff was based on

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120 375 S.W.2d 392 (Ky. 1964).
121 290 S.W.2d 28 (Ky. 1956).
122 317 S.W.2d 891 (Ky. 1958).
123 KRS 177.905-990.
124 375 S.W.2d 709 (Ky. 1964).
U.S. Const. amends. V and XIV and section 13 of the Kentucky Constitution, and the court stated that the act, if invalid, would violate section 2 of the constitution which provides: "Absolute and arbitrary power over the lives, liberty and property of free-men exists nowhere in a republic, not even in the largest majority."

A petition for mandamus filed by convicted defendants was dismissed in *Schroader v. Bratcher*. The petition was framed to compel a judge to supply the defendants with a record of their trial and to obtain release from a penitentiary on the basis that the constitutional rights of the parties were violated. The petition was held to be too general to show the alleged specific violation of their rights.

In *Stovall v. Eastern Baptist Institute* and *Stovall v. Commonwealth*, the Arts and Craft Loan Fund Act and the Nursing Home and Personal Care Home Loan Fund Act, which provides for loans to private companies and individuals in these areas, were upheld. The Kentucky State Treasurer, Thelma Stovall, refused to honor warrants for loans approved under the acts and the plaintiffs appealed. The treasurer contended that the acts were in violation of the Kentucky Constitution as an unlawful delegation of power, as serving a private rather than a public purpose, and a lending of the credit of the Commonwealth to an individual or company, and a donation to a company. The court found that there was no unlawful delegation of power following the *Commonwealth v. Associated Industries of Kentucky* case. The promotion of arts and crafts and nursing care for the elderly was upheld as a valid exercise of the public welfare powers. The fact that there would also be some private benefits under the acts did not negate their public purpose. The acts were not a lending of the credit of the Commonwealth but were merely a lending of money and the fact that private loans were not available did not equate the loans with a donation.

The Billboard Act prohibits signs within 660 feet of the...
right of way of any interstate, limited access highway or turnpike, and its constitutionality was upheld in Moore v. Ward\textsuperscript{124} against contentions that it was unreasonable and arbitrary because such signs bear no causal relationship to highway safety. It was further contended that the act constituted a relinquishment of the state’s police power to the federal government,\textsuperscript{135} and that it amounted to a taking of property without due process as well as an ex post facto law. The act was held not unreasonable because it had a valid public purpose in aesthetic considerations even if it did not have a bearing on traffic safety, and therefore it was not error in the lower court to exclude plaintiff’s evidence that the legislature made an incorrect evaluation. The court stated that its function was not to inquire into the motives or correctness of the legislature’s evaluation. The fact that the state adopted the same standards as the federal government was not a relinquishment of the state’s power, but was simply a legislative choice of the best of standards for the state. Nor was it invalidated by the fact that the adoption of federal standards was required for federal subsidy.

There was not a taking of a property right because there is no right to exploit state highways, and there was therefore a mere refusal of a privilege which could be created and which could constitutionally be taken away. The court noted the fact that practically any exercise of the state’s police power amounts to the destruction of a property right in some form. The act was not objectionable as ex post facto because private rights are always subject to public rights, and it was not unreasonable because it went no further than necessary to protect the public interest involved.

The 1962 absentee ballot amendment\textsuperscript{136} which provides for absentee ballots for persons serving the federal government and their dependents and for full-time students, was attacked in Hallahan v. Mittlebeeler.\textsuperscript{137} The plaintiff had contended that the act deprived persons not in the named groups of their right to vote \textit{contra} the Kentucky Constitution,\textsuperscript{138} and that the act was

\begin{itemize}
\item \textsuperscript{124} 377 S.W.2d 881 (Ky. 1964).
\item \textsuperscript{125} Federal standards for interstate highways are required to be adopted as a condition for federal subsidy.
\item \textsuperscript{130} Ky. Acts 1962, ch. 120.
\item \textsuperscript{137} 373 S.W.2d 726 (Ky. 1963).
\item \textsuperscript{138} Ky. Const. §§ 1, 2, 3, 6 and 59.
\end{itemize}
contra the constitutional provision for general registration of voters in the state. The court held that the constitution does not require the legislature to provide for the other voters and therefore they were not deprived of a right. The Kentucky Constitution merely recites that the legislature "may" enact legislation for "other voters;" it does not mean that the legislature must provide for all voters. There is no express provision prohibiting the establishment of classes of absentee voters and the classifications chosen by the legislature were found to be reasonable.

In Cook v. Ward the validity of an amendment which provides for allocation of funds "in accordance with the provisions of KRS 177.360 (1)" was upheld in light of section 51 of the Kentucky Constitution which provides that "no law shall be revised, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred shall be re-enacted and published at length." The court held that the purpose of the constitutional provision was to avoid the situation which existed when the legislature did not know what it was voting for, and that amendment by reference to KRS sections does not pose this problem because no legislator could be misled. The court quoted from a report of the debates of the constitutional convention as evidence of legislative intent:

> The members of the General Assembly did not know what they were voting on half the time and the section in the report provides when an act is amended it shall not be amended in that way, but the act, as amended, shall be set out in full, so every man will understand what it is when voting on it, and the people will know what change has been made when they see it.

The court also found the amendment not to be a re-enactment of KRS 177.360 (1) but merely an incorporation of its provisions into the amendment, and that the amended section was fully published.

American Beauty Homes Corp. v. Louisville and Jefferson

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139 Ky. Const. § 147.
140 Ibid.
141 381 S.W.2d 168 (Ky. 1964).
142 KRS 179.410.
143 381 S.W.2d at 170.
County Planning and Zoning Comm'n\textsuperscript{144} was the sole decision in which a statute was held unconstitutional. The commission challenged the validity of a statute\textsuperscript{145} which provided for a trial de novo in circuit court from zoning commission rulings as an unlawful attempt to delegate a legislative function to the courts in violation of the Kentucky Constitution provision\textsuperscript{146} for separation of the branches of state government. The court sustained this contention and declared this part of the statute invalid as a substitution of the court for a legislatively-created commission. However, the provision was found severable from the remainder of the statute providing for appeals because the right to appeal in certain situations\textsuperscript{147} is an inherent right and could not be impaired by the legislature. Two cases were expressly overruled. \textit{Louisville and Jefferson County Planning and Zoning Comm'n v. Grady}\textsuperscript{148} and \textit{Boyd v. Jefferson County Planning and Zoning Comm'n}\textsuperscript{149} were in direct conflict with the principal case. The court further indicated that it would follow the same path in appeals from board of adjustment rulings under a similar statute.\textsuperscript{150}
V. CONTRACTS

During the 1963-1964 term, the Court of Appeals rendered seven decisions which primarily sound in contract law. These seven involve questions ranging from fraud in the sale of an oil lease,151 interpretation of contractual intent,152 quantum meruit recovery,153 mutual releases,154 mutuality of consideration,155 the parole evidence rule,156 to an action for specific performance of an option to purchase.157

_Lappas v. Barker_158 is an unique case involving fraud in the sale of an oil lease in Green county. This suit was instigated by the seller of the lease to obtain satisfaction on a fifty thousand dollar note given in part payment for a three-quarter interest in the lease, and an additional one hundred thousand dollars having been paid in cash. The defendant, a foreign investor who had executed the note, pleads fraud in inducement and seeks recision of the whole transaction. Defendant's two contact men in Green County were men with whom he had previously entered in similar joint enterprises. These two induced the defendant to buy the said lease in a purported joint venture whereby they were to pay fifty thousand dollars for a one-fourth interest. Unknown to the defendant, these two men had a secret agreement with the plaintiff, seller, whereby their checks for twenty-five thousand each were to be returned to them. The seller had told the men that they could have all over one hundred and fifty thousand they could get for the lease.

The Court of Appeals held that the defendant and the two contact men had entered a joint enterprise to purchase and that a fiduciary relationship was thereby created between the parties.159 “As a general rule joint purchasers of property owe fiduciary obligations to one another”160 and therefore the defendant had a

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151 Lappas v. Barker, 375 S.W.2d 248 (Ky. 1963).
152 Arnold v. Mitchell, 377 S.W.2d 799 (Ky. 1964).
153 Jones v. Preston, 376 S.W.2d 530 (Ky. 1964).
154 Gibson v. Dupin, 377 S.W.2d 585 (Ky. 1964).
155 Cain v. White, 377 S.W.2d 90 (Ky. 1964).
156 Mario's Pizzeria, Inc. v. Federal Sign & Signal Corp. 379 S.W.2d 736 (Ky. 1964).
157 Duo County Telephone Cooperative Corp. v. Reese, 379 S.W.2d 483 (Ky. 1964).
158 Lappas v. Barker, _supra_ note 151.
159 Restatement, Torts § 874 (1934).
right to rely on the representations of these two men and the fairness of the transaction. All parties to the sale except the defendant knew these men were not in fact investing their own money. This, plus the method of transacting the sale, i.e., passing of three checks with two coming back under the table, together with the general circumstances surrounding the relationship, conclusively showed that there existed here a misrepresentation which constituted a material inducement for the defendant to enter the contract to his detriment.

Fraud was thus clear, but the question of relief was somewhat of a problem for the court since this was a suit by the seller against the defendant not involving the two contact men. A return to status quo appeared too difficult, and the court felt that the seller should not bear the entire loss. To solve the dilemma they granted the defendant recovery of excess payment against the seller on grounds of aiding and abetting the fraud. This was accomplished by reducing his note by a credit which made his total outlay three-fourths of one hundred and fifty thousand rather than of two hundred thousand dollars. Joint liability based on aiding and abetting a fiduciary seems to be of first impression in Kentucky.

Arnold v. Mitchell involved two consolidated actions by a real estate broker against the subdividers and the corporations formed to develop certain subdivisions, for additional compensation due. The findings of the Fayette County Master Commissioner to whom the cases were referred were approved almost to the letter by the Court of Appeals. One controversy arose out of a written preliminary contract between the parties looking toward formation of one of the defendant corporations. Both the contract and the corporation were brought into existence at least primarily to obtain capital gains treatment for the land-owning subdivider. The contract contained the following:

It is further understood and agreed that after said corporation has been formed and the land sold that an additional three percent (3%) of the total gross sale price will be paid to the party of the third part for his services rendered to the association and/or corporation.

101 Arnold v. Mitchell, supra note 152.
102 Id. at 800-801.
Defendants insisted that there was no intention to be bound by this contract of association since it was executed solely for tax purposes. But the court said that the Master Commissioner's finding of actual intent to pay was supported by the evidence and not so clearly erroneous as would be necessary to overturn. Defendant further asserted non-liability on the basis of a "null and void" context, holding that the instrument when read as a whole intended the obligations of the association to be transferred to the corporation on formation, which formation was to end the association as such.

Also noteworthy was an interpretation of the words "net profit." In a contract of compensation the plaintiff was to receive "twenty (20%) percent of the net profits after the costs of the land and development have been made." The court held that when these words were so qualified by expenses relating only to direct costs, the intent was net profit before deductions of indirect costs such as income taxes and the employing corporation president's annual salary.

In Jones v. Preston a subcontractor sought a quantum meruit recovery for work done in excess of his bid to the principal contractor. Two things worked to defeat the plaintiff's recovery here: (1) the defendant lost money on the principal contract and thus "no equities in favor of [plaintiff] . . . such as would furnish the basis for a quantum meruit recovery", (2) an oral contract between the parties "to go ahead and get it done and . . . if he made anything he would divide up . . ." clearly provided that the principal contractor would not pay anything unless he made a profit and this was not so indefinite as to warrant use of quantum meruit recovery.

In Gibson v. Dupin the plaintiff, injured in an auto accident, sues the driver of the other car, a minor, as well as his father, the owner, on the basis of the family purpose doctrine. The defendant pleads in bar a release signed by the plaintiff. To escape the financial responsibility requirements and consequences of Ken-

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163 Id. at 802.
164 Jones v. Preston, supra note 153.
165 Id. at 531.
166 Ibid.
167 See Simmons v. Atleberry, 310 S.W.2d 543 (Ky. 1958).
168 Gibson v. Dupin, supra note 154.
170 Gibson v. Dupin, supra note 154 at 586.
171 Accord, Clark v. Brewer, 329 S.W.2d 384 (Ky. 1959); see Restatement, Contracts § 70 (1932).
172 Kingins v. Hurt, 347 S.W.2d 811 (Ky. 1961); Restatement, Torts § 885 (1934).
173 Kingins v. Hurt, supra note 172, at 812.
174 Cain v. White, supra note 155.
thus terminate the agreement. But, if he did continue manufacturing, he must pay the plaintiff under the contract for his interest in the product. The court here followed fairly well settled principles of law concerning mutuality.\textsuperscript{175}

In \textit{Mario's Pizzeria, Inc. v. Federal Sign and Signal Corp.}\textsuperscript{176} the plaintiff alleged that he was fraudulently induced to enter a lease contract for a neon sign by the salesman's oral promise that he could buy the sign for one dollar at the end of the lease period. The signed contract provided specifically that the title was to remain always in the defendant. Plaintiff had read the contract before signing and protested but then allegedly acquiesced when the salesman promised otherwise. The salesman denies the oral promise. The plaintiff at trial level sought specific performance of the oral contract or damages. Appeal was brought by the plaintiff on a summary judgment for the defendant.

In affirming, the Court of Appeals said "it is our conclusion that there was no genuine issue as to a material fact to be tried"\textsuperscript{177} because the parol evidence rule applies and prevents anything coming in to contradict or vary the unambiguous terms of the written lease. The case is in accord with general law.\textsuperscript{178}

\textit{Duo County Tel. Co-op. Corp. v. Reese}\textsuperscript{179} is an action for specific performance of a right to purchase option sought to be exercised by the lessee. Defendant, owner of the building who had built to the lessee's specifications, insists on "\$4,500 in addition to stipulated option price, . . . [for] cost of changes in and additions to the specifications according to which the building originally was to have been constructed."\textsuperscript{180} The Court of Appeals reversed and held for the plaintiff on a finding that the defendant's acceptance of advance rental payments without asserting a claim for extra costs negated any construction of an implied contract to pay.

\textsuperscript{175} Hambrick v. City of Ashland, 321 S.W.2d 401 (Ky. 1959); United States Fidelity & Guaranty Co. v. Cabell, 264 Ky. 135, 94 S.W.2d 320 (1936); Restatement, Contracts § 372 (1932).

\textsuperscript{176} Mario's Pizzeria, Inc. v. Federal Sign and Signal Corp., supra note 156.

\textsuperscript{177} Id. at 740.

\textsuperscript{178} 24 Am. Jur. Fraud and Deceit § 267 (1939).

\textsuperscript{180} Id. at 484.
VI. CORPORATIONS

During the last term of the Court of Appeals, five decisions were rendered involving principally corporation law. The two most interesting are the well-written opinion by Judge Palmore in Security Trust Co. v. Dabney181 which was a shareholder’s derivative suit attacking the controversial merger of the Security Trust Co. and the First National Bank and Trust Co. of Lexington and, A & W Equipment Co. v. Carroll182 which was an unsuccessfull attempt by taxpayers in Bell County to defeat an allegedly questionable contract between their fiscal court and the defendant. The remaining three cases involved questions ranging from acceptance of a contract by ratification,183 to a creditor’s attempt to “puncture the corporate veil”184 to an action by the Attorney General, concerning a foreign corporation’s failure to qualify to do business in Kentucky.185

Security Trust Co. v. Dabney186 was a shareholder’s derivative suit brought against the officers and directors of the Security Trust Co. (hereinafter designated Security) and against the First National Bank and Trust Co. (hereinafter designated First National), with which Security proposed to merge. Plaintiff sought to have the proposed consolidation declared illegal and sought personal indemnity against the loss which would allegedly result to some 12,000 shares of Security stock held by Security in various fiduciary capacities. The trial court sustained the defendant’s motion to dismiss and the Court of Appeals affirmed by asserting “where a plaintiff chooses to state his complaint in full detail, . . . and neither its contents nor the inferences to be drawn from them will support his claim for relief, a motion to dismiss . . . should be sustained.”187

After holding that a shareholder could properly bring suit to enjoin or rescind a merger contract,188 the allegations of the com-

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181 372 S.W.2d 401 (Ky. 1963).
182 377 S.W.2d 895 (Ky. 1964).
183 Tarrants v. Henderson County Farm Bureau, 380 S.W.2d 274 (Ky. 1964).
184 Pike Motor Co. v. Adams, 380 S.W.2d 94 (Ky. 1964).
185 Commonwealth v. Monroe Co., 378 S.W.2d 809 (Ky. 1964).
186 372 S.W.2d 401 (Ky. 1963).
187 Id. at 407.
188 Botts & Co. v. Simpsonville & Buck Creek Turnpike Rd. Co., 88 Ky. 54, 10 S.W. 134 (1898).
plaint were categorized by the Court of Appeals into several parts and so discussed. In the main these were as follows:

A. The transaction is tainted with self-interest because some of the Security directors will make up the new consolidated board. The court held that this alone was not a disqualifying self-interest and, to the contrary, usually an indispensable arrangement for both the old and the new corporations.

B. The transaction is a bad business deal for Security's shareholders and trust accounts since: (1) Security's power and prestige are dissipated through loss of identity and absorption by a larger bank; (2) Security's shareholders will lose managerial control since their 100% will be reduced to 40% in the new bank; (3) the new stock will be worth less because the agreed value of Security stock is too low on the basis of a bona fide offer to purchase such stock, and the fact that First National included $400,000 goodwill in its evaluation and Security none; and (4) by virtue of consolidation, Security stock will become subject to First National liabilities. To this complaint the court merely reaffirmed the "business judgment" rule, which presupposes that the directors were acting in good faith as reasonably prudent business men, and on the basis of this refused to interfere with the management, absent a show of fraud.180

C. The initial board of the new bank will be constituted by contract thus depriving the shareholders of their statutory right of cumulative voting. Here the court felt that the reasonable necessity of such an arrangement far outweighed the temporary technical suspension of voting rights.

D. The vote by the board of Security's own stock held in trust by the bank should not have been counted, and if it had not, the necessary two-thirds shareholders approval would not have been achieved. On this point the court reiterated their holding advanced in the companion case of Graves v. Security Trust Co.,189 permitting the vote count, in absence of a showing of fraud or real and substantial self-interest.

In the language of the Court of Appeals, the A & W Equipment Co. v. Carroll191 case was initiated by "two interloping

189 369 S.W.2d 114 (Ky. 1963); 52 Ky. L.J. 695 (1964).
191 377 S.W.2d 895 (Ky. 1964).
volunteers, under the guise of public-spirited piety..." volunteering as taxpayers to invalidate a contract of sale between the defendant and the Bell County fiscal court for two road graders. The contract is attacked generally on the question of the capacity of the parties. The facts were chronologically as follows: (1) The fiscal court advertised for bids; (2) Only two were submitted, one for $30,530 and defendant's for $38,286.50; (3) The higher of the two was accepted on the grounds that it was the "best bid"; (4) The defendant formed and filed incorporation papers; (5) A contract was signed by one Dooly on behalf of the defendant although he was not an officer of the corporation at the time; (6) The contract was signed by the Bell County judge; (7) The graders were delivered but not paid for; (8) This suit was filed and the trial court issued an order restraining the fiscal court from acting further under the contract; (9) The fiscal court attempted to ratify the contract anyway; (10) A member of the county budget commission was also an officer of the newly formed defendant corporation. On these facts the Court of Appeals reversed the lower court's decision and upheld the contract on the theory of ratification by virtue of actual execution by the defendant, i.e., delivery subsequent to incorporation.

This case further points up the strong presumption in favor of a county fiscal court by re-stating the accepted Kentucky rule that the fiscal court is invested with broad discretion in consummating such purchases and that the courts should refrain from interfering without a clear showing of fraud, arbitrariness or capriciousness.

The court here also defines for the first time a limitation on KRS 61.190 by holding that its provisions "do not extend to an appointive member of the county budget commission." The court here also defines for the first time a limitation on KRS 61.190 by holding that its provisions "do not extend to an appointive member of the county budget commission."

Tarrants v. Henderson County Farm Bureau was an action by an architect for services rendered pursuant to an alleged contract with the county farm bureau. In support of a directed verdict in its favor by the trial court, defendant contends inter
alia, that there was no contract since the bureau had abandoned its building plans and because there was no formal resolution by the board authorizing the work done by the plaintiff. In granting a new trial the Court of Appeals followed the general rule and Kentucky case law, in holding that the corporation could be bound by ratification, and where there is evidence of acceptance of benefits and ratification there is a question for the jury.

In *Pike Motor Co. v. Adams* the two defendants, Pike Motor Co. and its president, J. W. Tomlin appealed from a trial court judgment which in effect punctured the corporate veil of the debtor corporation, Tomlin Ford Co. Inc. and sought to hold at least the defendant, J. W. Tomlin liable as the sole owner of both corporations. No appellee's brief was filed and the court accepted on the basis of RCA 1.260 the appellant's statement of the facts and issues. To these the Court of Appeals applied KRS 271.215 (2) which provides that "a shareholder of a corporation shall not be held personally liable for any debt or liability of the corporation", and then reversed in favor of the defendants.

*Commonwealth v. Monroe Co.* was an action by the Attorney General to escheat property of a Delaware corporation and for penalties for failure to comply with Kentucky's statutes pertaining to the necessary qualification in order for a foreign corporation to do business in the state. The court held that, even if the primary purpose was to enforce the penalties, the law was well settled, and where escheat is involved the Attorney General cannot instigate the action.

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200 See Big Four Mills Ltd. v. Commercial Credit Co., 307 Ky. 612, 211 S.W.2d 831 (1948).
202 KRS 271.055(3), .385(2), .990.
203 KRS 393.180; Commonwealth v. Grand Central Bldg. & Loan Ass'n Co. 97 Ky. 325, 30 S.W. 626 (1895).
VII. CRIMINAL LAW

A. RIGHT TO COUNSEL

In Higbee v. Thomas,204 the Supreme Court of the United States sustained a writ of certiorari and the Court of Appeals reconsidered the problem on remand of whether a habeas corpus petitioner was entitled to a hearing on allegations of ineffective counsel and a coerced plea of guilty. Petitioner alleged that because counsel could spend only a few minutes with him before the trial, he could not present an adequate defense. Assignment of counsel was made on the day of the trial. The court reversed itself and held that these allegations entitled him to a hearing. The court appeared puzzled as to whether the Supreme Court's "oblique" mandate would dictate a voiding of petitioner's conviction if his allegations proved true, because of the dissimilarity in the facts of the case205 upon which the Supreme Court relied in remanding Higbee.

The court held in Moore v. Commonwealth,206 that under rule 11.42 of the Kentucky Rules of Criminal Procedure [hereinafter referred to as RCr],207 a hearing must be held to determine whether the defendant was represented by counsel when he pleaded guilty to a charge of storehouse breaking, resulting in his conviction in 1936 as an habitual criminal.208 The Moore case presented the court with its first opportunity to rely upon the 1963 Supreme Court decision of Gideon v. Wainwright,209 which offers powerful authority against denial of counsel in a state felony proceeding. Its predecessor in Kentucky law was Gholson v. Commonwealth.210

In Bradley v. Commonwealth,211 the appellant contended that his constitutional rights were denied because the quarterly court

204 376 S.W.2d 305 (Ky. 1964).
206 380 S.W.2d 76 (Ky. 1964).
207 Ky. R. Crim. P. § 11.42 [hereinafter cited as RCr] provides in part: "A prisoner in custody under sentence who claims a right to be released on the ground that the sentence was imposed in violation of the Constitution or statutes of the Commonwealth or of the United States . . . may file a motion . . . to vacate. . . . If an answer raises an issue of fact that cannot be determined from the face of the record the court shall grant a prompt hearing. . . ."
208 KRS 431.190.
210 308 Ky. 82, 212 S.W.2d 537 (1948); see generally 40 Ky. L.J. 228 (1952).
211 880 S.W.2d 211 (Ky. 1964).
judge did not inform him of his right to counsel, even though the prosecuting attorney did so advise him. If it appears that the accused knew of his right to counsel it is not necessary that the court remind him.\textsuperscript{212} The court further held that even if it were assumed that the trial judge must in every misdemeanor case advise the accused of his right to counsel [there is no Kentucky authority for such a proposition] it must be shown that the accused was prejudiced thereby when he subsequently had counsel in the circuit court trial.

The amended RCr 3.08 [effective Jan. 1, 1965] states that the examining court shall appoint counsel to represent the accused in the preliminary proceeding if the crime of which the defendant is charged is punishable by a fine of more than $500 or by confinement for more than 12 months.\textsuperscript{213} This provision will offer the accused assignment of counsel a step earlier than the stage at which he is now assigned counsel—the arraignment.\textsuperscript{214} The accused, in \textit{Maise v. Commonwealth},\textsuperscript{215} had no counsel in an armed assault case when he was brought before the circuit court on his arraignment to indictment. The Court of Appeals held that since he was ably represented by counsel upon his trial his constitutional rights were not denied because he had no counsel on arraignment. Under amended RCr 3.08 an accused, unable to obtain the benefit of counsel and not waiving the privilege, shall have the benefit of counsel even before arraignment. If this change had been in effect, the court would have had adequate grounds for reversal.

\section*{B. Insanity}

In deciding \textit{Etherton v. Commonwealth},\textsuperscript{216} the court had ample authority for holding that non-compliance with the statute requiring a psychiatric examination did not void a conviction under the Habitual Criminal Act.\textsuperscript{217} As to whether a person is

\textsuperscript{212} Annot., 3 A.L.R.2d 1048 (1949).
\textsuperscript{213} Amended RCr 3.08 (effective Jan. 1, 1965).
\textsuperscript{214} RCr 8.04: "If on arraignment or thereafter in felony cases, the defendant appears in court without counsel, the court shall advise him of his right to counsel and shall assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."
\textsuperscript{215} 380 S.W.2d 230 (Ky. 1964).
\textsuperscript{216} 379 S.W.2d 790 (Ky. 1964).
\textsuperscript{217} Mercer v. Commonwealth, 346 S.W.2d 761 (Ky. 1961); Harrod v. Commonwealth, 311 Ky. 810, 226 S.W.2d 4 (1950); KRS 203.340 provides that when (Continued on next page)
properly fit to plead or defend himself in a criminal proceeding, the court in Commonwealth v. Strickland set out the test for determining whether the accused had the requisite mental state to properly plead: "... whether he had substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense." By an inquest Strickland was declared insane and sent to a state hospital. Hospital authorities subsequently stated that he suffered only from a personality disorder and could stand trial. The defendant pleaded guilty, but by means of RCr 11.42 the conviction was vacated by the circuit judge. The court has upheld convictions of persons previously adjudged insane and never formally restored, but the case was reversed at the instance of the Commonwealth because the trial judge did not conduct a hearing on defendant's mental capacity to plead after he had been adjudged of unsound mind.

Wide discretionary power has been allowed trial courts in ordering formal sanity hearings pursuant to RCr 8.06. In Hooper v. Commonwealth, the court held that failure to order a formal sanity hearing when the appellant was returned from a state hospital only a day before the trial was not an abuse of discretion where the appellant only alleged that he was not ready for trial. He did not specify grounds which would warrant a sanity hearing.

Wagner v. Commonwealth pointed out that it is well established in Kentucky that the fact that an accused has previously been adjudged to be of unsound mind is not conclusive of his sanity at the time of the commission of a subsequent offense. In fact, not even a presumption of insanity was raised

(Footnote continued from preceding page)
a person is indicted as an habitual criminal, notice of the indictment shall be given to the Commissioner of Mental Health who shall cause such person to be examined by a psychiatrist.
218 375 S.W.2d 701 (Ky. 1964).
219 Id. at 703; 14 Am. Jur. Criminal Law § 45 (1938).
221 Anderson v. Commonwealth, 353 S.W.2d 381 (Ky. 1962); Robinson v. Commonwealth, 243 S.W.2d 673 (Ky. 1951); RCr 8.06 provides that if there are reasonable grounds to believe that the defendant is insane, the proceedings shall be postponed and the issue of sanity determined.
222 371 S.W.2d 646 (Ky. 1963).
223 379 S.W.2d 731 (Ky. 1964).
in the Wagner case, since the last insanity judgment was entered fifteen years before he was tried.

A voluntary manslaughter conviction was reversed in Brumley v. Commonwealth,224 because of the application of Terry v. Commonwealth,225 which changed the standard form of instruction on insanity. The court held that the change in form of instruction was prospective in application except in the instance of Terry and those cases on appeal when the Terry appeal was decided. The Brumley case was pending on appeal when Terry was decided.

C. BURGLARY

An indictment for the possession of burglar tools with the intention of using them burglariously was dismissed because it involved vending machines outside of a building, and hence did not fall under common law burglary.226 The state sought a certification of the law and the court held that KRS 433.120(2) in using the language “tools for housebreaking, forcing doors, windows, locks or buildings or other places” indicated a broader intent than the common law burglary. The term other places includes all buildings or places where goods, wares, merchandise, or money is kept, including vending machines, instead of limiting it to dwelling houses.

D. TRIAL PROCEDURE

The following section deals with cases which have been decided on procedural or technical points. It is a mixture of cases which do not fit into any precise category, but must be dealt with under the general heading of trial procedure. This section will follow the sequence of events of pre-trial, trial, and post-trial proceedings.

In Gill v. Commonwealth,227 the circuit judge failed to follow the statutory procedure in selecting the grand jury. As a result the indictment was set aside. The judge had ordered names to be drawn from the drum during a special term on December 21, 1962. The order for the special term and the drawing apparently

224 375 S.W.2d 270 (Ky. 1964).
225 371 S.W.2d 862 (Ky. 1963).
226 Commonwealth v. Marganan, 370 S.W.2d 821 (Ky. 1963).
227 374 S.W.2d 848 (Ky. 1964).
took place on the same day. The indictment was returned on January 15, 1963. The court set out the procedural steps which should have been followed. KRS 29.135(1) provides, "at each term of circuit court . . . the judge shall, in open court, draw from the drum a sufficient number of names not to exceed sixty, to procure twelve persons to act as grand jurors for the next term. . . ." The terms of the Pulaski Circuit Court were in October and January for twenty-four days, so that a grand jury rendering an indictment in January would have to be selected in October. KRS 23.110(1) provides for a special term "... by order of record at the last preceding regular term . . ." or by posting a notice on the courthouse door for ten days. Neither of these procedural steps were observed.

In Woodford v. Commonwealth, the defendant brought error because defense counsel was required to examine jurors on voir dire collectively, instead of individually. The court said there was no error, because the examination of jurors is solely within the discretion of the trial judge, subject to any abuse. To prove the point, the court referred to RCr 9.38 which provides that the court itself may take over the examination of jurors. Reasoning from this, the court felt that where a trial court has this broad power, it must certainly have the lesser discretionary power of requiring collective examination.

Calhoun v. Commonwealth provided the court an opportunity to discuss the effect of a change in one of the rules. The defendant claimed error because the commonwealth's attorney failed in opening the trial, to state to the jury the evidence upon which he relied to support the charge. He claimed that he was prejudicially surprised by the testimony of two prosecution witnesses and the testimony of a third whose name was not on the indictment. The new rules, RCr 9.42(1), abandoned the requirement that a failure to read the indictment and the defendant's plea to the jury was reversible error. The old Criminal Code of Practice, section 219, stated that the prosecutor may state to the jury the nature of the charge against the defendant, but it was changed to shall in RCr 9.42(1). The court said that here the reading of the indictment was sufficient to apprise the jury of the

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228 376 S.W.2d 526 (Ky. 1964).
229 378 S.W.2d 222 (Ky. 1964).
charge. RCr 9.42(1) was intended only to preserve the necessity of apprising the jury of the nature of the charge.

The court had two opportunities to insist upon the need to show by affidavit the competency of testimony and prejudicial effect upon defendant by absent witnesses. A continuance was refused where the defendant found during the trial that two subpoenaed witnesses were missing. The defendant had failed to file an affidavit showing the competency of the testimony they would have given. The lower court ruling was upheld. Again the court upheld the refusal of a continuance in Pennington v. Commonwealth. Here an eyewitness used at the examining trial was later reported out of the state and unable to be subpoenaed for the trial. The defendant failed to give an affidavit showing that the absence was prejudicial to him.

The court dealt with several cases involving improper questioning of witnesses. Without previously introducing evidence to lay a foundation, the prosecutor repeatedly asked a character witness for the defendant, "Had you known" that the husband lived with the defendant before they were married "would you still say her moral reputation was good?" The trial judge sustained the objection to the question, but the prosecutor repeated it in the same line. The court strongly stated that it was prejudicial error to preface an inquiry to a character witness with "had you known,” and cited Laine v. Commonwealth. The court flatly stated that similar tactics employed in a subsequent trial would result in a reversal. In a similar situation, the prosecutor, in Woodford v. Commonwealth, repeatedly asked the defendant whether he had been chased by police officers prior to the accident. The defendant answered the first time in the negative. No evidence was introduced to prove such a chase. The court held this a reversible error, stating it was highly prejudicial to inject a false issue into the case by repeated questioning.

In Shirley v. Commonwealth, the defendant attacked the credibility of the chief prosecuting witness by asking if he had

230 Shirley v. Commonwealth, 378 S.W.2d 816 (Ky. 1964).
231 371 S.W.2d 478 (Ky. 1963).
233 287 Ky. 134, 151 S.W.2d 1055, 1057 (1941).
234 376 S.W.2d 526 (Ky. 1964).
235 378 S.W.2d 816 (Ky. 1964).
not had intoxicants prior to being robbed. He answered no. He
was then asked whether he had been arrested about fifteen times
for public drunkenness. The objection was sustained and upheld
on appeal. The court said that CR 43.07 does not permit par-
ticular wrongful acts to be shown for impeachment, with the
exception of a felony conviction. A witness cannot be cross-
examined on a collateral matter irrelevant to the issue.

In Jordan v. Commonwealth, the court made this classic
statement, "We cannot have one set of laws for Kentucky attor-
neys and another for lawyers from other states who undertake
the risk of trying cases here without familiarizing themselves
with our laws and practice." The circumstances were that
defendant's attorneys, who were from Cincinnati, Ohio, failed to
preserve errors for review by making timely objections. The
court stated that the motions for a new trial did not suffice to
preserve the errors.

In his closing argument to the jury, in Woodford v. Common-
wealth, defendant's counsel was not allowed to draw an in-
ference from the failure to administer an intoxication test, or
other evidence. The degree of defendant's intoxication was in
issue. The court stated that counsel may in his argument discuss
the facts proved, draw reasonable deductions, and attack the
credibility of witnesses, where it was based on the facts in
evidence.

In the case of Cooper v. Commonwealth, the defendant was
convicted of incest. The defendant raised the issue as to whether
the girl was actually his daughter, contending his wife, when
pregnant with the child, had told him it was the child of
another. The instruction read, "If the jury believe . . . that the
defendant Eugene Cooper, . . . did carnally know Marie Cooper,
his daughter, knowing such relationship to exist, . . ." (Italics
added.) It was error to definitely state the girl was his daughter
because it eliminated the issue as to parentage.

The terms "reckless conduct" and "wanton indifference" are
used in instructions a countless number of times. The court feels

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236 See KRS 447.155 and RCr 13.04.
237 371 S.W.2d 632 (Ky. 1963).
238 Id. at 634.
239 376 S.W.2d 526 (Ky. 1964).
240 374 S.W.2d 481 (Ky. 1964).
that although there are cases on both sides the better practice is to define key terms in the instructions.\textsuperscript{241}

Where thirteen jurors hear a case, one being an alternate, the clerk should put all the names in a box and draw one name at the close of the trial. That person is the alternate and will not decide the case. In \textit{Gill v. Commonwealth},\textsuperscript{242} the clerk failed to follow RCr 9.32 in reducing the jury to twelve. He pulled twelve names out of the box instead of one.

If the jurors are lodged overnight outside of the county seat in which the trial is being held, this alone is not reversible error.\textsuperscript{243} There must be some showing that it was improper and prejudicial to the defendant.

In a significant opinion, \textit{Jordan v. Commonwealth},\textsuperscript{244} the court, in recommending probation for the defendant, let it be known that it is more interested in rehabilitating defendants than punishing them. The defendant was nineteen years of age, had a good record, and the circumstances of the accident in which a passenger was killed did not indicate that the defendant had acted criminally. The trial court refused a request for probation because of the protests of the injured and the family of the deceased. The court stated that the state, not the injured individual, is the real party in interest and the chief beneficiary of the probation process.

In \textit{Jordan v. Commonwealth},\textsuperscript{245} the commonwealth's attorney subsequently associated himself with other attorneys in bringing civil suits against the defendant. The court did not consider this question on the merits, but did take the opportunity to speak out against it. The court stated that the practice was improper because it cast a reflection on the whole course of criminal proceedings.

\textbf{E. Evidence}

1. \textit{Admissibility}
   
   (a) \textit{In General}
   
   In \textit{Cook v. Commonwealth}\textsuperscript{246} a conviction of rape was reversed because hearsay evidence was erroneously admitted. A friend of

\textsuperscript{241} Woodford v. Commonwealth, \textit{supra} note 228.
\textsuperscript{242} 374 S.W.2d 848 (Ky. 1964).
\textsuperscript{243} Pennington v. Commonwealth, \textit{supra} note 231.
\textsuperscript{244} 371 S.W.2d 632 (Ky. 1963).
\textsuperscript{245} \textit{Ibid}.
\textsuperscript{246} 379 S.W.2d 228 (Ky. 1964).
the victim testified to statements made to him by the victim about an hour after the alleged rape. The court held that evidence of statements made by the victim after the rape were not admissible unless the statements were part of the res gestae; or were limited to the bare facts of the complaint. Details of the victim's later complaint to a third party are not allowed as substantive evidence. In a previous appeal of this case evidence of statements made by the victim six hours after the rape was held inadmissible for the same reason. The question involved in these cases is not the time lapse before the statements, but is simply whether the statements are part of the res gestae.

Goehring v. Commonwealth was concerned with evidence of the defendant's reputation for truth and veracity. The rule is that evidence affecting the defendant's credibility as a witness must be directed to the time he testified and a reasonable period before. In the Goehring case, the court said that the "reasonable period before" should not be construed too strictly, since often the defendant's bad reputation would simply be a result of the charge against him. It held that nine months before the trial was within a reasonable time in this case, even though it was the day before the offense was committed to which the evidence referred. The conviction of armed assault with intent to rob therefore was affirmed.

In Walker v. Commonwealth, the court held that a written confession signed by the defendant was properly introduced as evidence. The defendant did not claim a violation of the Anti-Sweating Act, KRS 422.110, and the confession was made only two hours after the commission of the offense. The only delay complained of by the defendant was long after the confession. It is obvious that this subsequent delay could not invalidate his confession. The judgment was affirmed.

(b) Search and Seizure

A search warrant issued by a trial commissioner was held to be invalid in Slone v. Commonwealth, even though the county

247 Cook v. Commonwealth, 351 S.W.2d 187 (Ky. 1962).
248 370 S.W.2d 822 (Ky. 1963).
249 Buchanan v. Commonwealth, 200 S.W.2d 459 (Ky. 1947).
250 377 S.W.2d 91 (Ky. 1964).
251 377 S.W.2d 51 (Ky. 1964).
judge had specifically authorized the commissioner to issue warrants, and had approved this warrant afterwards. The court said that the trial commissioner had no authority beyond the trials to which he is assigned, and issuance of a search warrant is not part of a trial. He therefore cannot issue search warrants regardless of the attempted delegation of this power by the county judge. Evidence obtained under this invalid search warrant was consequently inadmissible and the judgment was reversed.

In Scamahorne v. Commonwealth, the defendant was arrested under an invalid warrant of arrest, and evidence obtained by searching the defendant incidental to the arrest was therefore inadmissible. The warrant of arrest was invalid because it was based on an insufficient affidavit. An affidavit on which a warrant of arrest or a search warrant can be issued must furnish probable cause for the issuing officer to believe that the named person has committed the named offense. It must further state when and how the affiant has obtained his information. Prior to Henson v. Commonwealth, an affidavit was sufficient if it stated simply that the affiant knew the named party had committed the offense, without stating how he knew. This type of affidavit was known as an "ultimate fact" affidavit. However, in the Henson case the court held that thereafter even an ultimate fact affidavit would be insufficient unless it stated how and when the affiant obtained his information. The purpose of these strict requirements is to enable the defendant to bring an action against the affiant for false swearing or malicious prosecution if the affiant is not telling the truth. These requirements have been uniformly followed by the Court of Appeals in dealing with affidavits.

In Tabor v. Commonwealth the defendant had an automobile accident and was taken to a doctor, leaving his wrecked car at the scene. The sheriff thereafter had the car hauled to a garage, then searched it without a warrant. The court held, inter alia, that the evidence found as the result of this search was inadmissible since it was not made incidental to a lawful arrest. Even had it been made incidental to a lawful arrest, however, it

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252 376 S.W.2d 686 (Ky. 1964).
253 347 S.W.2d 546 (Ky. 1961).
254 Ibid.
255 380 S.W.2d 245 (Ky. 1964).
still would be inadmissible since the search was not made in the defendant's immediate presence.\textsuperscript{256}

Smith v. Commonwealth\textsuperscript{257} involved the unusual situation in which the defendant was arrested after the search was made as an incident to his arrest. However, the court held the evidence admissible since the arrest was not a result of the search. The officers had come to the house for the express purpose of arresting the defendant and had made the search almost contemporaneous with the arrest, but actually a few minutes prior thereto.

An additional point brought out in the Smith case was that the defendant could not complain of the search, even if it were illegal, since he was not the owner of the house and was not in exclusive occupancy of the section in which the evidence was found. Almost the same factor was involved in Brown v. Commonwealth,\textsuperscript{258} where the defendant was driving a car of which he was not the owner. The court said that he could not complain of the search made of the car, even though he was convicted solely on the basis of the evidence found in the car. The evidence was admissible since it was obtained as a result of a search incidental to the arrest of the defendant for a traffic violation. These cases are consistent with the rule that a person cannot complain of a search of another's property, even though it is incidental to his own arrest.\textsuperscript{259}

2. Corroboration of an Accomplice

RCr 9.62 provides that a conviction cannot be obtained upon the uncorroborated testimony of an accomplice. The usual test for establishing whether there is sufficient corroboration is stated to be made by eliminating all the evidence of the accomplice. The court must then determine if there is any other evidence which tends to connect the defendant with the crime,\textsuperscript{260} or enough evidence to substantially connect the defendant with the crime.\textsuperscript{261} In Truglio v. Commonwealth\textsuperscript{262} it was held that evidence that the

\textsuperscript{256}Flanery v. Commonwealth, 324 S.W.2d 128 (Ky. 1959).
\textsuperscript{257}375 S.W.2d 242 (Ky. 1964).
\textsuperscript{258}378 S.W.2d 608 (Ky. 1964).
\textsuperscript{259}Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1960).
\textsuperscript{260}Williams v. Commonwealth, 77 S.W.2d 609 (Ky. 1934).
\textsuperscript{261}Tinsley v. Commonwealth, 273 S.W.2d 364 (Ky. 1954).
\textsuperscript{262}371 S.W.2d 648 (Ky. 1963).
defendant was in the company of the two confessed robbers two hours prior, and three hours subsequent, to the commission of the offense was insufficient corroboration.

In *Galloway v. Commonwealth*,²⁶³ it was also held that there was insufficient corroboration of an accomplice. There the only other evidence had shown in effect that the defendant might have had in his possession at about the time of the robbery a pistol similar to the one used in the robbery.

*Richmond v. Commonwealth*²⁶⁴ was an abortion case which brought up a new question for the Kentucky court. This concerned whether the victim's paramour, who helped her find an abortionist, should be considered an accomplice. The majority of the court held that he was an accomplice and reversed the case because there was no corroboration of his testimony against the abortionist. The dissenting opinion, by Judge Palmore, discusses the history and purpose of the rule for the corroboration of an accomplice. He states that it was meant only to caution the jury concerning an accomplice and was not binding at common law. Therefore he is in favor of relieving the rule of its mandatory effect, and making it a precautionary admonition to the jury.

It is interesting to note a peculiar result of this case. Since KRS 436.020 provides that the woman upon whom an abortion is performed is not an accomplice of the abortionist, there is no corroboration needed for her testimony. Therefore, if she survives the abortion the abortionist can be convicted on her testimony alone. However, if she does not survive, the abortionist cannot be convicted on the testimony of her paramour without corroboration. This will often be impossible to do, due to the secret nature of the acts. Therefore, it gives the abortionist a very good chance of going free if the victim dies, but makes it almost impossible to go free if the victim survives. This carries an awesome suggestion to abortionists.

3. **Intent**

In a prosecution for larceny, evidence of drunkenness was held not to be conclusive of a lack of intent, and the defendant

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²⁶³ 374 S.W.2d 835 (Ky. 1964).
²⁶⁴ 370 S.W.2d 399 (Ky. 1963).
is only entitled to an instruction on that defense. Since that instruction was given in *Hagel v. Commonwealth*, the judgment was affirmed.

In *Watkins v. Commonwealth* the defendant claimed that he was not conscious of his acts due to a blow on the head and therefore should have been entitled to an instruction on that defense. The court held that unconsciousness at the time of the offense is a defense, but no special instruction on it is required. Before the jury could convict they had to find that the defendant intended his acts, and if they believed he was unconscious they could not find the necessary intent.

An inference of an intent to be seen in public was permitted to satisfy the requirement of intent in a prosecution for indecent exposure. In *Hunt v. Commonwealth* there was evidence of several different occasions when the defendant stood naked by his window, while in his home, and called attention to himself. The court said that the evidence permitted a reasonable inference that the defendant intended to be seen and thus affirmed the conviction.

**F. Habitual Criminal Act**

The instructions under the habitual criminal act must conform to a rigid rule that the prior conviction be emphasized, and not the act. The conviction must impress upon the defendant that crime does not pay and that his actions must cease. It is not the act, but the conviction which must be emphasized in the instruction, so that the jury understands the reason for life imprisonment under the habitual criminal act.

**G. Homicide Instructions**

In *Lambert v. Commonwealth*, the court was presented an opportunity to examine and discuss KRS 435.022, which renders obsolete Stanley's instruction classifying negligent homicide within the crime of voluntary manslaughter. "Negligent voluntary
manslaughter" was abolished and the words "wanton" and "reckless" are now used to describe involuntary manslaughter. In the Lambert case the appellant killed a fellow-prisoner in jail after having been attacked, and he was convicted of voluntary manslaughter. An instruction on involuntary manslaughter was not given. An eyewitness testified that Lambert knocked down the deceased and kicked and "stomped" him several times. The court held that instructions should have been given on first and second degree involuntary manslaughter on the basis of the following contentions of the appellant: there was extreme aggravation, appellant was suffering from the effects of alcohol, and he was in a state of shock. The testimony of the eyewitness and the manner in which Lambert killed the deceased left it questionable as to whether the appellant deserved an instruction on involuntary manslaughter, an unintentional crime. This case will be relied upon heavily and will offer strong authority for an involuntary manslaughter instruction when there is the slightest doubt as to whether the killing is intentional.

The court relied upon Lambert in Hemphill v. Commonwealth. The appellant was convicted of voluntary manslaughter and the court reversed because the trial court was instructed on the common law offense of voluntary manslaughter, rather than involuntary manslaughter as set out in KRS 435.022. The appellant killed a police officer and a witness testified that the appellant was grappling with the deceased.

The appellant was convicted of murder in Combs v. Commonwealth, and under the instructions given by the trial court, the jury had no other choice. Murder was the only crime presented before the jury, even though the circumstances showed that neither the appellant nor the deceased had ever borne ill will toward each other. The instrument used was a bottle, quite obviously an improvisation. The court held that if there is any evidence that tends to show that the crime was of less magnitude than murder, it is the duty of the court to give an instruction on such other phases of the case. In the Combs case such evidence

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271 379 S.W.2d 223 (Ky. 1964).
272 378 S.W.2d 626 (Ky. 1964).
273 Id. at 628.
waranted an instruction on involuntary manslaughter and the case was reversed on that account.

In another murder prosecution, Stanley v. Commonwealth, the facts showed that the appellant and a friend were occupying a motel room and both were drinking. The appellant shot the deceased six times and the court by means of circumstantial evidence, inconsistent with prior intent on the part of the appellant to kill, determined that an instruction on voluntary manslaughter should have been given. A supportable theory was that under the influence of alcohol there was some sort of affray. The court reiterated a well-settled rule in Kentucky law that if there is any evidence from which a reasonable inference may be drawn that the defendant in a homicide case is guilty of a lesser crime than murder, then instructions should be given consistent therewith.

In Ferguson v. Commonwealth, the trial court refused to instruct pre-emptorily to find a verdict for the defendant in a murder prosecution where he alleged self-defense. Purely circumstantial evidence was used to negate self-defense, as the accused was the only eyewitness. The Kentucky rule is that even though the defendant is the only eyewitness to a killing and he makes out a case of self-defense, the trial court may refuse to direct a verdict of acquittal where some of the physical facts and other testimony contradict defendant's testimony and cast doubt upon the truthfulness of it.

H. Post Conviction Remedy

The post conviction remedy phase of Kentucky law has recently undergone a substantial change. The change has taken place in proceedings in accordance with RCr 11.42, which has recently been amended, effective January 1, 1965. The only significant change incorporated in the amendment is that the Commonwealth shall have only twenty days after the mailing of the notice of the filing of the motion to the Attorney General to

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274 380 S.W.2d 71 (Ky. 1964).
276 Id. at 72.
277 373 S.W.2d 729 (Ky. 1963).
278 Id. at 730.
serve an answer on the movant. Prior to the amendment the time limit had been thirty days.

*Rice v. Davis*\(^{278}\) broadened the scope of habeas corpus remedy to include radical irregularity other than the lack of jurisdiction of the person or the offense as grounds for relief. This change brought Kentucky into conformity with the federal rule.\(^{279}\) *Ayers v. Davis*,\(^{280}\) handed down on March 13, 1964, made RCr 11.42 the exclusive remedy, where it applies, and incorporated the broadened habeas corpus remedy of *Rice* within its scope. The *Ayers* case held specifically that a habeas corpus proceeding was properly dismissed in the absence of a showing of inadequacy of remedy by motion to vacate, set aside or correct sentence as provided by RCr 11.42. A week after the *Ayers* decision six dismissals of applications for writs of habeas corpus were affirmed under the *Ayers* rule.\(^{281}\) There was a strong dissent to the decisions in these six cases made by Judge Montgomery.\(^{282}\) His reasoning was that such holdings constituted a wrongful suspension of the writ of habeas corpus in violation of the United States Constitution, Article 1, section IX, and of the Kentucky Constitution, section 16. His very impassioned dissent included the allegation that "nowhere is there any authority for depriving such person of his sacred right (habeas corpus) by resort to some other means first."\(^{283}\)

*Higbee v. Thomas*\(^{284}\) involves a petition for habeas corpus which was instituted prior to the effective date of RCr 11.42. The petitioner alleged that he had been denied effective counsel and that he was induced by the sheriff to plead guilty without understanding the effect of such a plea. The writ was denied by the circuit court and affirmed by the Court of Appeals. The Supreme Court of the United States remanded the case to the Court of Appeals, for further consideration in the light of *Pennsylvania ex rel. Herman v. Cloudy.*\(^{285}\)

\(^{278}\) 366 S.W.2d 153 (Ky. 1963).
\(^{279}\) 148 F.2d 667 (D.C.Cir. 1945).
\(^{280}\) 377 S.W.2d 154 (Ky. 1964).
\(^{281}\) Warner v. Davis, 377 S.W.2d 881 (Ky. 1964); Coles v. Thomas, 377 S.W.2d 157 (Ky. 1964); Jones v. Thomas, 377 S.W.2d 155 (Ky. 1964); Pryor v. Thomas, 377 S.W.2d 156 (Ky. 1964); Brown v. Thomas, 377 S.W.2d 156 (Ky. 1964).
\(^{282}\) 377 S.W.2d 878 (Ky. 1964).
\(^{283}\) 377 S.W.2d 878, 880 (Ky. 1964).
\(^{284}\) 376 S.W.2d 305 (Ky. 1963).
The Court of Appeals held on remand that Higbee's petition was sufficient to entitle him to a hearing on the issues (1) whether he was denied effective counsel, (2) whether he understood the nature and consequences of his guilty plea, and (3) whether he entered the plea voluntarily, free of inducements and pressures. If the questions were decided in his favor the conviction would be void. This case is similar to *Rice* in that both decisions were based on radical irregularities which are now considered to be sufficient grounds for proceedings under RCr 11.42. In the absence of sufficient grounds under RCr 11.42, the writ of habeas corpus may be used.

In *Moore v. Commonwealth*, the Court of Appeals recognized that the Supreme Court decision in *Gideon v. Wainwright* made it imperative that the states appoint adequate counsel for indigents in felony cases. This case firmly established the rule that a denial of adequate counsel in a felony case is grounds for a RCr 11.42 proceeding. It should also be noted that this case stands for the proposition that *Gideon v. Wainwright* is to be applied retroactively in Kentucky.

*Nolan v. Thomas* held that the mere fact that the petitioner's attorney was the son-in-law of the commonwealth's prosecuting witness was not such an exceptional circumstance as would allow an RCr 11.42 proceeding under the "radical irregularity" rule of the *Rice* case.

The following three cases gave the Court of Appeals ample opportunity to expound on the sufficiency of newly discovered evidence to sustain an attack under RCr 10.06. In *Yates v. Commonwealth*, the court held that evidence that another had orally admitted the killing for which a defendant was convicted was not newly discovered evidence, or even evidence at all, since it would not have been admissable at the trial because of the hearsay evidence rule.

In *Jennings v. Commonwealth* the court affirmed an order overruling a motion to vacate sentence made under RCr 11.42.

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280 380 S.W.2d 75 (Ky. 1964).
288 370 S.W.2d 825 (Ky. 1963).
289 RCr 10.06 provides for a motion for a new trial on the grounds of newly discovered evidence.
290 375 S.W.2d 271 (Ky. 1964).
291 380 S.W.2d 284 (Ky. 1964).
The court held that in order to support a motion for a new trial in a criminal prosecution, the newly discovered evidence must show with reasonable certainty that it would have changed the verdict, or would probably change the result if a new trial were granted.

In *Mullins v. Commonwealth*, new evidence which consisted of a sworn statement by the prosecuting witness that she had perjured herself at the trial was held sufficient grounds for reversal of the conviction. She had testified that defendants had walked into a room and shot decedent while he was seated in his chair, but in her sworn statement, she had admitted that the decedent had risen and fired at the defendant, thus provoking the incident.

The Court of Appeals has been very strict in granting new trials as indicated by the *Yates* and *Jennings* decisions. However, the court will not hesitate to grant a new trial where it appears that there might be a miscarriage of justice if one were not granted.

In *Commonwealth v. Strickland*, the Court of Appeals held that in the absence of a hearing on defendant’s mental capacity to plead after he has been adjudged of unsound mind, the prisoner in an RCr 11.42 proceeding would be entitled to relief. For this relief he must show that at the time he entered his plea at his trial he did not have sufficient mental competence to defend himself. The Court of Appeals reversed the trial court’s order to vacate judgment on the ground that defendant had not shown his incompetence to defend himself, and remanded the case for the necessary hearing.

One may conclude from these decisions that Kentucky law in the field of post conviction remedies has undergone two major changes. (1) RCr 11.42 has for all practical purposes superseded habeas corpus in situations where either would be applicable. (2) The scope of RCr 11.42 has been broadened to include radical irregularities of proceedings at the trial as grounds for relief.

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292 375 S.W.2d 832 (Ky. 1964).
293 375 S.W.2d 701 (Ky. 1964).
VIII. DOMESTIC RELATIONS

During the past term the Court of Appeals decided seventeen domestic relations cases. Of these, five were decisions worthy of comment. In Louisville Trust Co. v. Saunders, the court held that a person was not destitute for the purposes of KRS 405.080 where she had a substantial amount of unexpended capital and elected to preserve it. This statute requires children of indigent parents to support such parents when they are destitute of subsistence. The parent in this case was the mother of an incompetent child, and she had sought to have the committee in charge of that child to pay her a monthly support. The mother had $16,841.10 in bonds and savings accounts and elected to preserve this capital. In refusing the mother such support from her son the court said, “The appellee cannot place herself in necessitous circumstances simply by electing to preserve the principal of her estate.”

The statute had not been construed as to this point, so the court did not base its opinion on a Kentucky case. The court found a very similar Delaware case as authority for the above principal.

In Hall v. Hall, the court held that parental gifts received by the husband from his parents should be considered as part of the husband’s estate for the purpose of determining alimony in a divorce action. In this case almost the entire estate of the husband resulted from parental gifts. This was the first time this precise question had come before the court. The court cited a number of cases which were analagous to the present case. In Ahrens v. Ahrens, the court included a grandfather’s gift through inheritance in the husband’s estate.

The court said the chancellor had misinterpreted Heustis v. Heustis at the trial court level when he ruled that the parental gifts were not part of the husband’s estate. That decision did not and was never intended to exclude parental gifts from the husband’s estate. No other cases were found with any implication

294 374 S.W.2d 510 (Ky. 1964).
295 Id. at 511.
297 380 S.W.2d 231 (Ky. 1964).
298 313 Ky. 55, 230 S.W.2d 73 (Ky. 1950).
299 364 S.W.2d 778 (Ky. 1963).
of such exclusion. KRS 403.060 which provides for property settlements in divorce suits does not exclude parental gifts from the husband's estate when alimony is being determined.

In Fyffe v. Fyffe,\(^{300}\) the court determined two interesting questions. It was held that a wife could bring suit for restoration of property under KRS 403.060 (2) independent of a divorce action if the property rights were not determined in the divorce suit. In this case the wife aided the husband as tax commissioner while the husband worked at another job. No mention was made of a property settlement when the divorce was granted. The court relied upon Coleman v. Hunt\(^{301}\) which said "Restoration, when proper, may also be had in an independent action subsequent to the divorce judgment." But the court was relying on dictum since in that case the husband, who was seeking restoration of property, was denied the property on the grounds that he refused to prove he was entitled to what he was seeking. It is safe to assert that the court did not alter their past decisions on this point.

The second point of interest in this case was that the court awarded the wife the amount of money she had paid on her husband's insurance policy where she was named beneficiary. The payments were made out of her independent funds while he was in a period of incompetency. The husband later changed the beneficiary to persons other than the wife or their child. In holding that she was entitled to restoration of the premiums, the court cited as authority Schaubberger v. Morel's Adm'r,\(^{302}\) where the court held, "In other words, the wife's interest in the policy on the husband's life is divested by the judgment of divorce, and this is true though the premiums thereon may have been paid by the wife, but in the latter case she will be entitled to be reimbursed out of the proceeds of the policy the amount of the premiums paid thereon."

In Hinton v. Hinton,\(^{303}\) the court held that where a husband charged his wife with lewd and lascivious conduct, and he was unable to prove the charge, this was sufficient to support wife's claim of cruel and inhuman treatment of wife by the husband. The wife had filed for divorce and the husband counterclaimed

\(^{300}\) 375 S.W.2d 407 (Ky. 1964).
\(^{301}\) 258 S.W.2d 484 (Ky. 1953).
\(^{302}\) 168 Ky. 368, 182 S.W. 198 (1916).
\(^{303}\) 377 S.W.2d 888 (Ky. 1964).
for divorce under KRS 403.020 (4) with a charge of lewd and lascivious conduct. The lower court awarded the husband a divorce and custody of the children while denying the wife any alimony or maintenance. The Court of Appeals held the husband failed to prove his charge, but the Court of Appeals was precluded from reviewing the granting of the divorce to the husband by KRS 21.060 (6). But the court said they could review the refusal of alimony, maintenance and the custody of the children. The court followed a very similar case on this point, Rayburn v. Rayburn. The court cited Clay v. Clay which also held that such unfounded charges by the husband amounted to cruel and inhuman treatment sufficient to allow alimony as well as divorce. The court also gave the mother custody of the children after determining that no evidence had been submitted which showed she was an unfit mother.

In McDowell v. McDowell, the court held that where a wife is granted a divorce, the husband does not have to pay the wife maintenance support for a daughter by a former marriage. In this case the wife had a daughter by a prior marriage. The marriage lasted only a short duration. The court approved the award of alimony as a matter of right, but said that no legal duty rests upon a foster parent to support a stepchild upon divorce of the foster parent of the stepchild. The court distinguished Brummett v. Commonwealth where the foster father completely took his wife's son into his home and gave the son his name in assuming the role of loco parentis. As authority for the proposition that a foster father has no legal duty to support a stepchild, the court cited a Georgia case, Rogers v. Rogers. But the Rogers case is not in point, since there the child involved was not the child of either the husband or the wife and had not been legally adopted.

304 300 Ky. 209, 187 S.W.2d 204 (1945).
305 334 S.W.2d 909 (Ky. 1960).
306 378 S.W.2d 814 (Ky. 1964).
307 357 S.W.2d 37 (Ky. 1962).
IX. ETHICS

In *Ratterman v. Stapleton*,\(^{309}\) the court clarified the Kentucky law as to who has the power to disbar an attorney. In this case the circuit court had disbarred an attorney for making "false and malicious statements about a judge." The attorney appealed. In holding that the Court of Appeals is the only court that has such a power the court said ". . . [O]ne who is sole agency of admission can be the only court that can disbar."

The holding in this case would seem to abolish old R.C.A. 3.580 which said that "nothing in these rules shall be construed as limiting or altering the power of the circuit and other courts of this state to discipline members of the Bar as that power at present exists." It at least limits its application of punishment for contempt.

The Court of Appeals derives its power to disbar from KRS 30.170 which allows the court to formulate its own rules.

\(^{309}\) 371 S.W.2d 939 (Ky. 1963).
This term the court heard five cases concerned with the field of insurance. As one might expect, four of these grew out of automobile accidents. The other case involved a rather unique mining “accident”. In three of the automobile cases the court was involved with attempts by the insurer to escape liability on policies because of breaches of the conditions of the policies by the insured. The other automobile case was concerned with the steps necessary to result in a cancellation of a policy by the insurer.

In *Weaver v. National Fid. Inc. Co.* the court held that where the insured vehicles were used twenty-two per cent of the time on trips over the 150 mile limit of coverage specified in the policy, this constituted “frequent” trips as set out in the policy.

In this case the insured, Weaver, operated two trucks in his business in Pulaski County. One truck was wrecked in Celina, Ohio, a point more than 150 miles from Pulaski County, the place of principal garaging. The insurance policy on the trucks contained a rider providing that no “frequent or regular” trips of more than 150 miles from the place of principal garaging would be made.

During the four months the policy was in effect prior to the accident, the facts showed the trucks to have been used in trips of more than 150 miles twenty-two per cent of the time. While no Kentucky cases had construed this question, the court found ample support in decisions from other jurisdictions for their holding that this constituted “frequent” use within the meaning of the policy. Those cases cited by the insured as supporting his claim, were distinguishable on their facts as falling substantially below the twenty-two per cent use in the instant case.

*Aetna Cas. & Sur. Co. v. Martin,* while affirming Kentucky law on breach of a condition subsequent in a liability insurance

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310 377 S.W.2d 73 (Ky. 1963).
312 See *e.g.*, Bruin v. Anderson, 73 S.D. 620, 47 N.W.2d 493 (1957), holding that a truck engaged in trips beyond policy limits 10% of time was not enough to relieve insurer of liability.
313 377 S.W.2d 583 (Ky. 1963).
policy as a defense to an action under the policy, certainly presented a unique statement of facts. The insured in the case, one Mullins, a policeman in Floyd County, was pursuing decedent at the time of decedent's death. Mullins failed to report the accident "because he had not come into collision with the automobile of the deceased but was 600 feet behind when it ran off the road" and he "... therefore assumed no claim could arise."\(^\text{314}\)

However, the complaint alleged that Mullins operated his automobile in such a negligent manner as to run it into the car being driven by deceased, causing his death. One is pressed to understand how two versions of an accident could be that far askew.

However, the point of law raised by the case is well settled in Kentucky, and did not require the court to interpret these conflicting facts. A condition in the policy stated that in the event of claim or suit against the insured, the insured "shall immediately forward to the company every demand, notice, summons, or other process received." Mullins failed to notify the insurer, the defendant, until more than sixty days after he was served with the summons.

The court held that as a matter of law, this was a breach of a condition subsequent to defendant's liability and in such a case prejudice to the insurer is not germane. In so holding the court re-affirmed past Kentucky decisions on this point\(^\text{315}\) and made no change in accepted insurance law.

In United States Fid. & Guar. Co. v. Wells,\(^\text{316}\) the court found that the damage for which the insured was attempting to collect was excluded from coverage by the exclusionary clause in the policy. The clause excluded from coverage all property over which the insured had physical control. The agreed statement of facts showed that the car caught fire while an employee of the insured was welding a tailpipe.

In Partin v. United Services Automobile Ass'n,\(^\text{317}\) the court was faced with determining what constituted effective cancellation of an auto liability policy. The insured's automobile had been out of use for a period of time and he began correspondence with his insurance company to effect a cancellation and later

314 Id. at 584.
315 See e.g., National Sur. Corp. v. Dotson, 270 F.2d 460 (6th Cir. 1959).
316 380 S.W.2d 75 (Ky. 1964).
317 379 S.W.2d 741 (Ky. 1964).
renewal of the policy. During this period the auto was involved in an accident. The critical exchange which the court had to interpret involved a letter from the insurer to insured offering to cancel the policy if so requested, and a reply by insured the critical part of which follows: "If it is possible and permissible to start my policy effective 1 November '58 I would appreciate it." The court felt that in view of his use of the words "if possible and permissible", and in light of the insurer's letter, this should not be construed as an unequivocal request for cancellation, but rather was an offer to further negotiate.

The question of what is an "accident" within the terms of an insurance policy was dealt with in *The Travelers v. Humming Bird Coal Co.* The case is important enough to warrant a brief summary of the facts. Suit was brought by the insured, a strip mining company, to recover under two policies of insurance after settlement of the claim by the property owner against the insured.

In October, 1956, the insured began surface strip mining on a mountain side in Leslie County. In the operation a large amount of earth and debris was removed and pushed over the slope of the mountain. Operations at the site ended in December, 1956. During this period plaintiff held an insurance policy with defendant covering accidents and hazards resulting in destruction of property and loss thereto. Prior to December, 1956, the earth mass on the slope of the mountain began to shift or move, "not all at once but gradually and slowly until it reached the Melton farm below overrunning Melton's water supply and damaging him seriously." The exact time the damage occurred is not known.

Travelers denied liability, its chief defense being this was not an accident within the meaning of the policy. The lower court held for the insured and insurer appeals. The Court of Appeals upheld the lower court saying, "The accident mentioned in the policy need not be a blow but may be a process ... It is not required to be sudden like an Alpine avalanche that upon a shout roars down with an overwhelming rapidity. A glacier moves slowly but inevitably. Where the accident is a process, how long is then not significant whether it takes three houses, three weeks,

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318 Id. at 742.
320 371 S.W.2d 35 (Ky. 1963).
or months.” The court also said . . . “It was unforeseen that the earth removed from the shelf would not secure a firm foothold.”321 The court, after looking at numerous past cases formulated the following definition of accident: “As related to the present case we deduce the principle that any happening resulting in injury, arising out of the operation of the insured’s business, which is undesigned and unintended and not foreseeable as the natural and probable consequence of the initiating act, may be regarded as an accident within the meaning of the policy.”322

321 Id. at 88.
322 Ibid.
XI. LABOR LAW

During the past term, the Court of Appeals handed down three cases in the field of labor law. These involved fire department employees, wage agreements in leasing operations and the minimum wage in the hotel and restaurant industry.

KRS 95.500(3), which became effective in 1962, provides in substance that the fire departments of second class cities be divided into three platoons, each platoon to be on duty for twenty-four hours and off-duty for the following forty-eight hours. As most fire departments have employees who are engaged only for maintenance work, the issue arose whether this on-duty, off-duty provision applied to them. The court, in City of Covington v. Meyer, decided that an electrician employed by a second class city could not, under KRS 95.500(3), be required to work an eight hour day, five day week. Such employees were to have the same on-off duty schedules as regular "line firemen." The court arrived at its conclusion by an application of KRS 95.010(2)(c) in which the term "fire department" was defined as including all officers, firemen, and clerical or maintenance employees. This case was the first judicial interpretation of KRS 95.500(3).

In Blue Diamond Coal Co. v. Baker, the court held union members may not recover from a coal company on a wage agreement when the agreement was between the union and a third party where there was no evidence to establish a master-servant relationship between the third party and defendant, and no evidence of subterfuge. Evidence that the third party was a prior foreman of defendant would not in itself establish subterfuge and justify a verdict for the claimant.

The decision and process whereby the Commissioner of Labor fixed a new minimum wage scale for women and minors in the hotel and restaurant industry was contested in the last term of the court. In Hotel & Restaurant Ass'n v. Commissioner, the central issue was the commissioner's alleged failure to take into consideration the cost of living index in formulating the increase. The court held that failure to follow the cost of living index

\[323\] 376 S.W.2d 679 (Ky. 1964).
\[324\] 375 S.W.2d 699 (Ky. 1964).
\[325\] 374 S.W.2d 501 (Ky. 1964).
did not invalidate the new order because the cost of living index was only one factor to be considered in establishing a fair livable minimum wage.

Appellant also objected to the order on the theory that the commissioner had made the order "mandatory" whereas KRS 337.250(3) only authorized him to issue a "directive" order. The court decided that the above statute applies only to original orders subjecting an industry to a minimum wage and since the hotel and restaurant industry had already been subject to a minimum wage, the new order was merely a revision that could be declared mandatory under KRS 337.290 and 337.300.

The court also noted that while the new order did not take tips into consideration, a wage scale based in part on tips might not give workers in the industry who received few or no tips a fair wage.

The court further asserted that the commission had reasonably formulated a fair livable minimum wage on data properly considered which included minimum cost of living budgets of other industrial workers.

The present case shows a change in the attitude of the court toward the significance of the cost of living index. In a 1954 case, Middlekamp v. Willis, 267 S.W.2d 924 (Ky. 1964), the court held that orders fixing a minimum wage were not supported by substantial evidence where consideration of the cost of living schedule was unrealistic. In the period of time considered, from 1942 to 1949, the cost of living had increased by only four percent, and the commissioner had ordered an average wage increase of eleven per cent. This was deemed to be an unrealistic consideration of the cost of living scale. In Hotel & Restaurant Ass'n v. Commissioner, over the time period considered, the cost of living had increased by twenty-five percent, but the commissioner ordered wage increases of up to 150 percent in some cases. Therefore, the court has clearly lessened the importance of the cost of living index in minimum wage considerations.

326 Middlekamp v. Willis, 267 S.W.2d 924 (Ky. 1964).
XII. PROCEDURE

The procedure cases decided during the last term of the Court of Appeals may be roughly classified into four general categories: (1) pre-trial procedure, (2) trial procedure, (3) post-trial procedure, and (4) appellate procedure.

A. PRE-TRIAL PROCEDURE

The cases decided in the last term dealing with pre-trial procedure involved class actions, injunctions, summary judgments, requests for admissions, and declaratory judgments.

1. Class Actions

In the case of Business Realty, Inc. v. Noah's Dove Lodge #20, the court held that officers of two voluntary associations could be added as party plaintiffs as representatives of the associations and their members. As such, they would be real parties in interest and have the capacity to file suit on behalf of the associations. To defendants' contention that the three plaintiffs were improperly permitted to intervene, the court replied that the three did not intervene, but were added as plaintiffs, as representatives in a class action under CR 23.01. The court noted that voluntary associations are not legal entities and that in Kentucky, they cannot sue or be sued. Although CR 23.01 does afford some remedy, the court pointed out that legislation is needed to rectify this "deplorable situation."

2. Injunctions

Breathitt v. Warren County Election Comm'n involved a suit by Democratic candidates for an injunction against a county election commission and one of its appointees. The plaintiffs alleged that the provisions of KRS 116.070 were violated in the appointment of a registered Democrat as a Republican judge of the election for a voting place. The lower court denied relief and the Court of Appeals affirmed, holding that the plaintiffs failed to allege or prove that the appointment would in any

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327 375 S.W.2d 384 (Ky. 1963).
329 See Clay, Kentucky Practice, CR 4.04(4) comment.
330 372 S.W.2d 793 (Ky. 1963).
manner, adversely affect or injure them as candidates, citizens or taxpayers. It is well-established in Kentucky that an injunction will not lie unless the defendant is doing or threatening an act which will be injurious to the one seeking the injunctive relief. The rule is not changed by the fact that public acts or officials are involved.

3. **Summary Judgment**

In *Philpot v. Stacy*, the appellant sued the appellee, a physician, for alleged malpractice in failing to discover and remove pieces of the appellant's clothing imbeded in an abdominal puncture wound, before suturing the wound. The trial court entered summary judgment on the ground that the action was barred by the statute of limitations. The appellant urged reversal on three grounds: (1) the appellee fraudulently concealed the appellant's condition to him, (2) the treatment by the appellee was continuous, and (3) the statute did not begin to run until the appellant discovered the cloth in the wound. In affirming the summary judgment, the court held, with respect to the first contention, that the appellant had not pleaded nor proved fraud. Fraud must be pleaded and proved. With respect to the second and third contentions, the court states that the time of the injury itself is the controlling fact with respect to the statute of limitations and that the appellant could only have been injured when the operation was performed. The rule in Kentucky is that a cause of action accrues when a party has the right and capacity to sue, and his right of action is not suspended until he discovers that he has a cause of action. The only exception that has been made to this rule is in the case of an underground trespass.

4. **Requests for Admissions**

In *Smather v. May*, the defendant made requests for admissions of statements that plaintiff, the owner of a truck, and co-

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332 Tittle v. Boggie, 300 Ky. 668, 190 S.W.2d 26 (1945); Hethel v. Furst, 260 Ky. 844, 86 S.W.2d 1018 (1935).
333 371 S.W.2d 11 (Ky. 1963).
334 Curry v. Stewart, 301 Ky. 645, 192 S.W.2d 739 (1945); CR 9.02.
337 379 S.W.2d 230 (Ky. 1964).
plaintiff, the driver of the truck, were negligent in colliding with defendant's automobile at an intersection and that defendant had sustained special damages. The Court of Appeals held that the plaintiffs' failure to respond pursuant to CR 36.01 constituted admissions of the statements. While negligence may be a matter of both fact and law, failure to respond to a request by objection or denial constitutes an admission of negligence. All matters contained in the request for admissions are admitted if not answered. This case affirmed existing law. The court also held that where appellees fail to file briefs, although given nine extensions of time in which to do so, the appellant's statement of facts and issues are accepted as correct. This was simply an application of RCA 1.260(c)(1).

5. Declaratory Judgments

In Absher v. Illinois Cent. Ry., the plaintiffs brought an action seeking declaratory relief, alleging that the defendant breached its obligations toward them to provide medical care, services, treatment, and hospitalization. The appellee had established a hospital department to provide such services to its employees, including the plaintiffs. The plaintiffs had submitted to the hospital regulations under the agreement. The lower court entered a summary judgment on the ground that the factual issues were not material. In affirming, the Court of Appeals held that the plaintiffs were not entitled to a declaratory judgment because they did not exhaust remedies provided by the hospital regulations. It is established in Kentucky that such procedures must be followed before resort may be had to the courts. The court stated that even if the plaintiffs had exhausted such remedies, a summary judgment was appropriate, although it should have been in the form of a declaration of rights, instead of in the form of a dismissal. This is contrary to Morris v. Morris, in which the court refused to allow a dismissal to stand where a declaration of rights was appropriate.

In Freeman v. Danville Tobacco Bd., the court restated the

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338 Lyons v. Sponsel, 343 S.W.2d 836 (Ky. 1961).
339 O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958).
340 371 S.W.2d 950 (Ky. 1963).
342 See Hedden v. Hedden, 312 S.W.2d 891, 894 (Ky. 1958).
343 258 S.W.2d 908, 910 (Ky. 1953).
344 380 S.W.2d 215 (Ky. 1964).
settled rule that an actual controversy concerning a justiciable issue is a condition precedent to an action under Kentucky's Declaratory Judgment Act.\textsuperscript{345} The trial court's dismissal of appellant's action for a declaratory judgment that certain board regulations were unconstitutional was affirmed. The appellant had no present legal interest in the matter in which he was seeking a declaration. The court indicated that the test of a party's legal interest is a criterion of the judicial prerogative in declaratory judgment actions.

\section*{B. Trial Procedure}

The cases decided during the last term involving trial procedure consisted of a motion for a directed verdict, arguments to the jury and amending complaints.

1. \textit{Amendment of Complaint}

In \textit{Totten v. Loventhal},\textsuperscript{346} an administrator brought an action for wrongful death of his decedent. The decedent died December 10, 1958, from injuries received December 1, 1958. The appellant was appointed administrator in September, 1959. The original complaint was filed one year later, in September, 1960. In March, 1961, the appellant filed an amended complaint which was held by the lower court to state a new cause of action in that it asked for damages for pain and suffering, and as such, was barred by the statute of limitations in KRS 413.140(1)(a). In affirming, the court held that the original complaint stated a cause of action under the wrongful death statute.\textsuperscript{347} The personal representative of the deceased may elect to sue for wrongful death or for pain and suffering, but he cannot sue for both.\textsuperscript{348} Thus, an amended complaint seeking damages for pain and suffering states a new cause of action and does not relate back to the original complaint.

2. \textit{Notice}

In \textit{Wharton v. Cole},\textsuperscript{349} the trial court rendered a judgment permanently enjoining the defendants from doing certain acts.

\textsuperscript{345} KRS 418.040.
\textsuperscript{346} 373 S.W.2d 421 (Ky. 1963).
\textsuperscript{347} KRS 411.130.
\textsuperscript{348} Cottengim's Adm'r v. Adam's Adm'x, 255 S.W.2d 637 (Ky. 1953).
\textsuperscript{349} 374 S.W.2d 498 (Ky. 1964).
The defendants had neither notice nor an opportunity to be heard. The Court of Appeals held that the trial court committed reversible error. It is essential in a judicial proceeding that notice of hearing be given to the adverse party.\footnote{KRS 28.150.} In Kentucky, under CR 40, it is established that it is reversible error to render a judgment where the defendant is not in default and has no notice of the proceeding.\footnote{Ledford v. Osborne, 350 S.W.2d 641 (Ky. 1961).}

3. **Challenges for Cause**

   In *Brumfield v. Commonwealth*,\footnote{RCr 9.36(1).} the court held that a defendant was deprived of a fair trial because the trial court had erred in failing to sustain his challenges to jurors, two of whom had been impaneled to try him the previous day on a speeding charge and several others of whom had been in the courtroom during the course of the trial. A defendant in a criminal case is entitled to a jury composed of fair and impartial jurors who have neither actual nor implied bias.\footnote{Peckham v. Family Loan Co., 262 F.2d 422 (5th Cir. 1959).} This decision is consistent with past Kentucky decisions.\footnote{Federal Communications Comm. v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949).} The court also held that it was error to require the defendant to use his peremptory challenges before the Commonwealth had accepted the jury.\footnote{Sullivan v. Commonwealth, 904 Ky. 783, 292 S.W.2d 620 (1947).}

4. **Argument to the Jury**

   In *Pozitzer v. W. R. Martin Co.*,\footnote{374 S.W.2d 194 (Ky. 1964).} the plaintiff appealed from an adverse judgment in an action for negligence in the repair of an ironer, in which the defendant had filed a counterclaim for labor and materials. The court held that whether counsel should be given an opportunity to argue a case orally in an action tried without a jury is a matter within the discretion of the trial judge. The court held that CR 43.02(5) permits counsel to argue as a matter of right only in a jury trial. This construction of CR 43.02(5) is in line with the federal construction.\footnote{Federal Communications Comm. v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949).} It has been held not to deny due process of law.\footnote{Sullivan v. Commonwealth, 904 Ky. 783, 292 S.W.2d 620 (1947).}
5. Directed Verdict

*Ramey v. Ruth* involved an action to recover for damages arising out of an automobile collision. The court held that where the record does not show the grounds upon which a party's motion for a directed verdict is made, the ruling denying the motion is not reviewable upon appeal. A motion for a directed verdict must state the specific grounds on which the motion is made. The court also held that where a motion for judgment notwithstanding the verdict is based upon the erroneous overruling of a motion for a directed verdict in which the movant failed to state his grounds, it is as if no such motion had in fact been made. The court further held that alleged misconduct of counsel in closing argument is not reviewable upon appeal where no objection was taken at the time.

6. Excusable Neglect

Two important procedural points are involved in *Crowden v. American Mut. Liab. Ins. Co.* First, the Court of Appeals held that where a defendant only had an eighth grade education and had no knowledge of court papers, the circuit court was correct in denying his motion to set aside a default judgment on grounds of excusable neglect. It is not an abuse of discretion to overrule a motion to vacate a default judgment under such circumstances. The decision in each case must rest upon the particular facts of that case.

Second, the court held that the allegations of the complaint, when construed with the exhibits filed therewith, adequately supported the judgment. This is consistent with the rule that a pleading should not be construed against the pleader; and that the court should not dismiss for failure to state a claim for relief, unless it appears that the plaintiff would not be entitled to relief under any set of circumstances which could be proved in support of his claim.

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359 376 S.W.2d 292 (Ky. 1964).
360 Scott v. McLean County Bd. of Educ., 357 S.W.2d 312 (Ky. 1912).
361 CR 50.01.
362 Commonwealth v. Ragland Potter Co., 305 S.W.2d 915 (Ky. 1957).
364 379 S.W.2d 236 (Ky. 1964).
365 Richardson v. Brunner, 327 S.W.2d 572 (Ky. 1959).
366 7 Clay, Kentucky Practice, CR 60.02 (1963).
367 Ewell v. Central City, 340 S.W.2d 479 (Ky. 1960).
C. Post-trial Procedure

Several cases were decided during this term of court dealing with the time limit for filing a motion to set aside a judgment, the execution of a judgment, the required notice for motion to set a trial date, monetary amounts, and clerical errors.

1. Motion to Set Aside a Judgment

Tarter v. Medley involved an action to quiet title wherein judgment was rendered that the mother's daughter was the legitimate child and heir of the alleged father. A motion to set aside the judgment was filed more than a year later. The ground for the motion was that the witnesses had committed perjury. The motion was overruled and the movant appealed. The court held that the motion was barred. A motion to set aside a judgment on ground of perjury or falsified evidence must be made within one year after judgment.

Benson v. Iler involved a proceeding on a prisoner's application for a writ of mandamus to compel a circuit judge to rule on his motion to vacate the judgment of conviction. The motion was made pursuant to RCr 11.42. The court granted mandamus and held that a motion under RCr 11.42 must be summarily overruled if insufficient on its face as alleged to be by the respondent, so that the petitioner would not be deprived of the right to test its sufficiency on appeal.

2. Execution of Judgment

In Crady v. Bensinger, petitioner brought an original proceeding for a writ to prohibit the trial judge from entering an order directing his re-arrest. The court held that where the trial court entered judgment denying an application for a writ of habeas corpus, but admitting the prisoner to bail pending appeal, and a single judge of the Court of Appeals entered an order setting aside that portion of the order admitting the prisoner to bail, the order of the trial judge which in effect directed the re-arrest of the prisoner while the appeal was pending, was neither erroneous nor beyond the jurisdiction of the trial court.

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368 S.W.2d 480 (Ky. 1963).
369 CR 60.02.
370 S.W.2d 15 (Ky. 1963).
371 S.W.2d 820 (Ky. 1963).
Except where the appeal operates as a stay or supersedeas, the lower court may proceed in executing the original judgment or decree. If no supersedeas is issued, the successful party in circuit court may have the judgment enforced.\textsuperscript{372} It is the duty of the court, upon application of a real party in interest, to pursue as if the appeal had not been taken.\textsuperscript{373} The court cited the rule governing civil judgments as authority for the execution of the judgment in this criminal case.

3. Monetary Amounts

In Kayronz v. Joiner,\textsuperscript{374} purchasers brought an action against their vendors for specific performance of a land contract. The vendors brought in the real estate broker as a third-party defendant, seeking indemnity for whatever sum the plaintiffs might recover. The lower court entered judgment denying relief to the purchasers, but granting the broker’s claim against the vendors for his commission. The amount of the commission was $760.00. The judgment recited that the amount in controversy was over $2,500.00. In dismissing the appeal, the court held that the amount in controversy would be over $2,500.00 if the purchasers appealed, but only $760.00 for the purposes of an appeal by the vendors. The failure to make a timely motion for appeal in a case in which the amount in controversy is within the monetary ranges mentioned in KRS 21.080 is fatal.\textsuperscript{375} Although KRS 21.070 provides that a trial court may determine the value in controversy and such is conclusive if the judgment does not fix the value when construed with the pleadings, the trial court may not create an absolute right of appeal by reciting a value that has no basis when the judgment is construed in connection with the pleadings.\textsuperscript{376}

4. Clerical Error

In Commonwealth, Dep’t of Highways v. Daly,\textsuperscript{377} appeals were held to be untimely when not filed within thirty days from

\textsuperscript{372} Barrow v. Phelps, 238 S.W.2d 1016 (Ky. 1951).
\textsuperscript{373} Ex parte Hood, 107 Ala. 520, 18 So. 176 (1895).
\textsuperscript{374} 377 S.W.2d 890 (Ky. 1964).
\textsuperscript{375} See Pennyrile Rural Elec. Co-op. Corp. v. Lyon Co., 318 S.W.2d 430 (Ky. 1958).
\textsuperscript{376} Roth v. Stauble, 313 S.W.2d 269 (Ky. 1958).
\textsuperscript{377} 374 S.W.2d 497 (Ky. 1964).
the date that the county judge signed the order book. The fact that the order book showed no date of signing did not affect the time for appealing. The contention that the entry of the date is as important as the signing itself and that there can be no judgment until both are made is unfounded. Prior decisions indicate that the act which makes the judgment effective is that of signing the order book. Dating the entry is a matter of record to be performed by the clerk. The court treated the absence of a date as a mere clerical error subject to correction under the provisions of CR 60.01. This opinion restates and clarifies existing law.

5. Miscellaneous Cases

In the case of Commonwealth v. Johnson, the court held that pursuant to RCA 1.260(c)(3), the failure of the appellee to file a brief, where the appellant filed appropriate notice, is regarded as a confession of error requiring reversal without consideration of the merits of the case. This restates existing law.

In Walker v. Bencine, the court held that a one-day notice that a motion would be filed to set the case for trial was reasonable where no substantial time for preparation was required to resist the motion and there were no circumstances to prevent the defendant's presence at the hearing. The court pointed out that in Clay, CR 40, Comment 3, it is noted that a few minutes notice would be sufficient in some circumstances. Since there was no objection to the trial date as required by CR 40, the court held that the defendant waived any objection to the reasonableness of the notice of the motion to set the trial date. This restates and clarifies existing law, since the 1960 amendment to CR 40 expressly requires that there be reasonable notice of the motion to set a trial date.

In Smarsh v. Spade, attachment had been made of the defendant's property. His wife intervened claiming ownership.

378 KRS 177.087.
379 Commonwealth v. Clarke, 340 S.W.2d 442 (Ky. 1960); City of Frankfort v. Yount, 262 S.W.2d 665 (Ky. 1953).
380 376 S.W.2d 596 (Ky. 1964).
381 374 S.W.2d 369 (Ky. 1963).
382 Burns v. Brewster, 338 S.W.2d 908 (Ky. 1960).
383 376 S.W.2d 680 (Ky. 1964).
The attachment was sustained. The appeal was dismissed, since the amount in controversy was not shown to exceed $2,500.00.\textsuperscript{384}

D. APPELLATE PROCEDURE

The cases decided by the Court of Appeals during the last term involving appellate procedure are best separated into two categories: (1) those involving original proceedings in the Court of Appeals, and (2) those involving appeals from lower court decisions.

1. Original Proceedings

The Court of Appeals decided several cases in which the petitioners failed to name the judge against whom an order for mandamus was sought.

In Clevenger v. Judge, Pike Circuit Court,\textsuperscript{385} it was held that the failure to name the judge in a mandamus proceeding is fatal. The court cited Trodglen v. Judge, Daviess Circuit Court,\textsuperscript{386} which stated that a proceeding to control the action of a trial judge was in the nature of a personal action against him, and he must be sued by name and receive notice.

In Burton v. Judge, Owensboro Police Court,\textsuperscript{387} the court held that the petitioner erroneously proceeded in an original proceeding in the Court of Appeals for a writ of mandamus since CR 81 provides that the circuit courts have jurisdiction to provide relief in mandamus proceedings directed against courts inferior to them. This restates existing law.\textsuperscript{388}

Farrow v. Downing\textsuperscript{389} was an original proceeding to compel the trial court to permit the filing of an amended complaint in a personal injury action to increase the amount of damages claimed after the trial court had granted a new trial on the ground of an excessive verdict. The court held that mandamus was not an available remedy in the absence of a showing of an unusual condition or circumstance, that mandamus would not control the discretion of the trial court, and that an adequate remedy was

\textsuperscript{384} KRS 21.070 states that an appeal is subject to dismissal in the absence of a showing that the amount in controversy is as much as $2500.00.
\textsuperscript{385} 375 S.W.2d 277 (Ky. 1964).
\textsuperscript{386} 371 S.W.2d 40 (Ky. 1963).
\textsuperscript{387} 380 S.W.2d 263 (Ky. 1964).
\textsuperscript{388} Hettich v. Colson, 366 S.W.2d 907 (Ky. 1963).
\textsuperscript{389} 374 S.W.2d 480 (Ky. 1964).
otherwise available. Mandamus is an original proceeding seeking extraordinary relief, which is granted by the Court of Appeals under unusual circumstances, where it is apparent that a great injustice and irreparable injury will result to an applicant who has no adequate remedy by appeal or otherwise.\(^\text{390}\) But if there is an adequate remedy, mandamus will not be granted, even if the trial court abuses its discretion.\(^\text{391}\) Mandamus is a proper remedy to compel an inferior court to adjudicate on a subject within its jurisdiction where it neglects or refuses to do so, but it will not ordinarily lie to correct a decision of the court.\(^\text{392}\) In *Farrow v. Downing*, the court held that petitioner had two available remedies. If the trial court's ruling constitutes an abuse of discretion, he will have an adequate remedy by appeal. Under CR 15.02, if the proof establishes grounds for an award of additional damages, the trial court could sustain a renewed motion by petitioned since respondent's order was interlocutory.

In *Hampton v. Judge, Jefferson Circuit Court, Chancery Branch, Third Division*,\(^\text{393}\) a petition was filed in the Court of Appeals seeking a writ of mandamus to compel the respondent to halt a proceeding to obtain consent for the adoption of petitioner's child. The court held that there was an adequate remedy by appeal and that petitioner failed to comply with procedural rules in applying for the writ. It is established in Kentucky that when an adequate remedy exists, the court will not grant mandamus.\(^\text{394}\) The petition was also defective for the failure to name the trial judge against whom the writ of mandamus was sought. An original proceeding seeking the Court of Appeals to control the action of a trial judge is in the nature of a personal action against the trial judge and he must be named in the suit. Three other cases decided this term are in accord.\(^\text{395}\) This is the existing law in Kentucky.\(^\text{396}\) The court also pointed out that under RCA 1.420(a), in original proceedings, a petitioner must file a

\(^{390}\) Barker v. Breslin, 329 S.W.2d 573 (Ky. 1959).
\(^{391}\) Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961).
\(^{392}\) Fannin v. Keck, 299 S.W.2d 228 (Ky. 1956).
\(^{393}\) 375 S.W.2d 276 (Ky. 1964).
\(^{394}\) Stewart v. Taustine, 343 S.W.2d 575 (Ky. 1961).
\(^{395}\) Long v. Judge, Webster Circuit Court, 378 S.W.2d 628 (Ky. 1964); Lairson v. Judge, Clark Circuit Court, 378 S.W.2d 634 (Ky. 1964); Trodglen v. Judge, Daviess Circuit Court, 371 S.W.2d 40 (Ky. 1963).
\(^{396}\) Commonwealth, Dep't of Highways v. Circuit Court of Bullitt, 365 S.W.2d 106 (Ky. 1963).
memorandum of authorities in support of his petition before he is entitled to relief.\textsuperscript{397}

In \textit{Pryor v. Weddle},\textsuperscript{398} the petitioner requested a writ of mandamus for copies of warrants, transcript of evidence, closing arguments, instructions to the jury, judgment of his conviction and copies of three indictments, claiming that he needed them to support his allegations in pending litigation. He failed to specify what the pending litigation was. The court held that the petition was too vague to justify the granting of the relief sought. A petition seeking mandamus to have a record furnished must specify with particularity a ground or grounds in support of the claim that some substantial right has been violated.\textsuperscript{399}

In \textit{Brewster v. Bradley},\textsuperscript{400} the petitioner, held in the Lexington jail for extradition to Michigan, filed a habeas corpus petition in the court presided over by respondent, to test the extradition order of the Governor. The respondent made no final ruling, but indicated that he would deny relief to the petitioner. The petitioner then filed an original action in the Court of Appeals seeking to prohibit the respondent from complying with the extradition order. The court, in holding that no appealable order was before it, stated that the trial court would be justified in staying the execution of the extradition order until the termination of the habeas corpus proceeding, including any order denying habeas corpus which might be appealed. Denial would be the equivalent of compliance with the order. The appeal allowable in habeas corpus actions would be inadequate since there are no statutory means of staying or superseding the trial court's ruling denying habeas corpus, as there is where a judgment orders the release of the person detained.\textsuperscript{401}

2. \textit{Appeals from Lower Courts}

In \textit{Dr. Pepper Bottling Co. v. Ricks},\textsuperscript{402} the defendants appealed from the adverse judgment in an action for damages resulting from an automobile collision. In construing RCA 1.090, which

\textsuperscript{397} Curtis v. Bradley, 383 S.W.2d 944 (Ky. 1960).
\textsuperscript{398} 380 S.W.2d 263 (Ky. 1964).
\textsuperscript{399} Oakes v. Gentry, 380 S.W.2d 237 (Ky. 1964); Newman v. Pound, 378 S.W.2d 809 (Ky. 1964); RCr 12.54.
\textsuperscript{400} 379 S.W.2d 480 (Ky. 1964).
\textsuperscript{401} KRS 419.130(2).
\textsuperscript{402} 376 S.W.2d 299 (Ky. 1964).
provides that the appellee be named in the statement of appeal, the court held that the designation by name of the appellee in the statement in the caption of the appeal is sufficient. This is the converse of a holding by the court that names appearing in the statement but not in the caption are sufficient. The appellee moved to dismiss the appeal since the appellants failed to move for an appeal from a part of the judgment. In Garner v. Hicks, the court held that where the record does not show a motion for appeal from such part of the judgment as was awarded to one of the two appellees, the appeal from that judgment must be dismissed. However, in the Ricks case, the court noted that the Garner case was a departure from the existing law stated in Spartin v. Roylett. It is believed that the rule in Spartin is the better view since both claims stand and fall on the same basis. The court also held that where a motion for summary judgment has been denied on the ground that there exists a genuine issue of a material fact, then such order is not only non-appealable, but may not be reviewed for error on appeal from the final judgment in the action.

In Siler v. Williford, the court held that where an appellate court decided a question of law concerning an instruction on the evidence, the question decided is final upon retrial in which the evidence is substantially the same. The opinion delivered on the first appeal precludes reconsideration of the claimed error upon a second appeal.

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403 Pelphrey v. Lemaster, 240 Ky. 759, 43 S.W.2d 29 (Ky. 1931).
404 333 S.W.2d 509 (Ky. 1963).
405 312 S.W.2d 618 (Ky. 1958).
406 See 7 Clay, Kentucky Practice 169, Comment 10 (1963); Bell v. Harmon, 284 S.W.2d 812 (Ky. 1955).
407 Siler v. Williford, 375 S.W.2d 262 (Ky. 1964).
XIII. PROPERTY

A. MINERAL LEASES

A long standing rule in Kentucky is that, "words of exception or reservation are words of grant and are ineffective to convey a right or interest to a stranger to a deed." In Townsend v. Cable, the court readily abandoned a rule it termed archaic and technical. The deed causing the controversy contained a clause which read: "There is reserved out of the foregoing tract of land for the use and benefit soly (sic) of Jesse Townsend one half interest of all the oil and gas to dispose of at his will."

The court held that under this clause Jesse Townsend acquired title, so that a subsequent purchaser from Jesse Townsend has a superior claim to this interest over heirs of the original grantor. It recited three rules to be followed in the construction of deeds: (1) "To determine the intention of the grantor as gathered from the four corners of the instrument;" (2) disregard technicalities where the intention is clear; (3) "substance rather than form controls." It follows, therefore, where there is a clear intention to create an interest or right in land, expressions of reservation rather than grant will not per se defeat such an intention. This rule has been approved and followed in Blair v. City of Pikeville.

In Blue Diamond Coal Co. v. Campbell, the court followed precedent and held the lessee could as a matter of right strip and auger, and he is not liable for damage done to the surface by strip and auger mining unless it is done "oppressively, arbitrarily, wantonly or maliciously." Here the plaintiff failed to meet this test. The court noted, however, that the cutting of a certain road "might possibly" sustain a judgment and verdict under this rule. But the claim was for damages to the entire tract, and no attempt was made to assign specific damages to the road. For this reason

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409 See generally Annot., 88 A.L.R.2d 1199 (1963); Washum v. Konrad, 275 S.W.2d 427 (Ky. 1955); Sword v. Sword, 252 S.W.2d 869 (Ky. 1952); Flynn v. Fike, 291 Ky. 316, 164 S.W.2d 470 (1942).
410 378 S.W.2d 806 (Ky. 1963).
411 378 S.W.2d 806 (Ky. 1963).
413 Wilkerson v. Young, 285 Ky. 94, 147 S.W.2d 53 (1941).
414 380 S.W.2d 84 (Ky. 1964).
415 371 S.W.2d 483 (Ky. 1963).
416 Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).
"there was no evidence . . . on which the jury could make an award for damages attributable to the road." This case clearly illustrates the importance of itemizing damages.

Similar facts were before the court in Croley v. Round Mountain Coal Co. The Blue Diamond case was followed in allowing strip and auger mining as a matter of right under the lease. But it was held that the portion of the complaint alleging operation in an arbitrary, wanton and malicious manner stated a claim for relief and should be tried.

About ten years ago oil and gas was discovered under the Ohio River between the thread of the stream and the Indiana shore. Essentially three classes of parties claimed rights to this portion of the river: (1) the bordering counties; (2) those claiming under patents of the river bed north of the thread of the stream; and (3) the State Property and Building Commission. In Commonwealth v. Henderson County, the court noted it had previously determined that the northern bed of the Ohio River is not patentable. This eliminated that class of parties claiming under patents.

The only statute dealing specifically with the land in question is the County Leasing Statute which provides:

All that portion of the bed of the Ohio River, lying north of the thread of the stream, . . . is declared to be vacant . . . land, and the county court of each county bordering on the Ohio River may use or lease the river bed for county purposes. . . . Any contract of leasing by any such county court of such river bed for any sand and gravel rights for or on behalf of the county, conveys full right and title to the lessee. . . .

This statute has never been expressly repealed, but it was argued that it was impliedly repealed by the State Property and Buildings Commission Act. The court pointed out that this Act was construed in Preston v. Clements as involving only ministerial responsibilities to determine and fill the building needs of the state. The County Leasing Statute was held not repealed when

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417 Blue Diamond Coal Co., Inc. v. Campbell, supra note 415, at 485.
418 374 S.W.2d 852 (Ky. 1964).
419 371 S.W.2d 27 (Ky. 1963).
420 Ware v. Hager, 126 Ky. 324, 103 S.W. 283 (1907).
421 KRS 56.220.
422 313 Ky. 479, 232 S.W.2d 85 (1950).
the court found no conflict between it and the Buildings Commission Act. Since the County Leasing Statute was in force the building commission had no power to lease the disputed property.

Having thus disposed of the claims of the patentees and the building commission, the court held the counties had the power to lease the northern portion of the Ohio River. It further held that the mention of "sand and gravel" in the leasing statute did not restrict the plenary power to lease. The court said that the policy of the County Leasing Statute was to encourage development of vacant land and that narrow statutory construction would militate against this.

In another case, an oil and gas lessor's adjoining land was not part of the leased premises. The lessor by oral agreement had given the lessee temporary permission to use the adjoining land as access to the leased tract. The lessee was to procure another right of way within a reasonable time. The written agreement made no reference to this oral agreement. In this case, Anderson v. Britt,423 it was held that under these facts the lessee had no implied right to use the adjoining property for access to the leased premises.

In Hutchinson v. Schneeberger,424 the habendum clause in an oil and gas lease formed the basis of the controversy. The lease was fixed for a two year term, expiring on December 9, 1957, unless oil and gas was then being produced. The lessee discovered oil at a shallow depth during the primary term of the lease, but desiring better production he elected to drill deeper. Being unsuccessful at that depth, he then suspended all operations for the winter, an accepted practice. The next spring he returned and pumped oil from the shallow, first discovered level. The oil was there, and all parties knew it was there.

Noting that this situation had not previously been presented before it, the court held there was production under the provisions of the lease. So the lease was automatically in force for as long as there was production. The court relied on the Oklahoma case of Western States Oil & Land Co. v. Helms425 which held that oil discovered during the primary term of a lease could be tempo-

423 375 S.W.2d 258 (Ky. 1963).
424 374 S.W.2d 483 (Ky. 1964).
425 143 Okla. 206, 288 P. 964 (1930).
rarily abandoned to search for other oil, without a forfeiture of the lease. The court also relied heavily on the lessee's display of good faith in developing the lease with reasonable diligence.

B. WILLS AND TRUSTS

The case of Smith v. White\textsuperscript{426} involved the construction of a residuary clause in a holographic will. The clause was held ambiguous and void in its entirety. No new rule of law was enunciated, but the case serves to illustrate the need for proper execution of wills. Here the testatrix's intention seemed to have been carried out, but even so it was the opinion of a court, not necessarily that of the testatrix herself.

In another case the wife qualified as administratrix of her husband’s estate. In this capacity she sought to recover a loan made from her to the husband before his death. In Combs v. Combs\textsuperscript{427} the court disallowed such a claim for lack of proof of a promise to repay and noted that in Kentucky a loan made to one’s spouse does not imply a promise to repay.\textsuperscript{428} This case shows a spouse should have concrete evidence of a promise to repay; e.g., a note.

Two cases decided during the term concerned the appointment of administrators. Prior Kentucky law was followed in each case. Skaggs v. Cook\textsuperscript{429} involved the appointment of a public administrator when a niece and nephew both qualified as executors. Because the niece and nephew were antagonistic to each other, the county court appointed a public administrator and the circuit court affirmed. On appeal the judgment was reversed, and the niece, who would act to enhance deceased’s estate, was ordered appointed. It was noted that the antagonism necessary to disqualify the niece must be such that it is incompatible with the best interest of the estate. “‘... [M]ere personal hostility toward a distributee does not necessarily disqualify one to act as personal representative of an estate.’”\textsuperscript{430}

\textsuperscript{426} 378 S.W.2d 622 (Ky. 1964).
\textsuperscript{427} 380 S.W.2d 227 (Ky. 1964).
\textsuperscript{428} Bailey's Adm'r v. Hampton Grocery Co., 189 Ky. 261, 224 S.W. 1067 (1920).
\textsuperscript{429} 374 S.W.2d 857 (Ky. 1964).
\textsuperscript{430} Barnett's Adm'r v. Pittman, 282 Ky. 162, 167, 137 S.W.2d 1098, 1100 (1940).
Whisler v. Allen\textsuperscript{431} was an action against an ancillary administrator to determine the validity of the appointment. The decedent, an out of state resident, died from injuries sustained in an automobile accident. The challenged administrator was appointed in the county where the accident occurred. Citing Jewel Tea Co. v. Walker's Administrator,\textsuperscript{432} the court held "...that a claim for damages for death resulting from... an auto accident was sufficient estate on which to grant administration."\textsuperscript{433}

In another case, a very domineering father had exerted considerable influence upon his daughters to execute certain trusts. After his death the daughters sought to revoke the trusts because they were allegedly executed by reason of undue influence by the father. On some evidence of undue influence, the court in Citizens Fid. Bank & Trust Co. v. Leake\textsuperscript{434} allowed revocation of the trust. Relying on Brannin v. Shirley,\textsuperscript{435} the court held that where a trust deprives a settlor of all his estate, only slight testimony of undue influence is needed to set it aside.

C. Mortgages

In Wilder v. Boatright\textsuperscript{436} the court considered a question of first impression concerning a second mortgage. The original mortgagor of a house sold it and took a second mortgage from the grantee, the grantee having assumed the original mortgage. Subsequently, the house was reconveyed to the grantors, and the second mortgage released. The house was again sold with the first mortgage being assumed. These last grantees defaulted, and the first mortgage was foreclosed. The original mortgagors claim the surplus from the judicial sale under the second mortgage. The court held that the second mortgage merged with the first on the reconveyance to the original mortgagors. For this reason they had no claim to the surplus proceeds of the sale.

The well settled rule that forbearance to sue is a valid consideration to support a promise was reiterated in Cooke v. Louis-

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\footnote{431} 380 S.W.2d 27 (Ky. 1964).
\footnote{432} 290 Ky. 328, 161 S.W.2d 66 (1942).
\footnote{433} Whisler v. Allen, supra note 431.
\footnote{434} 380 S.W.2d 264 (Ky. 1964).
\footnote{435} 91 Ky. 450, 16 S.W. 94 (1891).
\footnote{436} 371 S.W.2d 949 (Ky. 1963).
\end{footnotes}
viele Trust Company.\textsuperscript{437} It was held that forbearance to demand payment on a prior note is sufficient consideration to support another note and a mortgage on the borrower's house. The court cited Hall v. Fuller\textsuperscript{438} and Forsythe v. Rexroat\textsuperscript{439} as authority.

D. Title to Intangibles

Where bonds are purchased in the name of the purchaser and a co-owner, the rule in Kentucky had been that without actual delivery by the purchaser to the named co-owner, there had been no gift to the latter, and he acquired no interest in them.\textsuperscript{440} This rule was expressly overruled in Marcum v. Marcum.\textsuperscript{441} Here a father purchased United States savings bonds in the joint names of himself and either of two sons. Reasoning that it was a question of third party beneficiary rights under a contract, and not one of a gift, the court held the sons were co-owners at the time of purchase. On the death of the father they became the sole and absolute owners, notwithstanding the lack of actual delivery. This decision brought Kentucky into accord with Treasury Department Regulations\textsuperscript{442} and a vast number of cases from other jurisdictions.\textsuperscript{443}

The court has approved and followed the Marcum decision in the subsequent case of Hensley v. Ball.\textsuperscript{444} There, the purchaser had bought stocks, bonds, notes and cashier checks issued in the names of members of his family. Citing the Marcum case, the court held that the named members of the family, rather than decedent's estate, had title to the instruments.

E. Fraudulent Conveyances

The significant aspect of Willett Lumber Co. v. Hall\textsuperscript{445} is the construction of the pleadings. Only by construing the pleadings

\textsuperscript{437} 380 S.W.2d 255 (Ky. 1964).
\textsuperscript{438} 352 S.W.2d 559 (Ky. 1961).
\textsuperscript{439} 234 Ky. 173, 27 S.W.2d 695 (1929).
\textsuperscript{440} Henderson's Adm'r v. Bewley, 284 S.W.2d 680 (Ky. 1953).
\textsuperscript{441} 377 S.W.2d 62 (Ky. 1964).
\textsuperscript{442} Second Liberty Bond Act § 22, 31 U.S.C.A. § 757c (1917); Treas. Reg. § 315.61 (1917).
\textsuperscript{444} 390 S.W.2d 279 (Ky. 1964).
\textsuperscript{445} 375 S.W.2d 266 (Ky. 1964).
liberally did the plaintiffs state a claim for which relief could be granted. Citing Kentucky Civil Rules 8.06, 801 and 54.03, the court reiterated its policy for liberal construction of pleadings.\footnote{Ewell v. Central City, 340 S.W.2d 479 (Ky. 1960); Lee v. Stamper, 300 S.W.2d 251 (Ky. 1957).}

In an action to set aside a deed as a fraudulent conveyance, the rule of evidence governing admissions was extended in Trent v. Carroll.\footnote{380 S.W.2d 87 (Ky. 1964).} The purchaser of the property was questioned concerning his prior notice of the claim of the vendor's judgment creditor. His evasive and unresponsive answers were held to be a failure to deny, therefore constituting an admission.

\section*{F. Quieting Title}

Probably the most important case during the last term, involving an action to quiet title, was Creech v. Jackson.\footnote{375 S.W.2d 679 (Ky. 1964).} It was important not for rules of property but because it enunciated a new rule in appellate procedure. Plaintiffs sought to quiet title to certain land and recover their proportionate share for timber removed from the land. The court below dismissed their claim, the separate claims being less than the jurisdictional amount necessary to afford an appeal as a matter of right. Plaintiffs sought to appeal on the basis that the aggregate of their claims exceeded that amount. The defendants argued that such combining of claims was not permissible to meet the jurisdictional amount required, citing Roth v. Stauble\footnote{313 S.W.2d 269 (Ky. 1957).} where the rule was:

\begin{quote}
... that when two or more parties who might have brought separate actions join in one suit to recover a money judgment, the aggregate sum does not determine jurisdiction of the court ... and (claims) cannot be united ... for the purpose of giving this court jurisdiction. ...
\end{quote}

The court expressly overturned Roth adopting the rule as stated in American Jurisprudence, Appeal and Errors, Section 56, pages 885 and 886. The new test is "... whether two or more persons ... claim property or money under one common right and the adverse party has no interest in its apportionment ...\footnote{Creech v. Jackson, supra note 448, at 680.}
between or among them.\textsuperscript{451} If so claimed the interests may be
joined to confer appellate jurisdiction. Here the court found the
plaintiffs claims were within this new test.

In another action to quiet title\textsuperscript{452} the court restated a rule
that in such an action the burden is on the plaintiff to establish his
title, and he may not rely on the weakness of his adversary's title.
On the same day in an ejectment action,\textsuperscript{453} the rule was again
stated. The court held that in an ejectment action the plaintiff
cannot prove his own title by showing a defect in the defendant's
deed.

In another case to quiet title the plaintiff was the holder of an
unrecorded deed.\textsuperscript{454} The defendant claimed to be a bona fide
purchaser because the deed was outside the chain of title. The
plaintiff had given an oil and gas lease to the property which
mentioned the unrecorded deed; the defendant admitted knowl-
dge of this lease. The court held that since there was knowledge
of the lease, there was notice of the deed cited in the lease. Such
notice was held to have bound the defendant so he could not
claim as a bona fide purchaser.

G. Restrictive Covenants

Two cases involving restrictive covenants were decided during
the term. Neither changed existing law. In \textit{Dartmouth-Willow Terrace, Inc. v. MacLean},\textsuperscript{455} the original developer had restricted
the lots in question for the benefit of the adjoining lots. But the
present owners of the adjacent lots executed quit claim deeds to
the appellee, releasing any right to enforce the restrictions. The
court held the restrictions were for the special benefit of the
adjoining lots and not part of a general scheme for the benefit of
the entire subdivision. The restrictions were no longer enforce-
able. moreover, these restrictions were against apartment houses,
and there had been many multiple dwellings built in the sub-
division. This change in conditions, the court found, also ex-
tinguished the restrictions to the extent they may have excluded
apartment houses.

\textsuperscript{451} \textit{Id.} at 681.

\textsuperscript{452} \textit{Kephart v. Rucker}, 379 S.W.2d 244 (Ky. 1964).

\textsuperscript{453} \textit{Brumley v. Brumley}, 379 S.W.2d 243 (Ky. 1964).

\textsuperscript{454} \textit{Turner v. McIntosh}, 379 S.W.2d 470 (Ky. 1964).

\textsuperscript{455} 371 S.W.2d 937 (Ky. 1963).
The case of McMahan v. Hunsinger involved the interpretation of a restrictive covenant worded "... shall be used for residential purposes only...." Following the rule of McMurtry v. Phillips Investment Co., the court noted that draftsmen of such covenants may use language expressly prohibiting the use of property. But the failure to use such specific language warrants the view that it was a deliberate and intended omission. The covenant as construed was held not to prohibit construction of apartment houses.

H. Injury to Property

An easement in general terms had been reserved on certain lots in favor of the city of Pikeville. The subsequent purchaser of these lots sought damages allegedly sustained from construction of a sewer line through the lots in Blair v. City of Pikeville. Judgment for the defendants. On appeal the court reversed holding: "If the sovereign extends its activities beyond the acquired right of way to the damage of the abutting owner, it... is taking (without compensation) within the purview of section 242 Ky. Constitution. The cause was remanded to determine if the city used the easement in an unreasonable manner.

In an action to recover for damages to a house caused by blasting operations there was strong expert testimony that the blasting could not possibly have been the cause. Under such facts in River Queen Coal Co. v. Mencer a directed verdict for the defendant was not allowed; there was substantial evidence in conflict with the expert testimony. In so holding the court declared that to take such a view "would be requiring a complainant to prove his case scientifically rather than by the law's old established standard of probable cause."

A suit to enjoin operation of a rock quarry as a nuisance was decided in Associated Contractors Stone Co. v. Pewee Valley Sanitarium and Hosp. It was held that since the test shot shook the homes, it was certain that they would be repeatedly shaken by

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456 375 S.W.2d 820 (Ky. 1964).
457 103 Ky. 308, 45 S.W. 98 (1898).
458 380 S.W.2d 84 (Ky. 1964).
459 Id. at 87.
460 379 S.W.2d 461 (Ky. 1964).
461 Id. at 464.
462 376 S.W.2d 316 (Ky. 1963).
the larger shots expected to be used in the regular quarrying operations. The judgment enjoining the operation was affirmed. In explaining the result the court pointed out some historical developments in the law of nuisance. Under the early view a person's right to unmolested enjoyment of his property was nearly absolute. During the industrial revolution this changed, and for a time industry could do no wrong. Today the policy is to achieve a reasonable balance between the person's right to peaceful enjoyment of his property and the needs of commerce.
XIV. TAXATION

*Commonwealth v. Smith*463 dealt primarily with the Commissioner of Revenue's attempt to enforce inheritance tax liens against certain real property in the hands of bona fide purchasers for value from the deceased's estate. They were without actual notice of the tax deficiency, the sale having taken place prior to filing of the liens. In holding that the liens could be enforced, the Court of Appeals followed Kentucky case law464 and interpreted, so as to reconcile, two seemingly conflicting statutes.465 In examining KRS 140.190 the court concluded that it, with "reasonable clarity, provides that there shall be a lien on the property transferred which, as respects real estate shall be valid . . . "466 against such purchasers whether notice is filed or not. This construction, as the court noted, is not unreasonable since purchasers from estates should anticipate the existence of an inheritance tax liability.

KRS 134.420, which is part of the general tax law, requires filing of notice of tax liens for them to be good against a bona fide purchaser without actual or constructive notice of such liens on all property. The court in order to reconcile the two statutes held that "with respect to inheritance taxes KRS 134.420 [should] be considered to apply only to property other than the property transferred;"467 thus notice is not required.

A less complicated approach would seem to have been to find that a purchase from the estate of a deceased person was in itself constructive (inquiry) notice of any existing inheritance tax liability and thus no conflict in the two statutes.

In *Kentucky Tax Comm'n v. American Tobacco Co.*468 the commission sought to apply an alternate taxing formula pursuant to KRS 141.120(9) to the defendant corporation. The questionable part of the formula provided that all receipts from sales to licensed wholesalers in Kentucky should be allocated to Kentucky despite the fact that the sales were chiefly negotiated in New

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463 375 S.W.2d 386 (Ky. 1964).
465 KRS 134.420, 140.190.
467 Ibid.
York. The court rejected the formula after interpreting the statute to require that if receipts from sales are used in any formula, those receipts must be assigned to the place of chief negotiation.

This case was brought under the above statute prior to its amendment in 1962 which would now permit such a formula. The statute as amended provides; “receipts from sale . . . shall be assigned to this commonwealth if . . . chiefly negotiated . . . in this state, or if . . . derived from . . . property delivered into this state, the place of negotiation of the sale notwithstanding.”469 (Emphasis added.)

469 KRS 141.120.
XV. TORTS

There was much litigation but little change in existing law in the area of torts during the past term.

In the case of Schweitzer v. Good,\textsuperscript{470} the court again interpreted KRS 189.470(1) which provides:

No person shall operate a vehicle when it is so loaded, or when there are in the front seat such number of persons, exceeding three, as to obstruct the view of the operator to the front or sides of the vehicle or as to interfere with the operator's control over the vehicle.

In Clark v. Finch's Adm'x,\textsuperscript{471} there were six persons in the cab of the plaintiff's truck. The court held that it was prejudicial error for the trial judge to refuse to instruct the jury that the plaintiff's duties included the duty not to have more than three persons on the seat occupied by the driver so as to obstruct his view to the front and sides of the vehicle or as to interfere with his operation and control thereof. In Coy v. Hoover,\textsuperscript{472} the plaintiff was one of four persons who occupied the front seat of a car. The defendants contended that the plaintiff, in so doing, was contributorily negligent. The Kentucky Court of Appeals, in upholding the lower court's submission of the issue to the jury, in effect held that a person is not contributorily negligent as a matter of law for riding in an automobile which has over three persons in the front seat. In the Good case, supra, there were also four persons, one of whom was a three-year-old child, in the front seat. There was no evidence that the presence of the fourth person had any causal connection with the accident. The court held that the trial court properly refused instruction under KRS 189.470(1).

In Music v. Waddle,\textsuperscript{473} the plaintiff pedestrian was struck while attempting to cross a city street between intersection. The plaintiff saw the approaching car as he left the curb and, thinking that he had plenty of time, did not look again. He was struck by the defendant's car just before he reached the center of the street. The court held that the plaintiff was contributorily negli-

\textsuperscript{470} 380 S.W.2d 809 (Ky. 1964).
\textsuperscript{471} 254 S.W.2d 984 (Ky. 1953).
\textsuperscript{472} 272 S.W.2d 449 (Ky. 1954).
\textsuperscript{473} 380 S.W.2d 203 (Ky. 1964).
gent as a matter of law and that his negligence was the proximate cause of the accident. The court noted that the plaintiff, under KRS 189.570(4)(a), was charged with the duty to yield the right of way. The court stated:

Unless this provision is to be reduced to something less than a statutory mandate, the necessity of keeping a reasonable look-out for his own safety cannot end at the curb, but must continue until he clears the street. . . . (Emphasis added)

In reaching this decision, the court overruled the cases of Wilder v. Cadle, Murphy v. Homans, and Ramsey v. Sharpley.

The “continuing duty” theory of due care was again expressed in the case of Louisville & N. R.R. v. Dunn. There was evidence that the plaintiff truck driver had stopped his truck some fifteen or twenty feet from the nearest rail and looked to see whether anything was coming. Upon seeing nothing for a distance of some 900 feet, the plaintiff proceeded to the railroad crossing. He testified, and the court accepted it at face value, that it took some 35 to 45 seconds to reach the tracks at which time he was struck by a train. After making the first look, the plaintiff did not again look in either direction and was oblivious to the presence of the train until after the collision. In holding the plaintiff contributorily negligent as a matter of law, the court said:

[D]ue care required that he either continue his lookout or at least look again during the interim. . . . [E]very person has a continuing duty of caution for his own safety and this duty is not discharged by a momentary caution that is prematurely abandoned. (Emphasis added)

In Wilson v. Lehman, the plaintiff sought to recover for administration of shock treatments, allegedly without her consent. The court adopted the rule stated in 70 C.J.S. Physicians and Surgeons Section 62:

In the absence of evidence showing that the patient was the victim of false representations, his consent to treatment or to

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474 227 Ky. 486, 13 S.W.2d 497 (1929).
475 286 Ky. 191, 150 S.W.2d 14 (1941).
476 294 Ky. 191, 150 S.W.2d 14 (1941).
477 380 S.W.2d 241 (Ky. 1964).
478 379 S.W.2d 478 (Ky. 1964).
an operation will be presumed from the fact that he voluntarily submitted to it.

The court found that since plaintiff voluntarily submitted to the treatments there was a presumption of consent, and because plaintiff failed to rebut the presumption the directed verdict for the defendants was affirmed.

Lastly, the case of Frederick v. Collins,479 the court held an employer liable for an intentional tort committed by an employee. The act was unauthorized. This case is not significant because of the result; rather, its significance is derived from the fact that the court used the test set forth in RESTATEMENT (SECOND), AGENCY, section 245.480 The court noted a tendency to extend the employer’s responsibility under modern theories of allocation of the risk of the servant’s misbehavior. In adopting the principle used in the second restatement, the court recognized that it reflects a broader basis of liability than did Section 245 of the first edition.481

479 378 S.W.2d 617 (Ky. 1964).
480 A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant’s employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.
481 A master who authorizes a servant to perform acts which . . . are of such nature that they are not uncommonly accompanied by the use of force is subject to liability for a trespass to such persons or things caused by the servant’s unprivileged use of force exerted for the purpose of accomplishing a result within the scope of employment.
XVI. SOCIAL SECURITY

One case of significance came before the court this term in the area of social security. In Commonwealth, Division of Unemployment Ins. v. Goheen, the court held that defendant, a West Virginia contractor, had to pay Kentucky unemployment taxes on workers on a project completed wholly within the state of Kentucky even though the workers were West Virginia workers as defined by the Act, and even though the defendant had paid the tax on these same wages in West Virginia.

At hand was an interpretation of KRS 341.056. The court said that the interpretation of the uniform statute (which Kentucky has followed) clearly makes the location of the work the chief criterion and in the instant case, all work was done in Kentucky.

The decision of the lower court in favor of the defendant, based on a double taxation problem, did not impress the Court of Appeals. "The case at bar is one where the employer proceeded at his own risk in making payments (to West Virginia) if in fact he did so . . ." The court relied on a New York case which reached a similar result under the uniform statute.

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482 372 S.W.2d 782 (Ky. 1963).
In the Workmen's Compensation area, the court handed down several interesting decisions which shall be considered within two rather broad categories: medical cases and subsequent claim fund.

A. Medical Cases

A large number of cases that reach the Court of Appeals contesting decisions of Workmen's Compensation Board concern the question of whether the Board was justified in reaching its conclusions under the evidence presented. The court in the past term adhered to the traditional rule that where there is conflicting medical testimony the Board's decision will be upheld, as the claimant has the burden of persuasion.\(^4\)

Even though this rule is well settled it was further explained and extended in three cases during the past term. In *Thompson v. Mayflower Coal Co.*, claimant contended he was totally disabled by an accident which occurred in the course of employment. The Board found that the claimant was disabled due to a non-occupational disease, osteoarthritis. There was conflicting medical testimony, but a specialist in radiology testified that in his opinion, claimant's arthritic condition was not sufficient to account for the disability. The radiologist, among the medical experts, was the most qualified in this field. Nevertheless, the court concluded that the Board was justified in reaching its conclusion, reasoning that except in cases of extreme and obvious contrast, medical testimony must not be weighed according to the qualifications of the witness insofar as review of Board decisions is concerned.

The court in this case also disregarded claimant's contention that the Board should have called one or more disinterested experts in the light of the conflicting medical evidence, because this was discretionary with the Board, since an amendment to KRS 342.315 in 1946 making this mandatory was repealed in 1948.

In *Kelly Contracting Co. v. Robinson*, where the deceased

\(^4\) Bays v. Indian Hills Country Club, 377 S.W.2d 86 (Ky. 1964); Roark v. Alva Coal Corp., 371 S.W.2d 856 (Ky. 1964).  
\(^46\) 379 S.W.2d 459 (Ky. 1964).  
\(^48\) 377 S.W.2d 892 (Ky. 1964).
died of a coronary occlusion while working for a road contractor, the only medical witness testified that the occlusion could have been caused by deceased's work. The court held that a mere possibility was not sufficient. This case reaffirmed the recent policy of the court to look with great suspicion on cases of heart attacks alleged to have been caused by the employment.\textsuperscript{487} Also, this decision seems contrary to cases which have held that the Board's decision must stand unless there is a lack of material evidence of a probative force to support the Board.\textsuperscript{488}

In \textit{Lee v. International Harvester Co.},\textsuperscript{489} the court held that a Board is not bound to give an award to claimant where claimant's medical evidence would support an award and where the defendant does not come forward with some definite quantum of rebutting evidence. This is in line with a great number of recent cases which hold that the claimant bears the burden of proof and the risk of persuading the Board in his favor.\textsuperscript{490} The present case is significant because it expressly overruled \textit{Greathouse Co. v. Yenowine}\textsuperscript{491} which had held that where a claimant presents evidence which would support an award, the Board is bound to find for the claimant unless the defendant comes forward with rebutting evidence.

In \textit{Neagle v. State Highway Department},\textsuperscript{492} claimant sought to receive compensation for chiropractor's fees in treating an on-the-job injury. The court upheld the Board which had dissallowed the claim. Apparently this was a case of first impression in Kentucky workmen's compensation law. The court based its decision on KRS 342.020 which provides for compensation for medical expenses, and KRS 311.550(8) which specifically provides that the practice of medicine does not include the practice of chiropractic.

\textsuperscript{487} Terry v. Associated Stone Co., 334 S.W.2d 926 (Ky. 1960).
\textsuperscript{488} Jenkins v. Tube Turns, Inc. 321 S.W.2d 48 (Ky. 1960); Clear Fork Coal Co. Gaylor, 236 S.W.2d 519 (Ky. 1956); Black Mountain Corp. v. Myers, 289 Ky. 49, 157 S.W.2d 488 (1941).
\textsuperscript{489} 333 S.W.2d 418 (Ky. 1963).
\textsuperscript{490} Columbus Mining Co. v. Childers, 265 S.W.2d 443 (Ky. 1954). Bays v. Indian Hills Country Club, \textit{supra} note 5; Roark v. Alva Coal Corp., \textit{supra} note 5.
\textsuperscript{491} 302 Ky. 159, 193 S.W.2d 758 (1946).
\textsuperscript{492} 371 S.W.2d 630 (Ky. 1963).
\textsuperscript{493} Green v. Rawlings, 290 Mich. 397, 287 N.W. 557 (1939); Shober v. Industrial Comm'n, 92 Utah 399, 68 P.2d 756 (1937).
In states which classify chiropractic as the practice of medicine, allowance for such fees is granted in workmen's compensation cases. But in jurisdictions like Kentucky which do not consider the practice of chiropractic the practice of medicine, the opposite result is reached, as in the principal case.

In a case of first impression in Kentucky, Berry v. Owensboro Ice Cream & Dairy Products, the court ruled that infectious bronchial asthma is not an "ordinary disease" arising out of and in the course of employment. Diseases which are ordinary are not compensable.

In Commonwealth, Dept. of Highways v. Lindon, claimant had injured his foot in the course of his employment. According to the medical evidence his foot had physically healed but claimant had a form of psychoneurosis hysteria whereby he was in constant pain and unable to work. There was conflicting medical evidence whether psychiatric treatment in the form of sodium amytal interviews (which are not considered dangerous or painful) would correct the condition. The court overruled the Board's decision and found that the refusal to submit to the treatment was unreasonable and therefore denied compensation under KRS 342.035. This seems to be a novel issue in Kentucky case law, but the situation is closely akin to the "refusal to submit to operation cases" where the court has consistently supported the claimant in his refusal to submit. The court based its decision on the fact that in the "operation cases" there was some degree of physical suffering involved and stated that the difference of expert opinion as to the possible success of the treatment was not sufficient to support a refusal to take the treatment where it would involve no suffering. This is in conflict with the theory in the latest operation case, Bethlehem Mines Corp. v. Hall (decided last term), which expressly held that if there is a difference of expert opinion concerning the danger or result of a major operation, even though the great weight of

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494 Corsten v. State Industrial Comm'n, 207 Wis. 147, 240 N.W. 834 (1932).
495 376 S.W.2d 302 (Ky. 1964).
496 KRS 342.316.
497 380 S.W.2d 247 (Ky. 1964).
499 379 S.W.2d 58 (Ky. 1964).
medical evidence indicates the operation is advisable, a Board cannot be overruled in its finding that the employee's refusal to submit is not unreasonable as a matter of fact.

In *Inland Steel Co. v. Mosby*, the court approved an award to claimant of one hundred per cent disability for silicosis without deducting an award for fifty per cent disability to the body as a whole arising out of a leg injury incurred during the same period of employment during which the silicosis was incurred. The court quoted the statement that "The fact that a man has once received compensation for fifty per cent of total disability does not mean that ever after he is in the eyes of compensation law but half a man..." This case followed prior law.

In *Brock v. International Harvester Co.*, *Stevens Elkhorn Coal Co. v. Tibbs*, *Alva Coal Corp. v. Trosper* and *American Radiator & Standard Sanitary Corp. v. Gerth*, the court held that an employee who is employed full-time by his employer is not considered to be disabled while he is so employed. This is of importance because of the statute of limitations for filing notice of a claim. KRS 432.316(2) provides that "... notice of the claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted such disease, or a diagnosis of such disease is first communicated to him, whichever shall first occur." In 1961 *Mary Helen Coal Corp. v. Chitwood*, interpreted this statute to mean notice of actual disability, not symptoms of an occupational disease. The above four cases along with two 1963 cases are a drastic extension of this questionable interpretation of the statute. It may well be that the law is by no means settled on this point.

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500 375 S.W.2d 268 (Ky. 1964).
501 Id. at 269, quoting from 2 Larson, Workmen's Compensation Law 67.
502 International Harvester Co. v. Poff, 331 S.W.2d 712 (Ky. 1959).
503 374 S.W.2d 507 (Ky. 1964).
504 374 S.W.2d 504 (Ky. 1964).
505 375 S.W.2d 407 (Ky. 1964).
506 375 S.W.2d 817 (Ky. 1964).
507 351 S.W.2d 167 (Ky. 1961).
508 Inland Steel Co. v. Mullins, 387 S.W.2d 250 (Ky. 1963); Bethlehem Mines Corp. v. Davis, 385 S.W.2d 176 (Ky. 1963). These two cases are considered in the First Annual Kentucky Court of Appeals Review, 52 Ky. L.J. 706, 707.
B. SUBSEQUENT CLAIM FUND

In Nashville Coal, Inc. v. Drake, claimant was injured while working for defendant. The Board found that the injury to claimant while working for defendant resulted in a twenty per cent permanent disability and that a prior injury resulted in claimant being eighty per cent permanently disabled. The Kentucky statute in effect at the time of the injury, KRS 342.120(1), provided in substance that if the present injury combined with a pre-existing permanent partial disability to produce a disability greater than that of the present injury alone and exceeding the total of the previous plus the present injury disabilities, the employer is liable only to the extent of the present injury and the Subsequent Claim Fund is liable for the per cent of disability over the total of the two accidents—due to a combination of disabilities. Since in the present case the claimant was eighty per cent disabled by the first accident and twenty per cent disabled by the second, the court concluded he could not recover from the Subsequent Claim Fund because there was no disability over and beyond that directly attributable to a combination of the first and second injuries. This case is a logical qualification of the statute.

500 371 S.W.2d 859 (Ky. 1963).
510 This statute was amended in 1962, but KRS 341.120(3) now has substantially the same wording KRS 342.120(1) formerly had.