The First Annual Kentucky Court of Appeals Review

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The First Annual Kentucky Court of Appeals Review

FOREWORD

By JOHN BATTERM

The Kentucky Court of Appeals annual review is new evidence of the generative quality of the young mind. It is a bright and fresh approach to law journal service. The review is solely the work-harvest of the Law Journal students. To pun poorly on an old song (too old for these students to have heard)—Yes, sir, it's their baby.

Since this is the first review, we can view it in a Spockian sense. That is, it will mature over the years. No doubt! However, unlike most babies, this "youngling" can stand, walk and run on its own legs.

I am certain that the review will become an established institution. And this institution will work with two things in mind. First, to provide the practitioner with a superior research service. Second, to place at the disposal of national legal scholars the end-statements and analysis of the Kentucky Court of Appeals. To sum: This issue is dedicated to these purposes and, as I see it, to the intellectual intoxication and vista-vision that youth possesses.

* Associate Professor of Law, University of Kentucky College of Law.
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I. CONSTITUTIONAL LAW

During the 1962-1963 term, the court of appeals rendered nine decisions involving various provisions of the federal and state constitutions. The cases of greatest interest were: *Arlan's Department Store v. Commonwealth,* in which Kentucky's Sunday closing law was challenged as being "void for vagueness"; *McIntosh v. Commonwealth,* which delineated the extent of an indigent's right to court-appointed counsel on appeal in light of recent Supreme Court decisions on that subject; and *Commonwealth v. Brinkley,* which concerned the admissibility into evidence of tape recordings where the method by which the recordings were obtained was attacked as being an unconstitutional "search and seizure" and a violation of the Federal Communications Act, section 605. The remaining six cases involved questions ranging from racial discrimination in jury selection, the mandatory provision of the statute requiring voting machines, and interpretation of Kentucky's murder statute in common law terms, to the department of agriculture's summary power to kill a cow, to a prisoner's right to credit on his sentence, and a unique problem arising out of Frankfort's transition from third class councilmanic government to second class city manager type.

For the second time in a year, *Arlan's Department Store v. Commonwealth* brought Kentucky's Sunday closing law before the court of appeals for interpretation and reconciliation with the Federal Constitution. On the first hearing of this case, the court held that the law did not violate constitutional guarantees and prohibitions with respect to religion, was a proper exercise of the police power, was not discriminatory or arbitrary, nor was its enforcement a violation of Arlan's right to equal protection of the law.

On this appeal Arlan's contended, *inter alia,* that the statute was

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1 369 S.W.2d 9 (Ky. 1963).
3 368 S.W.2d 331 (Ky. 1963).
5 362 S.W.2d 494 (Ky. 1962).
6 Martin v. Commonwealth, 361 S.W.2d 654 (Ky. 1962).
8 Pryor v. Thomas, 361 S.W.2d 279 (Ky. 1962).
9 Spillman v. Beauchamp, 362 S.W.2d 93 (Ky. 1962).
10 Fowler v. Black, 364 S.W.2d 194 (Ky. 1963).
11 City of Frankfort v. Triplett, 365 S.W.2d 328 (Ky. 1963).
12 369 S.W.2d 9 (Ky. 1963).
too vague to be enforceable, relying on the "void for vagueness" rule. Arlan's argued that the exemption of "works of necessity" from the operation of the statute created an area of doubt as to what Sunday business is permissible and what is not, and thus what is criminal conduct under the statute and what is not. This question was new for Kentucky and has not yet been considered by the Supreme Court. It was discussed briefly in Justice Frankfurter's concurring opinion in McGowan v. State, where he pointed out that the "... effect of the phrase has been to give the courts a wide range of discretion in determining exceptions."

The court, almost giving recognition to the fact that the enforcement of the law has been erratic and the exemption of works of necessity as "long as the chancellor's foot," admitted the strength of appellant's argument.

The court left little doubt that the statute as it now reads—with the judge in each instance determining what is and what is not a work of necessity—is constitutional and that any further complaints should be taken to the legislature.

McIntosh v. Commonwealth is of special interest. In that case appellant challenged his conviction on grounds that counsel was not provided to prepare his appeal. The court of appeals was forced to

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14 Where the law-making body in framing the law has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared void and inoperative. See Burke v. Stephenson, 305 S.W.2d 926 (Ky. 1957).
16 Id. at 527.
17 Kentucky decisions construing "works of necessity" are: Natural Gas Products Co. v. Thurman, 205 Ky. 100; 265 S.W. 475 (1924) (The manufacture of carbon black is a work of necessity.); McAfee v. Commonwealth, 173 Ky. 83, 190 S.W. 671 (1917) (The sale of sodawater, soft drinks, cigars, and tobacco is not a work of necessity, but the sale of sandwiches and canned goods is.); Gray v. Commonwealth, 171 Ky. 269, 188 S.W. 954 (1916) (A barbershop is not a work of necessity.); Page v. O'Sullivan, 159 Ky. 703, 169 S.W. 542 (1914) (The attendance of a prison guard at a state penitentiary is a work of necessity.); Commonwealth v. London, 149 Ky. 372, 149 S.W. 852 (1912) (The sale of candy, fruits, chocolate, ice cream, bread and butter sandwiches, and coffee is within the exception of work of necessity.).
18 Arlan's Department Store v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963).
19 368 S.W.2d 381 (Ky. 1963).
consider the recent Supreme Court decisions of *Gideon v. Wainwright*\(^\text{20}\) and *Douglas v. California*\(^\text{21}\) in deciding the case.

McIntosh was assisted by court-appointed counsel during his trial, and the jury returned a verdict of guilty under the state habitual criminal statute in October, 1958.\(^\text{22}\) Appellant's counsel entered a motion for a new trial as their last act on appellant's behalf. In November, McIntosh was brought to the judge's chambers without counsel, his motion for new trial was denied and judgment entered. The record shows that, at his request, he was given until February to prepare for appeal, and that during the interim he was kept in the county jail. There was no evidence that appellant requested counsel during this time.

Appellant moved that his conviction be set aside under section 60.02 of the Kentucky Rules of Civil Procedure [hereinafter referred to as CR.] He alleged that section 11 of the Kentucky Constitution guaranteed counsel in criminal trials, that this meant counsel "at every step of the way," and that since counsel had not been present at the pronouncement of judgment, his conviction must be set aside.

The court held that, although an indigent defendant is entitled to counsel "at every step of the way,"\(^\text{23}\) a verdict and judgment cannot be set aside simply because counsel was not present during the otherwise proper sentencing. The reason is that the court has no discretion in determining punishment and sentencing is more ceremony than substance. The court further noted that if appellant felt that the lack of counsel at sentencing had deprived him in any way of asserting good and substantial grounds for forestalling the judgment, it would have been proper for him to have raised this objection under CR 60.02, but that he had not done so.

The court noted that, in light of their holding, formal pronouncement of sentence in the defendant's presence was not a constitutional right. This would not be true in the situation where the defendant pleads guilty and the judge has discretion in assessing the quantum of punishment.

McIntosh also asserted as grounds for setting aside his conviction that the right to appeal was guaranteed him by statute,\(^\text{24}\) yet the trial court had not supplied him with counsel to help prepare an appeal. The court first noted that a motion to set aside the verdict was not a


\(^{22}\) KRS 431.190.

\(^{23}\) Powell v. Commonwealth, 346 S.W.2d 731 (Ky. 1961).

\(^{24}\) KRS 21.140(1).
proper motion, but that, as the question presented was one of first impression, the appeal would be treated as an application for appropriate relief. The court, in dealing with the "most nettlesome problem in the case," was faced with several complications. Although appellate review as such is not a constitutional right, Kentucky Revised Statute section 21.140 [hereinafter referred to as KRS] authorizes original appeal in this instance as a matter of right; furthermore, equal protection of the laws since the Douglas case requires the indigent be supplied with counsel where appeal is guaranteed by statute, and mere failure to ask for counsel is not, at least at the trial level, considered a waiver of the right to counsel.\(^2\)

In reaching the conclusion that the defendant was not denied due process, the court emphasized that the appellant had proper counsel during trial, that the trial court was never advised during McIntosh's incarceration that he had been abandoned by counsel, and that McIntosh never requested counsel to help prepare his appeal. After emphasizing that the right to counsel on appeal stands on a different footing than the right to counsel at the trial level, the court concluded its opinion by saying:

"Equal protection" gives to the indigent defendant a right to counsel and to a transcript of the record on appeal if he requests it. In the absence of such a request it does not, in our opinion, oblige the court either to initiate an inquiry or to extend an invitation to appeal...\(^2\)

Commonwealth v. Brinkley\(^2\) was a case of first impression in Kentucky. The question presented was whether a tape recording of a conversation between a principal witness and the defendant should be admitted into evidence where that recording was obtained: (1) by attaching the microphone of the recorder to the earpiece of the principal witness' telephone with permission of the witness; or (2) by placing the recorder in the trunk of the principal witness' car and inducing the defendant to make statements while in the car.

Although it could have excluded this type evidence for policy considerations, the court held: (1) that the means of obtaining such recordings do not constitute "interceptions" within the meaning of section 605 of the Federal Communication Act;\(^2\) (2) that the Federal Communications Act does not act as a bar to the admissability of

\(^{25}\text{Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948).}\)
\(^{26}\text{McIntosh v. Commonwealth, 368 S.W.2d 331, 336 (Ky. 1963).}\)
\(^{27}\text{362 S.W.2d 494 (Ky. 1962).}\)
\(^{28}\text{Federal Communications Act, 47 U.S.C. § 605 (1958), which provides in part, "[N]o person, not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . .".}\)
evidence in state proceedings,29 and (3) that the recordings were not "seizures" within the concept of the fourth amendment prohibition against illegal searches and seizures30 so that they would be excluded under the fourteenth amendment.31 Therefore, the court of appeals said, it was not error for the trial court to admit the recordings if a proper foundation was laid.32

Justice Moremen, in dissenting, expressed grave concern over "abandoning a tenent of legal philosophy at a time when it is needed most,"33 that tenent being our right to be secure from unwarranted intrusion.

In the case of Martin v. Commonwealth,34 a Negro appealed from a conviction of murder by an all-white jury, contending that he was deprived of equal protection of the laws because only three Negroes were called for jury duty at that term of court. No proof was disclosed concerning proportions of Negroes to whites in the county or the ratio of Negroes to whites on the tax commissioner's books or on the voter registration lists.35 Counsel relied on Gilchrist v. Commonwealth,36 in which a conviction of manslaughter was reversed on proof that Negroes were systematically excluded from jury service. The court distinguished this case on its facts and said, "it is our view no case has been made out which in any wise supports appellant's assertion that negroes are prohibited from performing jury duty in Fayette County... ."37 The test is whether the commissioners acted in good faith in their selection of names for the jury wheel. The appeal from the retrial of the Gilchrist38 case was cited by the court as an example. In that case the court affirmed a murder conviction where the ratio of Negro to white in the county was one to six, and, out of ninety-six names, only one Negro was called for jury duty.

In Lackey v. Garner,39 the trial court held KRS 118.450(4) unconstitutional on the grounds that the provisions of that statute making it mandatory that counties purchase voting machines were in direct conflict with section 147 of the Kentucky Constitution. The court of

30 Olmstead v. United States, 277 U.S. 488 (1927); Williams v. Ball, 294 F.2d 94 (2d Cir. 1961).
33 McIntosh v. Commonwealth, supra note 26, at 498.
34 361 S.W.2d 654 (Ky. 1962).
35 See KRS 29.045(3).
36 311 Ky. 230, 223 S.W. 2d 880 (1949).
37 Martin v. Commonwealth, supra note 6, at 655.
38 Gilchrist v. Commonwealth, 246 S.W.2d 435 (Ky. 1952).
39 367 S.W.2d 257 (Ky. 1963).
appeals reversed. The statute in question provides that "each county shall acquire voting machines. . . ."\textsuperscript{40} The allegedly conflicting constitutional provision states that "counties so desiring may use voting machines. . . ."\textsuperscript{41} The trial court relied on the court of appeals' construction of section 144 of the constitution, which contains a similar "may" provision with regard to election commissioners.\textsuperscript{42} In \textit{Billiter v. Nelson},\textsuperscript{43} the court had held that the constitution was intended to give counties an option in the use of election commissioners and that this precluded subsequent mandatory legislation on the subject. In the principal case, the court overruled the \textit{Billiter} case as too restrictive, holding that an option granted by the constitution does not "preclude a . . . mandatory requirement by the general assembly."\textsuperscript{44}

Judge Palmore, in concurring, said, "it would appear self-evident that the . . . provisions . . . under which counties 'may' do certain things on their own . . . without enabling legislation, are not inconsistent with the power of the legislature to require that those things be done."\textsuperscript{45}

Judge Montgomery, in dissenting, recognized the problem concerning voting machines and the desirability of their use but urged that "this does not justify abusing the plain meaning of simple words and violating the constitution."\textsuperscript{46} He stated further that where an amendment has been passed making the use of voting machines permissive, this by construction clearly amounts to a constitutional limitation against mandatory legislation in this area.

In \textit{Pryor v. Thomas},\textsuperscript{47} a convicted murderer contended that the Kentucky homicide statute\textsuperscript{48} violated due process in that it did not define the nature of the crime. He asserted that the statute does not create the crime by merely fixing the punishment. Appellant further complained that the indictment was framed in common law terms, asserting that this was not authorized by the statute. In a brief resume of the origin of the common law in this country and its application in Kentucky, the court held that the statute was completely adequate when viewed in light of section 283 of the Kentucky Constitution, which adopts the common law in Virginia. In summing up its position, the court stated that "it has long been accepted by the bench and

\textsuperscript{40} KRS 118.450(4).
\textsuperscript{41} Ky. Const. § 147 (1962).
\textsuperscript{42} Ky. Const. § 144 (1962).
\textsuperscript{43} 300 S.W.2d 790 (Ky. 1957).
\textsuperscript{44} Lackey v. Garner, \textit{supra} note 7, at 258.
\textsuperscript{45} \textit{Id.} at 259.
\textsuperscript{46} \textit{Ibid.}
\textsuperscript{47} 361 S.W.2d 279 (Ky. 1962).
\textsuperscript{48} KRS 435.010.
bar that the common law prevails unless changed by the constitution or statutes,49 citing Nider v. Commonwealth50 for a good statement of this principle.

In Spillman v. Beauchamp,51 agents of the department of agriculture, pursuant to a statute providing for the slaughtering of diseased animals,52 had entered the plaintiff's property and without his participation or permission removed and slaughtered his cow. The plaintiff contended that the killing of the allegedly diseased animal without a prior hearing deprived him of property without due process. The court affirmed a judgment for the defendant, holding that where the owner refused to participate in the appraisal and slaughtering as contemplated by statute, a reasonable interpretation of the statute would permit action without him. On the question of due process, the court said:

The rule is firmly established that under the police power the government may cause the summary killing of an animal believed to be diseased, without giving the owner a prior hearing. All that is required . . . is . . . the opportunity subsequently to litigate the question of whether the animal was in fact diseased, and be provided a remedy in damages in the event it is proved that the animal was not diseased.53

Another question of due process arose in Fowler v. Black.54 KRS 197.045 permits the division of correction of the department of welfare to allow a prisoner to earn credit on his sentence up to ten days a month for good behavior. This statute also authorizes the division to cancel accumulated credit and to deny the prisoner the right to earn credit in the future if the prisoner violates rules of the institution. The court held that cancellation under the statute did not deprive Fowler of his rights without due process, because the right was not vested but conditional upon good behavior.

In City of Frankfort v. Triplett,55 the question was whether the office of police clerk was abolished by statutes governing changes in the form of government. Frankfort had changed from a third class to a second class city and had adopted a city council form of government. The relevant statutes literally abolished all nonelective city offices for cities with this form.56 Appellee, a police clerk, had been receiving a salary by ordinance, of 275 dollars a month. A new council, upon

49 Pryor v. Thomas, supra note 8, at 280.
50 140 Ky. 684, 131 S.W. 1024 (1910).
51 362 S.W.2d 33 (Ky. 1962).
52 KRS 257.110.
53 Spillman v. Beauchamp, supra note 9, at 35.
54 364 S.W.2d 164 (Ky. 1963).
55 365 S.W.2d 828 (Ky. 1963).
56 KRS 89.040. See also KRS 89.420, 26.570, and 26.580.
taking office, passed another ordinance reducing his salary to thirty dollars a month. Appellee contested this ordinance, and the city contended that the office was abolished by statute upon the changing of the form of government, and further that the ordinance was within their legislative power. The court of appeals rejected the first contention summarily and held further that the ordinance was an abuse of legislative power. The court stated that the legislative branch could not exercise control over created judicial officers, especially when the office is created by the general assembly, nor could it *effectively* abolish the office by reducing the salary to almost nothing.
II. CRIMINAL LAW

A. Criminal Insanity

The M'Naghten rule may be allowed to return to the nineteenth century, but the return trip promises to be stormy. *Terry v. Commonwealth*\(^{57}\) harbingers a fresh approach in Kentucky to the controversial instruction for insanity. In the *Terry* case, the court of appeals held that the right-wrong and irresistible-impulse instruction was inadequate as the test of criminal insanity. In its place, the court established the following instruction:

> Before the defendant can be excused on the ground of insanity the jury must believe from the evidence that at the time of the killing, the defendant, as a result of mental disease or defect, (a) was substantially unable to understand that he was violating the law, or, (b) if he did understand it, was nevertheless substantially unable to resist his impulse to commit the illegal act.\(^{58}\)

The court defined mental disease or defect as “not including an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”\(^{60}\)

The court was dissatisfied with the old instruction because it felt that the traditional phraseology therein defined the law in terms of moral right and wrong instead of legal criminality and therefore impaired the capacity of medical witnesses to assist the court and jury. The court pointed out that the new rule is similar to section 4.01 of the Model Penal Code which was approved by the American Law Institute in 1962. That rule is the standard in Vermont and the third federal circuit.\(^{60}\)

In dissenting, Judge Montgomery reminded the court of *Newsome v. Commonwealth*.\(^{61}\) In that case, which was decided less than thirty days before the *Terry* case, the court affirmed the M'Naghten rule and pointed out that the rule had been embodied in Kentucky criminal law for sixty-three years. Judge Montgomery indicated that the difference between the old rule and the new was purely technical, and that to change such a long standing rule for an unjustifiable reason destroys all of the stability characteristic of the law.\(^{62}\)

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\(^{57}\) 371 S.W.2d 862 (1963).

\(^{58}\) *Id.* at 865.

\(^{59}\) *Ibid.*

\(^{60}\) Note, 1 Washburn L.J. 463 (1961). The jurisdictional survey is as follows: M'Naghten Rule—thirty states; right-wrong and irresistible-impulse rule—seventeen states, United States military law, and all but one of the federal circuits; Durham Rule—two states, District of Columbia and the Virgin Islands. For the third federal circuit see United States v. Currens, 290 F.2d 751 (3rd Cir. 1961).

\(^{61}\) 366 S.W.2d 174 (Ky. 1962).

Further oil was poured on the fire in the *Terry* case by Judge Palmore’s statement in his concurring opinion that:

The dissenting opinion’s discussion of the recent Newsome case would leave the impression that the court had resolved and settled the question. The fact is that five members of the court were then dissatisfied with the old instruction and would not have affirmed in that case *had it involved a death sentence*. The *Terry* case was under submission at the time, and it was clearly understood that the old instruction would not survive it. (Emphasis added.)

B. RIGHT TO COUNSEL

In *Bauer v. Commonwealth*, the court held that an accused has no constitutional right to counsel during the investigation, non-judicial stage of a case. Bauer’s attorney was not permitted to see him during the eleven hour pre-arraignment questioning by the police. Deciding this point for the first time, the court brought Kentucky in line with federal law. The absence of counsel at this stage is a circumstance to be considered in determining whether the confession was in fact coerced. The court felt that a contrary ruling would unduly impair the ability of the police to solve difficult cases. In *McIntosh v. Commonwealth*, the court ruled that the defendant was not deprived of his constitutional right to counsel merely because there was no counsel present at the time of sentencing. Allocation and formal pronouncement of sentence in the defendant’s presence are not constitutional rights, but statutory procedures. This question had not previously been decided by the court, though it has been so decided in several other states. In *Rice v. Davis*, the court determined that when a court appointed attorney failed to obtain a court reporter upon request of his client and thereafter failed to object to the court’s denial of the client’s request, the attorney exhibited such a lack of due diligence that his client was in effect denied his right to counsel.

C. HABEAS CORPUS

*Rice v. Davis* broadened the scope of the writ of habeas corpus. Previously, the writ had applied only to questions of the court’s juris-

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63 *Id.* at 867.
64 364 S.W.2d 655 (Ky. 1963).
66 366 S.W.2d 331 (Ky. 1963).
68 366 S.W.2d 153 (Ky. 1963).
69 KRS 28.430 provides that upon motion of either party the court shall order the reporter to make a full and accurate transcript.
70 *Rice v. Davis*, 366 S.W.2d 153 (Ky. 1963).
diction of the offense and of the person accused. In the *Rice* case, the defendant had no opportunity for an appeal because the court appointed attorney had not obtained a court reporter. The lack of appeal brought about by the negligence of counsel was such an extreme irregularity that the judgment was considered void by the court.^{71} Under the new rule if irregularities which will shock the conscience of the court occur before judgment and sentencing, and if the irregularities deprive the accused of his fundamental rights, there is an absence of jurisdiction of the court and the writ is the proper remedy. This change brings Kentucky into conformity with the federal rule.^{72}

**D. Search and Seizure**

*Commonwealth v. Brinkley*^{73} involved the admissibility of two recorded conversations between the prosecuting witness and the defendant. Both recordings were made with the consent of the prosecuting witness. One was procured by attaching a microphone to the telephone receiver in the prosecuting witness’ home; the other was obtained by an officer hidden in the trunk of an automobile. The court, in a case of first impression, held both recordings were admissible, providing the proper foundation was laid. Although section 605 of the Federal Communications Act^{74} does not apply to the states,^{75} the court concluded that even had this been a federal case, the recordings would not have violated the Act because (1) such communications are not privileged, (2) one party may not bind the other to secrecy merely by using a telephone, (3) one entitled to receive a communication may use it for his own benefit or have another use it for him,^{76} and (4) evidence offered in the form of a sound recording is not inadmissible per se.^{77} Also, there was no violation of a fourth amendment right, since there was no unauthorized physical encroachment within a constitutionally protected area.^{78} Proper foundation consists of showing the following: (1) the manner of preserving the recording and the manner of identifying the speakers, (2) the

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^{71} Id. at 155.
^{72} Diggs v. Welch, 148 F.2d 667 (1945).
^{73} 362 S.W.2d 494 (Ky. 1962).
^{74} 47 U.S.C. § 605 (1934) provides in part: “... no person not being authorized by the sender shall intercept any communication and divulge ... contents ... of such intercepted communication to any person...”
^{76} Rathbun v. United States, 355 U.S. 107 (1957); Carnes v. United States, 295 F.2d 598 (5th Cir. 1961).
^{77} Annot., 58 A.L.R.2d 1008, 1029 (1956).
competency of the recording device and the operator, (3) the authenticity, correctness and completeness of the recording, and (4) absence of coercion.\textsuperscript{79}

In \textit{Fields v. Commonwealth},\textsuperscript{80} officers searched a home under a warrant issued for the search of illegal alcoholic beverages. They find automobile tires, cartons of cigarettes, and several shotguns with boxes of shells. The officers had knowledge of recent break-ins in the community in which tires and cigarettes had been stolen. The court held that the search was valid even though the seized objects were not described in the search warrant, because the objects seized were articles of which possession is illegal per se. The general rule is that where entry upon the premise is lawful, contraband open to observation may be seized.\textsuperscript{81} This rule had been applied in \textit{Pigg v. Commonwealth}\textsuperscript{82} to a situation where an income tax investigator with no search warrant was given permission by the owner to search for evidence of income tax evasion. The investigator found liquor instead. The court ruled that the evidence was properly seized and was admissible in a prosecution for selling liquor in a dry county. In the \textit{Fields} case, the court reasoned that the theory of the \textit{Pigg} case was applicable, since in both instances the entrance was permissive and therefore legal.

\section*{E. Juries}

In \textit{Smith v. Commonwealth},\textsuperscript{83} the court determined that the trial judge properly permitted members of the jury to make telephone calls concerning their needs relative to their overnight stay. The calls were made in the presence of a deputy sheriff who heard the conversations of the jurors but did not hear what was said from the other end of the line, while another deputy remained with the other jurors during the time the calls were being made. Appellee contended that this separation was in violation of rule 9.66 of the Kentucky Rules of Criminal Procedure [hereinafter referred to as RCr].\textsuperscript{84} This decision helped clarify prevailing Kentucky law. In two previous

\begin{footnotesize}
\textsuperscript{80} 368 S.W.2d 324 (Ky. 1963).
\textsuperscript{81} Patterson v. Commonwealth, 252 Ky. 285, 66 S.W.2d 513 (1933); 79 C.J.S. Searches and Seizures § 17 (1953).
\textsuperscript{82} 284 S.W.2d 670 (Ky. 1955).
\textsuperscript{83} 366 S.W.2d 902 (Ky. 1963).
\textsuperscript{84} Ky. R. Crim. P. § 9.66 [hereinafter cited as RCr] provides in part: "If the offense charged is punishable either by life imprisonment or by death, the jurors shall be kept together in charge of the proper officer. They may be permitted to separate only by agreement of the parties and with approval of the court."
\end{footnotesize}
cases, the practice of permitting a juror to hold a conversation over the telephone when the officer could hear what was said to the juror had been condemned. The court distinguished these cases on the ground that here the officer who had heard the conversations of the jurors and could testify that they made no mention of the case, and this afforded the protection missing in previous cases.

The court, in Martin v. Commonwealth, involved the general rule that a conviction of a Negro will be reversed where, at the term of court in which defendant was tried and for many years previous, there had been a planned exclusion of Negroes from jury service. In the Martin case, three Negroes had been called as jurors for the term at which defendant was tried. None of the Negroes served on defendant's jury, though two of them performed jury service during the term. The court held that even though no Negroes were called for defendant's trial, there was no systematic exclusion of Negroes which would amount to a denial of defendant's equal right to protection of the law.

In Price v. Commonwealth, the judge selected the petit jury in the vault of the clerk's office more than a month after the preceding term. The court held that there was insufficient compliance with KRS 29.135, which provides that at each term a judge must draw the names of jurors for the succeeding term. The Price case restated the law in order to establish clear guidelines in an area where previously the cases and the statutes had not been helpful. The court set down the following precise steps for the selection of jurymen: (1) the judge, during a regular term, is to draw names from the wheel at a regular session on a juridical day to compose the list of jurors for the next term; (2) the court is to be opened in a ritualistic manner; (3) the drawing should be preferably in the presence of the sheriff or clerk and should be in open court; and (4) the drawing should be done in a place which is at least temporarily devoted to use as a courtroom, if not in the courtroom itself.

F. WAIVER OF JURISDICTION

In Prather v. Commonwealth, the court ruled that a release by state officials to federal authorities of one who is under arrest, but who

85 Canter v. Commonwealth, 313 Ky. 371, 231 S.W.2d 30 (1950); Wells v. Commonwealth, 176 Ky. 360, 195 S.W. 825 (1917).
86 361 S.W.2d 654 (Ky. 1963).
88 366 S.W.2d 725 (Ky. 1963). Bain v. Commonwealth, 140 S.W.2d 612 (1940); Hopkins v. Commonwealth, 130 S.W.2d 784 (1939).
89 368 S.W.2d 175 (Ky. 1963).
had not yet been indicted or convicted, did not constitute waiver of
the right to indict and prosecute for the state offense. Defendant was
arrested by state officials and charged with carrying a deadly weapon
and possessing burglary tools. He was released to federal authorities
on a charge of transporting a stolen car in interstate commerce.
Defendant was re-arrested, tried, and convicted by the state after the
federal authorities had released him on bond. It had been held that
where the defendant was already serving a prison term, his release to
federal authorities constituted a forfeit of Kentucky’s right to com-
plete the execution of the state court sentence. However, the precise
question had never before been ruled upon. The Prather decision is
consistent with federal law.

G. TRIAL PROCEDURE AND EVIDENCE

In Smith v. Commonwealth, the court restated Kentucky’s rule
that in general all evidence which is pertinent to the issue and tends
to prove the crime is admissible, even though it may also prove or
tend to prove the commission of another crime by the defendant.
In this case the admitted evidence tended to prove that the defendant
had acquired the gun in question in a previous crime. The court said
that the evidence was admissible because it tended to show de-
fendant’s possession of a fatal weapon with a design to use it to get
money by force.

In Commonwealth v. Reynolds, the court was concerned with
the impeachment of a felon under CR 43.07. The defendant had
been convicted of a felony but his sentence and the entering of
judgment was postponed and the defendant had been placed on
probation. The court held that if the one to be impeached has had a
verdict rendered against him or has pleaded guilty, a sentence need
not be imposed in order for the impeachment to be attempted. The
court reasoned that the purpose of impeachment was not to show the
extent or nature of the punishment imposed but to show the character

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90 Davis v. Harris, 355 S.W.2d 147 (Ky. 1962); Jones v. Rayborn, 346
S.W.2d 743 (Ky. 1961).
91 Werny v. Looney, 208 F.2d 102 (10th Cir. 1953).
92 366 S.W.2d 902 (Ky. 1963).
93 Martin v. Commonwealth, 361 S.W.2d 654 (Ky. 1962); Sheppard v.
Commonwealth, 322 S.W.2d 115 (Ky. 1959).
94 365 S.W.2d 853 (Ky. 1963).
95 Ky. R. Civ. P. § 43.07 [hereinafter cited as CR] provides that a witness
may be impeached where it can be shown by a record of judgment or examination
of a witness that he has been convicted of a felony.
of the defendant. Kentucky had decisions skirting around this precise question but none directly in point. In *Foure v. Commonwealth,* the court held that a conviction which was being appealed could not be used for impeachment. It has also been held that a prior felony conviction in which the defendant had served time could be used for impeachment purposes. In addition, where a defendant had been charged and acquitted, the charge was not admissible for purposes of impeachment.

In *McGill v. Commonwealth,* a homicide prosecution, the defendant's daughter testified that, on the day of the killing, the defendant had stated that he had an urge to kill, that he would kill someone before the sun went down, that he had killed one man already, that it did not bother him and that it would not hurt him one bit if he killed another. The court held that this evidence was competent to show an evil motive and was not excludable as evidence of another act of homicide. The court reasoned that the testimony tended to prove defendant's state of mind—the intent to commit the homicide. This decision helped clarify the general rule which was formulated in several previous cases.

In one of those cases, *Jackson v. Commonwealth,* the court reversed a voluntary manslaughter conviction on the ground that a witness could not testify to defendant's wife's statement after the shooting that defendant was having one of his crazy spells like he had some time before when he shot her. Also, in *Powell v. Commonwealth,* the court considered the witness's quotation from defendant as saying he had been in the "pen" and had deserted from the army reversible error.

In *Martin v. Commonwealth,* the court ruled that when two or more defendants are jointly indicted for the same offense and severance is obtained for separate trials, the counsel who had previously defended one of the accused may assist in the prosecution of the other if there was no attorney-client relationship with the other. This question was unique in Kentucky law.

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96 214 Ky. 620, 283 S.W. 958 (1926).
97 Bond v. Commonwealth, 236 Ky. 472, 33 S.W.2d 320 (1931); Morgan v. Commonwealth, 24 Ky. L. Rep. 2117, 72 S.W. 1098 (1903).
98 Hickey v. Commonwealth, 185 Ky. 570, 215 S.W. 481 (1919); Stewart v. Commonwealth, 185 Ky. 34, 213 S.W. 185 (1919).
99 365 S.W.2d 470 (Ky. 1963).
100 Holt v. Commonwealth, 354 S.W.2d 50 (Ky. 1962); Lee v. Commonwealth, 242 S.W.2d 984 (Ky. 1951); Miller v. Commonwealth, 305 Ky. 69, 205 S.W.2d 480 (Ky. 1947).
101 296 S.W.2d 472 (Ky. 1956).
102 308 Ky. 467, 214 S.W.2d 1002 (Ky. 1948).
103 381 S.W.2d 654 (Ky. 1962).
H. Anti-sweating Act

*Bauer v. Commonwealth,*\(^{104}\) reiterated Kentucky's prior interpretation\(^{105}\) of the import of KRS 422.110, which provides in part, "no . . . person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused . . . by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means. . . ." The court ruled that questioning at length without evidence of accompanying threats or coercion will not alone invalidate a confession. The court reasoned that it is not the extent of the questioning which is prohibited but the manner in which questioning is conducted. Although there is no federal anti-sweating statute, federal decisions as to the admissibility of confessions is consonant with the *Bauer* decision.\(^{106}\)

\(^{104}\) 364 S.W.2d 655 (Ky. 1963).

\(^{105}\) McClain v. Commonwealth, 284 Ky. 359, 144 S.W.2d 816 (1940).

III. ADMINISTRATIVE LAW AND PUBLIC OFFICIALS

A. MUNICIPAL CORPORATIONS

Although there were several cases decided last term which concerned municipal corporations, most of them involved specific ordinances and statutes governing the various classes of cities. Consequently, these decisions were generally limited to statutory construction and the holdings were somewhat narrow.

1. Annexation

The court of appeals decided three cases dealing with annexation by a municipal corporation during the last term. Each case concerned different aspects of the problem. One case involved the procedure of annexation, one was concerned with a method of establishing a fire protection district, and the third dealt with the validity of an annexation for tax purposes.

In *Buchanan v. City of Dayton*, the court upheld the institution of annexation proceedings by a fourth class city, although a previous remonstrance suit covering a portion of the same property was pending. Since the previous suit was dismissed after the filing of the subsequent action, but before the latter complaint had been attacked on this ground, there was no bar to completion of the new annexation proceedings. The court distinguished *Garner v. City of Lexington*, which involved a second class city governed by a different statute.

In the *Garner* case, Lexington had enacted an ordinance proposing to annex a one-owner portion of property involved in existing litigation. The court ruled that the new proceeding could not take place independently of the first action in the circuit court and thereby circumvent its jurisdiction. In the *Buchanan* case, both proceedings were in the circuit court.

The *Buchanan* case has extended a suggestion made in *City of Greenville v. Gossett* to a clear holding that, when a fourth class city has proved a prima facie case of substantial benefit to the property proposed to be annexed, the burden of proof is shifted to the remonstrants, even though they comprise a substantial majority of the resident voters.

A novel method of establishing a workable fire protection district was given approval in *Kelly v. Dailey*. The first step included a successful proceeding setting up a fire protection district embracing

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107 363 S.W.2d 92 (Ky. 1962).
108 306 S.W.2d 805 (Ky. 1957).
109 355 S.W.2d 311 (Ky. 1962).
110 366 S.W.2d 181 (Ky. 1962).
one-half square mile on the petition of twenty-four resident voters in accordance with KRS 75.010. This statute authorizes such establishment on petition of fifty-one per cent of the voters residing within the proposed boundaries. Two weeks later the newly established district brought suit to annex an additional four and one-half square mile area. Although several hundred freeholders remonstrated, they comprised less than fifty-one per cent of the freeholders and thus there was no statutory provision for a hearing on the merits. If the whole five square mile area had been included in the original action to establish a fire protection district, fifty-one per cent of the resident voters would have had to sign a petition for the plan to be successful. The court recognized the scheme, but, after stating that a fire protection district was a type of municipal corporation, declared that the fixing of boundaries was a legislative function and that KRS 75.020 authorized the procedure used.

The court of appeals, in City of St. Matthews v. Harrison, reaffirmed the rule that only property situated within the corporate limits of the city on assessment date can be subject to imposition of ad valorem taxes by the city. Louisville, by ordinance, had annexed the territory involved on April 1, 1957, the assessment date. Although the City of St. Matthews received a declaratory judgment decreeing this annexation ordinance void on May 31, 1957, this judgment was reversed on appeal. Louisville, therefore, had both de jure and de facto jurisdiction over the territory involved on April 1, 1957, and also on April 1, 1958, the two assessment dates in question.

2. Ordinances

The court of appeals was asked to decide the validity of three municipal ordinances during the last year. There was no apparent interrelation among the three decisions, each having wholly distinct factual bases.

In City of Middlesboro v. Grubbs, the court reversed a circuit court decision which had invalidated a city ordinance establishing a merit system for the police department. The validity of the ordinance was attacked by six police officers, and the lower court found the plaintiffs to be deprived of vested rights in rank and seniority. The Middlesboro police department had been operating under a previous ordinance which provided no system for determining rank and mentioned nothing about seniority. The new ordinance abolished all ranks except that of chief and placed personnel in a grade which

111 369 S.W.2d 7 (Ky. 1963).
112 City of Louisville v. City of St. Matthews, 316 S.W.2d 210 (Ky. 1958).
113 363 S.W.2d 95 (Ky. 1962).
would raise their salary ten dollars per month. The court of appeals reviewed the applicable statutes\(^{114}\) and held the ordinance was not objectionable as depriving the police officers of rights of rank and seniority.

In *City of Frankfort v. Triplett*,\(^{115}\) the court struck down a city ordinance reducing the police court clerk's salary from 275 dollars to thirty dollars per month, citing this as an arbitrary and unreasonable abuse of discretion. The electorate of Frankfort adopted the city manager form of government in 1956. In 1958 the police judge appointed appellee as clerk of his court. A literal construction of the statute under which the city manager form of government is established requires the abolishment of all non-elective offices in a second class city such as Frankfort.\(^{116}\) The court, however, tempered a literal construction with public policy and found the clerk's office to be judicial in nature and without the bounds of the statute.

In *Cassidy v. City of Bowling Green*,\(^{117}\) the court upheld the constitutional validity of municipal ordinances creating a municipal garbage disposal system, and in so doing declared that to forbid the use of private facilities and compel residents to use the public system was within the police power of the municipality. This is a restatement of a long established rule. One of the series of ordinances provided for discontinuance of water and sewer services upon failure to pay the garbage disposal service charge. No constitutional right was found to be violated by this latter ordinance and the interrelation of the services was cited in the finding that no arbitrary or unreasonable methods were used.

3. **Bond issues**

During the last year, the court decided two cases involving the validity of municipal bond issues. One case required the specific construction of a statute and the other was decided more on general principles.

In *Hemlepp v. Aronberg*,\(^{118}\) the court upheld the validity of refunding Ashland school district revenue bonds in advance of the redemption date. The original issue was sold in 1960 and carried an interest rate of four and one-quarter to three and three-quarter per cent. The bonds were non-callable until March 1, 1965. The refunding bonds carried an interest rate of three and three-quarter per cent,

\(^{114}\) KRS 95.430, 95.440-470.  
\(^{115}\) 365 S.W.2d 328 (Ky. 1963).  
\(^{116}\) KRS 89.420.  
\(^{117}\) 368 S.W.2d 318 (Ky. 1963).  
\(^{118}\) 369 S.W.2d 121 (Ky. 1963).
which demonstrated the economic feasibility of the plan. An approximate saving of 75,000 dollars was expected, although the principal amount of the proposed refunding issue was to exceed the principal amount owing, due mainly to the eighteen month period between the issuance of refunding bonds and the redemption of the original issue. Heretofore, the well-settled rule in Kentucky had been that the amount of the refunding bond issue should not exceed the outstanding obligations of the original issue. The court, however, found this rule was not applicable when the bonds were revenue bonds. This plan of refunding revenue bonds in advance of the redemption date was a case of first impression in Kentucky. In distinguishing the refunding of revenue bonds, the court cited Florida cases approving similar proposals.119

A project for the acquisition of an industrial plant to be financed by city revenue bonds and using the progress-payment plan was held valid in Gregory v. City of Lewisport.120 To pay construction costs in stages as work progressed was within the contemplation of the statute authorizing the city to acquire an industrial building either by purchase or construction.121 The amount of the proposed bond issue was 50 million dollars. Since the bank named as agent or trustee must have a combined capital and surplus of an amount greater than the value of the bonds, an out-of-state bank was required. The court found no statutory prohibition of designating a non-Kentucky bank to act in this capacity.

4. License taxes

The court decided only one case last year having to do with a license tax imposed by a municipal corporation. In City of Georgetown v. Morrison,122 a city ordinance levying a motor vehicle license tax was held not to apply to a sheriff's car which privately owned, but was operated solely in performance of official duties. The automobile was owned jointly by the sheriff and his two deputies and registered in the name of the "Sheriff of Scott County." When not used in performing official duties, the car was parked at the side of the county courthouse. The court pointed out that a municipal government is not an independent body but rather an agent of the Commonwealth property located within its boundaries. Another automobile owned by a non-resident of the city which was operated only temporarily

119 State v. Jacksonville Expressway Authority, 93 So. 2d 870 (Fla. 1957); State v. City of Melbourne, 93 So. 2d 371 (Fla. 1957).
120 369 S.W.2d 183 (Ky. 1963).
122 362 S.W.2d 289 (Ky. 1962).
within its city limits was also held not to be within the license taxing authority of the city.

B. Counties

1. Fiscal courts

The court decided two cases having to do with the operation of county fiscal courts last year. The scope of authority of county fiscal courts was broadened by the court when it held that the purchase of a steamboat from the general county fund by a fiscal court was valid.\(^{123}\) Additional legal protection was vested in the operations of fiscal courts by a judgment that in a contract between a county fiscal court and an architect which gives the court the right to cancel any time before detailed drawings are begun, there is an implied obligation on the part of the architect to give notice before he proceeds with the drawings.\(^{124}\)

In *Boone v. Cook*,\(^{125}\) the court affirmed a judgment that the purchase of a steamboat by a fiscal court was a public project, where the steamboat was dedicated for use as a recreational facility and paid for out of the general county fund. The fiscal court was held to be a governmental agency within the definition set out by KRS 58.010(2) and the steamboat was held to be a public project within the meaning of KRS 58.010(1), which defines a public project as "any ... suitable for and intended for use as public property for public purposes ...." Therefore, the purchase was held to be within KRS 58.010 and subsequent sections which, in general provide that governmental agencies may acquire or develop public projects and may issue revenue bonds to defray the cost thereof. Previously, the court had held that a public project had included an auditorium, a swimming pool and a field house,\(^{126}\) a city waterworks and a sewer system,\(^{127}\) and a city bus transportation system,\(^{128}\) but none of these cases involved purchases by a fiscal court.

The court set out a new rule in *Hammon v. Jefferson County*,\(^{129}\) holding that where a provision in a contract between a county fiscal court and an architect gives the court the right to cancel any time before detailed drawings are begun, there is an implied obligation on the part of the architect to give notice before he proceeds with the drawings. The court reasoned that the architect would otherwise

\(^{123}\) *Boone v. Cook*, 365 S.W.2d 100 (Ky. 1963).
\(^{124}\) *Hammon v. Jefferson County*, 364 S.W.2d 165 (Ky. 1963).
\(^{125}\) 365 S.W.2d 100 (Ky. 1963).
\(^{127}\) *Dunn v. City of Murray*, 306 Ky. 426, 208 S.W.2d 309 (1948).
\(^{128}\) *Chrisman v. Cumberland Coach Lines*, 249 S.W.2d 782 (Ky. 1952).
\(^{129}\) 364 S.W.2d 165 (Ky. 1963).
have had the advantage of being able to cut off the fiscal court's right
to cancel whenever he so desired and thus defeat the purpose of the
clause, which was to give the court the power to cancel the contract
before substantial work had been begun by the architect.

2. Maximum indebtedness

The court decided one case last year construing section 158 of the
Kentucky Constitution which contains a maximum debt limitation
on counties. In *Miller v. County of Breckinridge*, the county pro-
posed a bond issue, the purpose of which was to comply with the
provisions of the Hill-Burton Act and qualify for federal aid in the
construction of a new hospital. The bond issue was contested on the
ground that it would cause the county to exceed its normal debt
limitations. The trial court found that hospital facilities in the county
were grossly inadequate. In affirming the judgment that the bond
issue was valid, the court held that this situation was an "emergency,"
as defined in section 158. Therefore, the county was allowed to exceed
its normal debt limitations. This question as to hospitals was novel,
but the emergency rule had been applied to other situations of county
indebtedness and the extension in this case was apparently within the
intent of the rule.

C. Schools and School Districts

1. Votes of property owners

During the last term the court had occasion to decide one case
determining who was entitled to vote to change a school district. In
*Campbell County Board of Education v. Boulevard Enterprises, Inc.*, the
question was whether a husband and wife who owned real estate
as tenants by the entirety were both owners within the meaning of
KRS 160.045 and consequently whether both were entitled to vote for
a change in the school district.

Prior to 1956, when this case arose, KRS 160.045(2) provided that
if seventy-five per cent of the owners of real property located in a
county school district present a written petition to the board of
education of the school district in which their property is located
demanding that their property be placed in another school district,
the board shall proceed at once to place the property in the school
district as demanded by the petitioners. The court held that both the
husband and wife were entitled to vote because they were both owners
of property within the meaning of the statute. The case, however, is

\[130\] 361 S.W.2d 283 (Ky. 1962).
\[131\] 360 S.W.2d 744 (Ky. 1962).
dated because KRS 160.045 as amended in 1956 allows registered voters or property owners to have a vote on a change of a school district.

2. County board of education

Two cases were before the court last year dealing with statutory requirements of members of or candidates for county boards of education. One case was concerned with a required oath for members and another dealt with the requirements of a nominating petition of a county board candidate. An additional case dealt with the power of a board to dismiss its counsel. In Commonwealth v. Marshall, the court held that an innocent and an inadvertent omission of a public school officer to take an oath prescribed by statute does not authorize his removal from office when he had taken the oath required by section 228 of the Kentucky Constitution.

The Commonwealth relied on KRS 62.010(1), which provides that no officer shall enter upon the duties of his office unless he takes the oath required of him by law. KRS 62.990 makes the violation of 62.010(1) a misdemeanor upon conviction of which the offender is to be “removed from office.” Additionally, KRS 160.170 provides that every person elected to a board of education “shall before assuming the duties of his office” take both the Constitutional oath and the statutory oath set forth therein.

The court, in reaching a decision for the defendant, noted that, since most laws are supposed to reflect the public well, it is necessary and proper that they be given a construction which is likely to be regarded by the public as reasonable and that to require one who had innocently and inadvertently omitted to take the statutory oath after having taken the constitutional oath to forfeit his office would be unreasonable in the eyes of the public.

In Huie v. Jones, the court was faced with an action to enjoin a county clerk from placing the defendant's name on a ballot as a candidate for membership on the county board of education. The plaintiff had challenged three signers of a nominating petition for failure to show a place of residence. One signer was challenged as not being a legal voter and six signers were alleged to have signed two petitions. KRS 160.220 provides that the nominating petition for membership of a board of education shall be signed by not less than fifty qualified legal voters of the district, and that the place of residence of each person signing shall be shown. The court held

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132 361 S.W.2d 103 (Ky. 1962).
133 362 S.W.2d 287 (Ky. 1962).
that a statutory requirement that a petition show the place of residence of each signer is mandatory, and that persons who do not show a place of residence are not proper signers. This was a reaffirmance of the rule.\textsuperscript{134}

The court also held in the \textit{Huie} case that where signers of a petition signed more than one petition, the petition filed first is valid and is not rendered invalid when the signers sign a second petition. This again affirmed the existing rule.\textsuperscript{135}

In \textit{Hobson v. Howard},\textsuperscript{136} the court held that where a county board of education was only one of an attorney's many clients, the attorney was an independent contractor rather than a public school employee within the meaning of KRS 160.380, and that he may be discharged from employment as counsel after filing a suit against the board. The court noted that there a presumption that a professional man is an independent contractor and that the court could take judicial notice of the fact that the board was only one of the appellant's many clients.\textsuperscript{137}

3. \textit{Equal educational opportunities}

During the year, the court was faced with one decision regarding equal educational opportunities. In \textit{Wooley v. Spalding},\textsuperscript{138} the court held that where a court order required the county school district to maintain equal educational facilities for all children of that district, and either to maintain a regional high school system and re-establish a high school or to establish a central high school system, a proposal to improve and expand an existing city high school and maintain one of two schools in the western part of the county with equality of programs, curricula, facilities, and expenditures of funds was acceptable.

D. Administrative Agencies

Seven cases arose during the last term which concerned the scope of operations of state administrative agencies and the limitations of the courts on appeals from their decisions.

1. \textit{Public service commission}

In the first case of \textit{Kentucky Utilities Company v. Farmers Rural Electric Co-op.},\textsuperscript{139} the court held that where the appellee brought suit

\textsuperscript{134} Bogie v. Hill, 286 Ky. 732, 151 S.W.2d 765 (1941).
\textsuperscript{135} Huff v. Black, 259 Ky. 550, 82 S.W.2d 473 (1935).
\textsuperscript{136} 367 S.W.2d 249 (Ky. 1963).
\textsuperscript{137} New Independent Tobacco Warehouse No. 3 v. Latham, 282 S.W.2d 846 (Ky. 1955).
\textsuperscript{138} 365 S.W.2d 323 (Ky. 1963).
\textsuperscript{139} 361 S.W.2d 300 (Ky. 1962).
attacking the ruling of the commission but failed to make the commission a party to the action until forty-two days had elapsed, the action should have been dismissed due to a failure to comply with KRS 278.410 which provides that "any utility affected by an order of the Commission may within twenty days after being served with the order . . . bring an action against the Commission." The fact that the suit was instituted against appellant within twenty days after the order was served was deemed insufficient to meet the requirements of the statute.

The second case between the same parties challenged the commission’s order allowing the appellant to serve a subdivision where appellant had been so doing long before the subdivision was created, but where appellee also had lines running through the area.140 The contention that such an order would provide for duplication of facilities was sustained by the circuit court. The court of appeals reversed, holding that although there must of necessity have been some duplication, there was no showing that the decision of the commission was either unlawful or unreasonable and that, therefore, it should not have been overruled. This case indicates the wide discretion the commission is given in its decisions.

2. Department of agriculture

In Spillman v. Beauchamp,141 the court upheld the statutory authority of the department of agriculture to order the destruction of diseased animals.142 The court stated that the officers could not be held personally liable even if it should be proven that the animal was not in fact diseased, as long as they did not act in a willful and malicious defiance of the veterinarian’s diagnosis. Both holdings seem to be in accord with an earlier Kentucky decision143 and the general rule.144 This is another illustration of the wide discretion an administration agency is given in its operations.

3. Department of welfare

In Fowler v. Black,145 a prisoner in the Kentucky State Reformatory brought suit against the director of the bureau of corrections, acting under the authority of the department of welfare, to have rescinded a penalty imposed for a violation of prison regulations. The penalty

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141 362 S.W.2d 33 (Ky. 1962).
142 See KRS 44.070-160, 246.210, 257.020, 257.030, and 257.110.
143 Schneider and Son v. Watt, 252 S.W.2d 898 (Ky. 1952).
144 67 C.J.S. Parties § 125 (1950).
145 364 S.W.2d 164 (Ky. 1963).
consisted of a revocation of accumulated credit on his sentence and a denial of the privilege of earning any further credit. The court held that the privilege was a conditional gratuity rather than a vested right and that therefore it could be forfeited by the prisoner's misconduct.

4. Alcoholic beverage control board

In the case of Durbin v. Wood, the court reversed an order of the alcoholic beverage control board, upheld by the circuit court, which granted appellee's application for a liquor license when the required published notice describing the premises read, "Ben Wood, No. 2, Boaz, Kentucky." The court based its holding on KRS 243.360(1), which requires that the notice state "the location of the premises for which the license is sought." The purpose of that statute is to notify the public of the proposed use of specific property so that any member of the public is afforded an opportunity to file a protest against the issuance of a license for that location. Therefore, the court in following the interpretation of an earlier case, held that the notice was insufficient. Two supplementary questions of interest were also answered. The first was whether a subsequent notice, published after application for the license, will cure the inadequacy of the original notice. The court held that it will not because KRS 243.360(1) provides that an applicant must publish his notice before applying for a license. The other question was whether insufficiency of notice is waived by the failure to raise the question before the board. It was held not to be waived because the fulfillment of the notice requirement is a condition of eligibility which is made mandatory by the provisions of KRS 243.450.

In Alcoholic Beverage Control Board v. Woosley, the court reversed the circuit court and reinstated the board's order denying appellee's application for a liquor license because of other liquor outlets in the area, even though he had complied with regulations which would qualify him for the license. The basis of the decision was that the issuance would not be in the public interest, and that KRS 243.450(2) gives a state administrator the authority to deny an application which might otherwise be issued "for any reason which he, in the exercise of his sound discretion, may deem sufficient." In this case, there were two other liquor outlets in the vicinity which adequately served the immediate area and the premises to be licensed were close to two churches and other public areas frequented by minors.

146 369 S.W.2d 125 (Ky. 1963).
147 Barnett v. Portwood, 328 S.W.2d 164 (Ky. 1959).
148 367 S.W.2d 127 (Ky. 1963).
5. Board of claims

In Kentucky State Fair Board v. Nicklies, the court dealt with the general question of the power of the circuit court on appeal from a decision of the board of claims. In this case, the board had found that the paved area on which the claimant fell was not negligently designed or constructed and refused to allow the claim. The circuit court awarded damages for the claim. The court of appeals reversed, stating that appeals to the circuit court are governed by KRS 44.140(2) which limits the powers on appeal to remanding the case to the board if the circuit court holds the finding erroneous. Additionally, the court held that it was the board and not the circuit court which may make an award in cases within the scope of the statute. This appears to be the general law applicable to all of the state's administrative agencies as to discretionary powers and the limitations imposed on the courts on appeal.

E. Elections

The court of appeals had occasion to decide four cases last year pertaining to elections. Three of the cases involved requirements of voting machines and the fourth dealt with the rules governing nominating petitions.

1. Voting machines

In Ford v. County of Carlisle, a resident brought an action to enjoin the purchase and use of voting machines on the ground that they did not comply with the requirement of KRS 125.040(1) that a voting machine must insure secrecy to the voter. The court held that the requirement is met even though the machine makes a distinguishable sound when a write-in ballot is cast, if the sound would not always be audible above the normal noises of the voting place. In addition, the court held that where it takes longer to vote for a candidate of different parties in a certain voting machine, there is no material violation of the secrecy requirements of the statute. The court noted that a straight ticket could always be voted in a few seconds but a split ticket would naturally take longer, and therefore it would be unreasonable to hold a voting machine not to be within the statutory requirements on that ground. The court also held that the fact that a voting machine could be unlocked and the counters read to determine who cast the ballot did not violate the statute.

In Mills v. Broughton, the plaintiff's majority of votes were

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149 361 S.W.2d 269 (Ky. 1962).
150 361 S.W.2d 757 (Ky. 1962).
151 365 S.W.2d 315 (Ky. 1963).
eliminated when the circuit court decreed that it was impossible to
determine the will of the voters from a certain precinct in an election.
The defendants were declared elected on the grounds that in the
precinct the secrecy requirements set out in section 147 of the Ken-
tucky Constitution and KRS 125.140(2) were violated. KRS 125.140(2)
provides:

No voter shall be permitted to receive an assistance in voting unless
he makes and signs an oath that by reason of inability to read English
. . . he is unable to vote without assistance. . . .

In the precinct in question fifty per cent of all the voters were given
aid by precinct judges in using the voting machines, and none of the
voters made or signed the required oath. It was impossible for the
trial court to determine for whom any of the votes were cast.

The court held that the signing of the oath is mandatory under
KRS 125.140(2) and votes cast with assistance are illegal under the
statute unless the oath is signed. This was the first ruling on the
section, but it conformed in substance with KRS 118.300(1) pertaining
to illiterates voting by ballot where failure to take the prescribed
oath rendered the vote invalid.

Under KRS 122.040(4), the court may find that there has been no
election only if it appears from the whole record that there has been
such fraud, intimidation, bribery or violence that there could have
been no fair election. The holding in the Mills case is consistent with
this statute since in an earlier case construing this statute, the court
held that if it has been established that a large proportion of the votes
cast were illegal, and it is not possible to determine how the votes
were cast the election will nevertheless be voided.152

In Lackey v. Garner,153 the court ruled on the constitutionality of
KRS 118.450(4), which requires each county to acquire voting ma-
chines for each precinct in which such machines are not already in
use. Section 147 of the Kentucky Constitution provides that counties
so desiring may use voting machines. The trial court construed the
words of the constitution as prohibiting mandatory use of voting
machines. In reversing the trial court's decision, the court of appeals
changed the construction of the word "may," and ruled that the
Constitution's use of the word "may" does not render unconstitutional
mandatory legislation. This expressly overruled an earlier decision to
the contrary.154

152 Napier v. Noplis, 318 S.W.2d 875 (Ky. 1958).
153 287 S.W.2d 257 (Ky. 1963).
154 Billiter v. Nelson, 300 S.W.2d 790 (Ky. 1957).
2. Nominating petitions

The only other decision by the court last year pertaining to elections dealt with nominating petitions.

In *Carter v. Henrickson* the court was involved a nominating petition which stated that a certain person was nominated as candidate for "Office of the U. S. Congress," and the names of citizens from counties within the congressional district. The court held this was sufficient to identify the House of Representatives and the district to be represented. This was a reaffirmation of the general rule that courts will construe election statutes liberally in favor of citizens whose right to choose their public officers is challenged. This rule is complemented by another rule of construction which provides that a good faith purpose to nominate a candidate for public office should be recognized unless the plain or manifest purpose of the law demands a decision invalidating the petition.

F. Public Officials

1. Compensation

The court of appeals last year had occasion to decide two cases involving the compensation of public officials. One case dealt with the compensation of justices of the peace and the other with the compensation of county attorneys.

In *Webster County v. Nance* the fiscal court had not placed a limitation upon the compensation for magistrates. The defendant magistrate had an average of 1,443 cases yearly, and in the year in question most defendants pleaded guilty to the charge of breach of peace and were fined one dollar and court costs, which were assessed at 20.50 dollars in each case. The number of cases before the defendant magistrate multiplied by his share of the court costs greatly exceeded the 5,000 dollar statutory compensation he was allowed.

The court of appeals held that where the fiscal court had not placed a limitation in a certain term upon the compensation for magistrates and justices of the peace, the maximum compensation was that which had been fixed previously, before the term of office began.

In *Webster County v. Vaughn* there was involved an action to recover from a former county attorney sums received by him as fees in traffic cases in a magistrate's court where the county attorney did

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155 361 S.W.2d 102 (Ky. 1962).
156 Queenan v. Mimms, 283 S.W.2d 380 (Ky. 1955).
157 See KRS 120.060, 118.080(2).
158 362 S.W.2d 723 (Ky. 1962).
159 See KRS 64.700; Upton v. Whitley County, 256 S.W.2d 3 (Ky. 1953).
160 365 S.W.2d 109 (Ky. 1963).
not appear in any of the cases. The court of appeals held that a county attorney is not entitled to collect fees as court costs of cases in magistrates court when he was not present and took no part in the prosecution of the traffic offenders. The court applied KRS 64.410(2) which prescribes that no officer shall demand or receive any fee for services not actually rendered.

2. **Duties of an officer**

In *Raney v. Stovall*,¹⁶¹ Raney was appointed a deputy sheriff while he was serving a four-year term in the Kentucky Senate under a permissible construction of section 165 of the Kentucky Constitution, KRS 61.080 and 61.090. It was charged that the offices of senator and deputy sheriff are incompatible and the acceptance of the second office vacated the first. The senate, however, passed a resolution recognizing Raney as a duly qualified senator and the commissioner of finance issued warrants covering compensation and allowances as a senator during the period he held both offices.

The appellee state treasurer refused to honor the warrants and suit was brought to compel her to do so and to enjoin her from refusing to honor future warrants properly presented. The court held that the state treasurer is not required to honor any warrant issued by the department of finance. She may properly, acting in good faith and upon substantial constitutional grounds, raise the question for judicial determination concerning the legality of a warrant.

¹⁶¹ 361 S.W.2d 518 (Ky. 1962).
IV. TAXATION

Of note during the past term was the interpretation of three of Kentucky tax statutes. In *Marcum v. Kentucky Enterprise Federal Savings & Loan Association*, the court decided that the liability for the annual tax of one dollar on each 1,000 dollars of paid-in capital stock of building and loan associations imposed by KRS 136.300 is upon the association and not its stockholders. In granting the stockholders immunity to liability for the tax, the court reasoned that there was nothing to indicate that the stockholders should be liable for the tax, as would be the case if the association was merely a collecting agency for them, and concluded that the decision in an earlier supreme court case should be followed.

In *James B. Beam Distilling Company v. Department of Revenue*, the court held that whiskey purchased in a foreign country and stored in Kentucky in its “original package” without being sold or used by the purchaser cannot be taxed under KRS 243.680(2). This statute requires anyone who ships or transports distilled spirits into the state to secure a permit to do so and to pay a ten cents per gallon tax thereon. Plaintiff complied with the statute and paid the tax levied against the whiskey, but subsequently brought this action for a refund of the taxes paid, on the ground that the transaction could not be validly taxed under the constitution. The contention was upheld on the ground that the whiskey was an “import” within the “export-import” clause of the United States Constitution and therefore was immune to tax in view of the decision in *Brown v. Maryland*. In that case, the Supreme Court held that goods imported into a state in their “original package” could not be constitutionally taxed. In answer to the contention that the levy was a license tax and not a tax upon the “import” itself, the court pointed out that the form of the tax is not controlling. Since the tax levied was, in fact, a tax upon an import in its “original package,” it violated the constitutional protection afforded by the *Brown* case.

Finally, in *Marcum v. Kentucky & Indiana Terminal Railroad Company*, it was held that a corporation’s income was properly adjusted pursuant to KRS 141.205(5). The corporation operated a bridge and switching terminal, and all of its shares of stock were

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162 363 S.W.2d 118 (Ky. 1962).
164 367 S.W.2d 267 (Ky. 1963).
165 U.S. Const. art. I, § 10.
166 25 U.S. (8 Wheat.) 419 (1827).
167 363 S.W.2d 98 (Ky. 1962).
owned equally by three railroad companies. The three shareholders agreed that they were to pay for their use of the corporation's facilities only an amount necessary to meet all expenses and obligations of the corporation which exceeded revenues earned through use of the facilities by non-stockholders. KRS 141.205(5) provides, in effect, that a corporation which carries on transactions with shareholders shall have its net income adjusted to an amount that would result if such transactions were carried on at "arms length." The tax department levied a deficiency against the corporation after adjusting its income pursuant to the statute. The court upheld the adjustment, the method used and the amount assessed. The important aspect of the case, however, lies in the interpretation placed upon the statute. The court said, "simply stated the statute means that the department shall determine the net income of a subject corporation to be an amount equal to that which it would have received had all of its business been carried on with strangers."\(^\text{168}\) Thus, the case clearly established that KRS 141.205(5) is mandatory and will be applied by the department to thwart any scheme devised to avoid income tax where a corporation transacts business with its shareholders.

\(^{168}\) *Id.* at 101.
V. INSURANCE

The most interesting case decided during the term was Salisbury v. Vick. The court held that a divorced wife who was the named beneficiary of her former husband's life insurance policy was not entitled to its proceeds upon his death even though she had paid the premiums on the policy subsequent to the divorce. The decision is the last in a line of cases interpreting KRS 403.060(2) and KRS 403.065 as they relate to a divorced wife's right to the proceeds of an insurance policy procured by the husband during the marriage. Those statutes provide that upon a judgment of divorce all property of either party obtained from or through the other before, during, or in consideration of the marriage should be restored to the appropriate party.

The earliest case decided by the court held that these statutes abrogated any rights the divorced wife had in a life insurance policy her husband had procured during the marriage. However, two subsequent decisions limited this rule. In Ficke v. Prudential Life Insurance Company of America, it was held that if the wife, during the marriage, procured the policy and paid the premiums, then, even though there was a subsequent divorce, she was entitled to the proceeds. Subsequently, in Johnson v. Johnson's Administratrix, the court held that even though the wife did not procure the policy, if she paid the premiums on it before and after the divorce then she was entitled to receive the proceeds.

In the Vick case, the plaintiff argued that while the statutes abrogated her rights she reinstated her interest in the policy after the divorce by payment of the premiums until her former husband's death. The court, in answer to this contention, reaffirmed its first rule and distinguished the Ficke case on the ground that there the wife had paid premiums during the marriage, and not just subsequent to the divorce. No mention was made of the Johnson case. The court reasoned that since after the divorce the wife was a stranger to the policy by statute, both established legal principle and policy favored the conclusion that she could not be allowed to reinstate her interest. The net effect of the Vick decision is to negate any possible inference that might have been drawn from the Johnson case that since the wife was entitled to the proceeds when she paid the premiums before and after the divorce, she would be entitled to the proceeds by mere payment of the premiums after the divorce.

169 368 S.W.2d 317 (Ky. 1963).
170 Warren v. Cuporlock's Adm'r, 292 Ky. 668, 167 S.W.2d 858 (1943).
171 305 Ky. 171, 202 S.W.2d 429 (1947).
172 297 S.W.2d 753 (Ky. 1944).
In two other cases the court reaffirmed and applied several well settled principles of law in Kentucky and other jurisdictions. *Home Insurance Company of New York v. Caudill*\(^{173}\) involved an action to enforce payment under a fire insurance policy where the plaintiffs had secured the policy through the defendant’s local agent, agreeing to make five installments in payment of the premium. A promissory note for the total amount due was given. The policy provided that if there was any default in payment the policy was to be suspended until the amount due was paid. The plaintiffs defaulted, but after the local agent demanded payment, with express authority of the defendant, the overdue installment was paid. Thereafter, the plaintiffs’ house and barn were destroyed by fire and they filed a claim for payment under the policy. The defendant denied it on the ground that the plaintiffs’ payment of the overdue installment to the local agent was not payment to it, and therefore coverage under the policy was suspended at the time of the fire. The court held that the installment was paid to the defendant, even though the policy provided that the installments were payable at the defendant’s offices in New York or Chicago. The defendant’s previous course of dealing in allowing plaintiffs to pay the other installments to the local agent amounted to a custom or habit which justified them in believing the payment as made was binding.

In *State Farm Mutual Automobile Insurance Company v. Shelton*,\(^{174}\) where an action was brought to enforce a judgment against a company’s insured driver, the court of appeals held that the lower court erred by refusing to allow the company to present evidence of fraud and collusion in the previous action. The defendant contended that the plaintiff had conspired with its insured to make it appear that the latter was driving the automobile at the time of the accident when in fact he was not. The basis for the court’s award of a new trial was the recognized exception to the general rule of collateral estoppel.\(^{175}\) Ordinarily a liability insurer has a right to defend an action against its insured if it has timely notice, but if it fails to do so a judgment against the insured is binding upon it as to the issues litigated.\(^{176}\) However, where fraud or collusion is involved the rule does not apply, especially where the insured helped perpetrate the

\(173\) 366 S.W.2d 167 (Ky. 1963).

\(174\) 368 S.W.2d 734 (Ky. 1963).


Therefore, the court held that the defendant had a right to raise and prove the defense and it was error to deny it the chance.

Two other cases required the construction of certain words used in the policies involved in the litigation. In *Niagara Fire Insurance Company v. Curtsinger*, the court held that the mere sinking of a porch floor which pulled it and the porch roof away from the side of the plaintiff's house was not a "collapse" of the building. Therefore, there could be no recovery by the plaintiff for a "collapse" of the house under the policy. However, it was held that the falling away of land next to the carport of the house, which caused its roof to sag and pull away from the house, presented a triable issue on the question of whether this damage was caused by a "landslide" and therefore compensable under a provision of the policy. The interesting point of the case was that the court adopted the position that an insurance company may be liable under a policy protecting against damage caused by a "landslide" not only where land falls down upon a building but also where the land slides out from under the structure.

Finally, in *Bays v. Mahan*, the court concluded that a mother living in the home of her son, and dependent upon him for support, was a member of his "immediate family" and thus the son was entitled to the benefits due under a burial plan insurance contract.

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177 *Id.* at § 189.
178 361 S.W.2d 762 (Ky. 1962).
179 There was evidence which tended to show that since the house was positioned upon a hillside, the damage to the carport could have been caused by land on the side of the hill giving way under the house. *Id.* at 763.
180 362 S.W.2d 732 (Ky. 1962).
VI. PROPERTY

A. EMINENT DOMAIN

The most significant case decided in the area of condemnation law during the last term was *Commonwealth v. Sherrod.*\(^{181}\) The opinion patently rejects the old rules by which juries evaluated damages in condemnation actions and sets forth new rules designed to make courts and juries adhere strictly to the concept of fair market value. The state condemned a strip of land which was subject to commercial lease. The trial court’s instructions failed to state that the total damages payable by the condemnor could not exceed the difference in fair market value of the entire tract before and after the taking, and the court of appeals held that this failure constituted reversible error under existing case law.\(^{182}\)

The court went on, however, to reevaluate and change the entire system of assessing the award to the landowner whose land is taken under the state’s power of eminent domain. The problem of determining and allocating damages where the condemned land is subject to lease was initially considered. The previous method, as outlined in *City of Ashland v. Price,*\(^{183}\) was to first determine the value of the lease to the lessee by ascertaining the present fair rental value, comparing that with the rent stipulated in the contract, and allowing the lessee damages computed by multiplying the difference by the unexpired term of the lease. The court said this method was completely unsound, unfair and unworkable in that it led to deviations from the rule that the total amount payable by the condemnor cannot be increased by outside contracts entered into by the condemnee. The court felt that the method outlined in the *Price* case led in practice to juries awarding the lessee damages for the unexpired lease and then awarding the lessor essentially full damages.\(^{184}\)

The new rules, as set down in the *Sherrod* case, require a finding of difference in fair market value before and after the taking before any consideration is given to the value of the lease. The new instructions require the jury to find: (1) the fair market value of the tract as a whole immediately before the taking, giving consideration to

\(^{181}\) 367 S.W.2d 844 (Ky. 1963).

\(^{182}\) Commonwealth v. Gilbert, 258 S.W.2d 264 (Ky. 1951); Ky. Water Service Co. v. Bird, 239 S.W.2d 66 (Ky. 1951).

\(^{183}\) 318 S.W.2d 861 (Ky. 1951).

\(^{184}\) The court pointed out that it is not uncommon for the figure produced by multiplying the difference in rental value before and after the taking by the remaining months of the lease to be greater than the figure representing the fair market value of the property. *Commonwealth v. Sherrod,* supra note 1, at 848.
the fact that it has rental value but evaluating it as if free and clear of the lease; (2) the fair market value of the tract as a whole, immediately before the taking, if sold subject to the lease; (3) the fair market value of so much of the leased tract as remains immediately after the taking, giving consideration to the fact that it has rental value but evaluating it as if free and clear of the lease. After the jury has fixed these three values the judge will compute the total damages payable by subtracting (3) from (1) and allocating this amount between the lessee and lessor, and subtracting (2) from (1) and dividing by (1) to arrive at the lessor's percentage of ownership. Under this method the total damages are computed first and the value of the lease second. Thus the lessee may be at a disadvantage because he will not be allocated any damages at all unless a jury determines that the existence of the lease detracts from the value of the land to the lessor.

The court noted that its method of evaluation omitted any reference to the fixing of taking and resulting damages and said that "the omission is intentional . . . and the conclusion we have reached, for the reasons hereinafter set forth, is that there should be no separate determination and fixing of taking and resulting damages in any condemnation case. . . ." The court also considered the question of the offsetting of benefits to the remainder derived from the improvement against the damages to be awarded the condemnee. Prior Kentucky law on the subject is illustrated by the recent case of Frenel v. Commonwealth, which stated that benefits may be offset against resulting damages but not against damages for the taking, the rationalization being that there is a constitutional right to damages for the taking but only a statutory right to resulting damages. As the court pointed out in the Sherrod case, however, the situation was confused by decisions holding that benefits could not be offset against either taking or resulting dam-

\[185\] Id. at 852.
\[186\] Ky. Water Services Co. v. Bird, 239 S.W.2d 66 (Ky. 1951); Commonwealth v. Combs, 244 Ky. 204, 50 S.W.2d 497 (1932).
\[187\] The railroad condemnation statutes rendered in part inoperative are KRS 416.020 and 416.050. The highway condemnation statutes affected are KRS 177.083 and 177.087. Also affected is KRS 416.110 providing for the separate fixing of damages for fencing, trees, and shrubbery.
\[188\] 331 S.W.2d 710 (Ky. 1959).
ages and decisions introducing the concept of "incidental damages" against which benefits could be offset. The court, in a dramatic and forthright manner, threw out all categorizations as to types of damage and said that benefits accruing to the remainder because of the special relationship of the improvement to the remainder could be offset against the total damages payable to the condemnee. In so holding, the court followed the reasoning of a Supreme Court decision that the property of a landowner is a value unit and when part of the land is taken the only question is how much has the unit been reduced in value. If property is thought of as value, benefits may be offset against either taking or resulting damages as there is a decrease of value in either case. If the owner's loss has been mitigated by an enhancement in the value of the remaining land, it would violate the constitution to pay him compensation without regard to the enhancement, since this would not be paying the condemnee just compensation for the value unit taken.

The Sherrod case atly held the statutes providing that benefits may be offset only against resulting damages unconstitutional. The jury in the future shall determine the difference in the fair market value of the tract as a whole before and after the taking, giving consideration to any enhancement in value of the remainder to the improvement. This is to be distinguished from the enhancement of property values in the community generally.

The court has already manifested a tendency to extend the principles of the Sherrod case. In Gulf Interstate Gas Company v. Garvin, the appellant sought to condemn a pipeline easement through land subject to a mineral lease. The court held that where land containing minerals is condemned, the quantity and quality of the minerals may be properly introduced as affecting the market value of the tract—surface and minerals, but not as a basis of separate compensation. The owners of the mineral lease may introduce evidence showing the quantity and quality of the minerals and by the principles of the Sherrod Case this would increase the total amount payable by the condemnor and would increase the mineral holder's percentage of ownership. In practice this method may penalize the mineral holder as he may prove his damage only indirectly and his

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189 Broadway Coal Mining Co. v. Smith, 136 Ky. 725, 125 S.W. 157 (1910); Asher v. Louisville & N.R.R., 87 Ky. 391, 8 S.W. 564 (1888).
192 KRS 177.083, 416.020.
193 368 S.W.2d 509 (Ky. 1963).
share is to be computed only if the jury finds the lease detrimental to the surface owner. The question of evaluation when the minerals are owned in fee by one other than the surface owner remains open.

The case of Commonwealth v. Tyree\textsuperscript{194} deals definitively with the admissibility and probative value of opinion evidence as to the fair market value of the property condemned. Opinion evidence to be admissible at all must be given by a competent witness. The court, in the Tyree case, held that, to be competent, a witness must have knowledge of property values generally and a knowledge of the particular property involved. The later case of Commonwealth v. Taylor\textsuperscript{195} elaborated on these qualifications and held that "... a witness, to be qualified to testify as to the value of realty, must know the property in the vicinity, must understand the standard of value, and must be possessed of the ability to make a reasonable inference."

The court, in the Tyree case, after roughly defining competency, went on to distinguish between competency and relevancy. A witness may give his opinion as to fair market value without stating what factors he considered in making his estimate and such an opinion is both competent and relevant. If, however, on cross-examination, it is brought out that the witness relied on an irrelevant measure of value or an element of value that is legally non-compensable, the testimony may be stricken as irrelevant. The court hinted that the opinion might be saved on re-direct examination by having the witness recompute his estimate without the irrelevant factor. The right to consideration on appeal must, of course, be preserved by a motion to strike at the trial level.

The concept of limited probative value was introduced into condemnation law in the Tyree case. The court stated that evidence of probative value is evidence having the fitness to induce conviction in the minds of reasonable men, but went on to make it clear that all competent and relevant opinion evidence, no matter how extravagant, will be thought of as having some probative value. The lack of supporting facts for an opinion will detract from the probative value of that opinion to the extent that contrary opinions are supported by facts. An unsupported opinion or an opinion patently extravagant may be capable of conviction up to a certain point but not beyond. A verdict in accord with extravagant evidence will be set aside as not supported by the evidence.

\textsuperscript{194} 365 S.W.2d 472 (Ky. 1963).
\textsuperscript{195} 368 S.W.2d 732 (Ky. 1963).
\textsuperscript{196} Commonwealth v. Taylor, 368 S.W.2d 732, 734 (Ky. 1963), citing 32 C.J.S. Evidence § 545 (1942).
In the case of Commonwealth v. Lyons, decided prior to the Tyree case, the court ruled that testimony of the condemnee’s witness that a house, valued at 9,000 dollars before condemnation, was absolutely worthless after condemnation of a strip of land thirty-two feet from the house was so contrary to common knowledge as to be without evidentiary value. By the rule of the Tyree case, such testimony would have to be deemed to have some evidentiary value but as a practical matter it would have so little that a jury could not return a full verdict or a verdict near the evaluation of the witness. The change in terminology might effect a change in the rationalization of the Lyons case but not in the result.

In another decision prior to the Tyree case, Commonwealth v. Raybourne, the court reversed as excessive an award of 6,910 dollars for damages to the remainder of a farm resulting from the taking of a strip of land where the residence was to be 600 feet from the highway. The court stated that since the testimony did not have a reasonable and valid basis it lacked sufficient probative value to support the award. By the rules of the Tyree case, however, supporting facts are necessary to lend probative value to opinion evidence only to the extent that supporting facts are introduced to support contrary opinion evidence. Testimony cannot be discounted solely because it is not supported by specific facts.

The Tyree case has already been cited as controlling authority for the proposition of limited probative value. The court held, in Commonwealth v. Elizabethtown Amusements Inc., that an estimate of 32,000 dollars for a sixty-six foot strip along the front of a drive-in theatre had probative value, and that an award of 11,700 dollars was not patently in excess of any amount the evidence reasonably could sustain.

The question of the admissibility into evidence of property tax evaluations signed by the condemnee was dealt with in the cases of Texas Gas and Transmission Company v. Rose and Commonwealth v. Lanter, both holding that the exclusion of such evidence constitutes reversible error. This follows the general rule of Commonwealth v. Rankin. As made clear by the Tyree case, however, there is no requirement that the evaluation be given considerable weight unless the assessed value bears some reasonable relation to the minimum

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197 364 S.W.2d 336 (Ky. 1963).
198 364 S.W.2d 812 (Ky. 1963).
199 367 S.W.2d 449 (Ky. 1963).
200 365 S.W.2d 332 (Ky. 1963).
201 384 S.W.2d 652 (Ky. 1963).
202 346 S.W.2d 714 (Ky. 1960).
market value as established by other evidence in the case. There is no question of estoppel.\textsuperscript{203} The evaluation, for the purposes of relevancy, is to be thought of as having been made when the condemnee last signed the assessment sheet, regardless of when the county assessor actually made the evaluation.

In \textit{Commonwealth v. Eubank},\textsuperscript{204} evidence tending to show the productivity of agricultural land was held to be admissible as a factor affecting fair market value. The court, however, held that it is not proper to show prior earnings because that would tend to show the worth of a business as distinct from the worth of the land itself.

In \textit{Commonwealth v. McGreorge},\textsuperscript{205} the court held that evidence of a comparable sale was not inadmissible merely because the buyer had the power of eminent domain, despite the theory that evidence of a comparable sale is inadmissible unless it is between a willing seller not compelled to sell and a willing buyer not compelled to buy. In the comparable sale in that case the buyer was the local school board and it was clear that the board, unlike the department of highways, was not committed by advance plan to the acquisition of certain pieces of property. Therefore, the court held that whether the comparable sale was by free choice was a question of fact which should go to the jury for whatever weight they choose to put on it.

In \textit{Commonwealth v. Blackburn},\textsuperscript{206} the rule was restated that the condemnee may not receive compensation for enhancements in the value of the land taken where the enhancement is due to the prospect of the improvement itself. Likewise, a comparable sale favorably reflecting the prospect of the improvement should be excluded on motion. But, the court said, it is incumbent upon the condemnor to object or move to strike at the trial level to preserve grounds for appeal. The court in this case was not forced to consider the difficult question of how the condemnor can prove that a sale has been favorably influenced by the prospect of the improvement.

Three cases decided during the term concerned in some way the procedure by which the condemnor secures right of entry onto the condemned property. Commissioners are appointed by the county court, they inspect the property and make an award, a judgment is entered in the county court in accord with this award, and the condemnor pays the amount of the award into the county court. The date of taking is the date of the entry of the county court judgment.

\textsuperscript{203} \textit{Commonwealth v. Tyree}, 365 S.W.2d 472, 478 (Ky. 1963).
\textsuperscript{204} 369 S.W.2d 15 (Ky. 1963).
\textsuperscript{205} 369 S.W.2d 126 (Ky. 1963).
\textsuperscript{206} 364 S.W.2d 332 (Ky. 1963).
All questions as to the right to take are adjudicated in the county, either the condemnee or the condemnor may appeal the amount of the commissioner’s award to the circuit court and have a jury trial de novo as to the adequacy of the award.

The condemnee, in the county court, challenged the right of the department of highways to take his property, alleging fraud, bad faith and abuse of discretion. The court, in Commonwealth v. Burchett, held that a mere showing that a road could have been routed so as to miss appellee’s property does not support a claim of abuse of discretion. The public interest demands that the department of highways be allowed broad discretion in the acquisition of property and should not be held to the shortest or most economical routes.

The general question of enforcing debts against the state was considered in the case of Commonwealth v. Circuit Court of Bullit County. Specifically the circuit judge issued a writ of execution upon property of the department of highways. The lower court issued an injunction to prevent the levy and this appeal was taken by the state. The court of appeals held that a writ of execution will not lie against property owned by the state, and that the proper method of enforcing debt is to ask the circuit court to issue a writ of mandamus to compel the commissioner of finance to issue a warrant and to compel the treasurer to pay the warrant.

KRS 177.087, which provides that all appeals from county court to the circuit shall be taken within thirty days from the entry of judgment in county court, was construed to be jurisdictional in nature in the case of Commonwealth v. Berryman. An appeal taken on the thirty-second day was declared void and it was held that the failure of the opposing party to object in subsequent circuit court proceedings could not constitute a waiver, as jurisdiction can never be conferred on a court by the actions of the parties.

An interesting question is presented by the case of Bowling Green-Warren County Airport Board v. Long, where the board condemned a portion of appellee’s land to extend a runway. The court held that the condemnees were entitled to compensation for the contemplated use of the air space above the remainder, stating that the condemnation of land does not ipso facto include the right to invade the reasonable air space of adjacent land. The court relied on a Supreme Court decision because there was no Kentucky case in point.

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207 367 S.W.2d 262 (Ky. 1963).
208 365 S.W.2d 106 (Ky. 1963).
209 363 S.W.2d 525 (Ky. 1962).
210 364 S.W.2d 167 (Ky. 1963).
Although the *Bowling Green Airport* case, by its language, seems to stand for the proposition that one has a property interest in the air space over his land, it is questionable, however, whether the case, on its facts, stands for anything more than that in assessing damages to the remainder, a valid factor for consideration is that airplanes will be flying at low altitudes over the land and to some extent interfering with the use and enjoyment of the land. The question remains open: if one does have a property right in air space as such, how high does this property right extend?

In *Commonwealth v. Carlisle*, the court held that the only right of access that a landowner has is the right of "reasonable access to the highway system." The access of the landowner is subject to control under the police power, presumably with a court weighing the benefit to the landowner against the danger to the traveling public. The court made it clear that where the department of highways seeks to limit access it should do so under the police power and not under the theory of taking of a property interest. If there is a condemnation as such, the department cannot complain when a jury awards damages for the taking. The court further held that the appellee was not entitled to damages for the construction of deceleration and turning lanes or the placing of traffic dividers between the north and south lanes. While these may interfere with traffic reaching appellee's property, the appellee has no compensable interest in the flow of traffic.

The *Carlisle* case contains language with broad implications and presents an open question to the courts. How far can the department of highways go in limiting access rights under the police power? If the landowner is entitled only to reasonable access to the highway system, could the department, on the theory that the traveling public is endangered by commercial enterprises on major highways, provide those enterprises with secondary access roads and close certain major highways to commercial enterprises?

B. **Dower**

Only one case of importance concerning dower rights was decided during the last term. In *Walters v. Anderson*, the husband's land was sold at execution and brought an excess over the amount of the judgments. The husband then assigned his rights in the excess to his wife. When the purchaser paid the sale price into court, he attempted

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212 363 S.W.2d 104 (Ky. 1962).
213 361 S.W.2d 31 (Ky. 1962).
to earmark a portion as value of the wife’s inchoate dower right, but
the court temporarily set aside the amount pending adjudication. The
wife, however, upon motion, received the moneys as assignee of her
husband. Upon the husband’s death, she asserted her dower right
to the property. The court of appeals, reversing the trial court, held
that as the wife had taken the sale price money without prejudice
to her dower right and had not surrendered that right, then under
the applicable statute, she was not estopped from claiming her
one-third life estate in the land.

This decision affirmed the existing law in Kentucky regarding
dower rights in land sold at execution. The right may, of course,
be relinquished or waived. Kentucky has long recognized the rule
that an execution sale does not bar the inchoate dower rights of the
wife, and the statute mentioned above is merely a codification of,
and is in harmony with, the common law.

C. MORTGAGES

The Kentucky court recently construed an old statute in a new
context. In Trio Realty Company v. Queenan, plaintiff sought a
declaratory judgment construing the provision of KRS 382.330, which
provides that:

No county clerk shall record a deed or deed of trust or mortgage covering
real property by which the payment of any indebtedness is secured
unless the deed or deed of trust or mortgage states the date and the
maturity of the obligations thereby secured which have been already
issued or which are to be issued forthwith.

The plaintiff received a mortgage in consideration of any indebted-
ness which might be incurred by the mortgagor to the mortgagor in

214 KRS 392.020. The pertinent provision is as follows:
After the death of the husband or wife intestate, the survivor shall have
an estate . . . for his or her life in one-third of any real estate of which
the other spouse . . . was seized of an estate in fee simple during the
coverture but not at the time of death, unless the survivor’s right to
such interest has been barred, forfeited or relinquished.

215 Ellis v. Grider, 6 Ky. Opin. 29 (1872) held that where a wife appeared
in court and relinquished her dower right in her husband’s land sold at a com-
missioner’s sale, she was thereby estopped from asserting this claim against the
purchaser. See generally, 28 C.J.S. Dower § 51 (1941).

216 Robinson v. Robinson, 74 Ky. 174 (1874), held that a purchaser takes
subject to the widow’s dower interest even though the judgment directing the
sale of the land fails to mention that the land is subject to dower interests. See
also, Fields’ Heirs v. Napier, 26 Ky. L. Rep. 240, 80 S.W. 1110 (1904); Vinson

217 C.J.S., op. cit supra note 3, at § 61.

218 860 S.W.2d 747 (Ky. 1993).

the future, up to a stated limit. The instrument purported to be a “continuing pledge” of the real estate and was to remain in full force and effect until released of record by the mortgagee.\(^\text{220}\) When the plaintiff sought to have the mortgage recorded, the county court clerk refused to record it in absence of the date and maturity of the obligation of the security, as required by the statute.

The court pointed out that, while the purpose of the statute was unclear, the purpose appeared to be to protect a mortgagor or lien holder rather than prospective purchasers as in most recording statutes.\(^\text{221}\) The court speculated that the statute may have been enacted to prevent unscrupulous persons from gaining a stranglehold on property by recording an encumbrance with undefined limits and thereby prevent the mortgagor from using the property for further security. The conclusion reached by the court was that where a valid mortgage fails to reveal the date and maturity of the obligation, the instrument is not recordable.

D. Cancellation of a Deed

In Sanders v. Needy,\(^\text{222}\) the plaintiff, a widow, lived with her daughter and son-in-law in a home owned by the plaintiff. She deeded an interest in this and other property to them in consideration for their promise to furnish her with a home during her lifetime. They built a house upon the lot and invited the plaintiff to move. She refused and brought suit for cancellation of the deeds on the ground that there was a partial failure of consideration. The court of appeals held that a deed should not be cancelled where the parties cannot be restored to their former position due to the passage of time since execution of the deed, and where the defendant has so substantially changed its position by making improvements on the land.

This holding repeats the established doctrine that, in the absence of fraud, a court of equity will not cancel a deed for partial failure of consideration.\(^\text{223}\) The majority rule, however, is that where a grantee refused or fails to perform his promise to support the grantor, such is a ground for cancellation.\(^\text{224}\) But in the Sanders case, the defendants were willing to perform their obligations and even give more than an adequate contribution toward the plaintiff’s support. The case, therefore, merely affirms existing Kentucky law that a deed should not be

\(^{220}\) Trio Realty Company v. Queeman, 860 S.W.2d 747, 748 (Ky. 1993).
\(^{222}\) 363 S.W.2d 114 (Ky. 1962).
\(^{223}\) 12 C.J.S. Cancellation of Instruments § 23 (1938).
\(^{224}\) Id. at § 30.
cancelled if the parties cannot be restored to their former position.\footnote{225} Kentucky has held in such cases that where the grantee fails to support the grantor as promised, cancellation may be decreed upon terms which make allowance for the value of the services rendered.\footnote{226} The court in the Sanders case, however, expressed doubt whether a substantial breach had been shown, and concluded that the defendant’s offer to perform solved the problem.\footnote{227} Each case apparently turns on its own peculiar circumstances.

E. MILITARY RESERVATIONS

In Kingwood Oil Company v. Henderson County Board of Supervisors,\footnote{228} the appellant corporation, as lessee of oil and gas rights within the Camp Breckinridge military reservation, was assessed state and county ad valorem taxes. The court of appeals reversed the assessment, holding that the lease rights were not subject to Kentucky ad valorem taxes because: (1) the jurisdiction of the territory in which the rights had their situs had never been retroceded to the Commonwealth, and (2) Congress had never consented to the imposition of such taxes on property within the boundaries of federal enclaves.\footnote{229}

This decision was the court’s first construction of KRS 3.010 since it was amended in 1954.\footnote{230} The statute originally gave blanket consent to the acquisition of lands in Kentucky by the United States, but the amendment, passed after Camp Breckinridge had been acquired by the federal government, provides that “said acquisition shall not be deemed to result in a cession of jurisdiction by this Commonwealth.”\footnote{231} Prior to the amendment, the court had said that the Commonwealth’s consent to the acquisition of its land may be accompanied by certain qualifications.\footnote{232} But no such qualifications originally accompanied the statute, and the court in the Kingwood Oil case ruled that the later amendment cannot operate to qualify the

\footnote{226} Luster v. Whitlock, 203 Ky. 405, 262 S.W. 572 (1924); Humbles v. Harris, 151 Ky. 685, 152 S.W. 797 (1918); see generally Annot., 112 A.L.R. 670, 708 (1933).
\footnote{227} Sanders v. Needy, 363 S.W.2d 114, 117 (Ky. 1963).
\footnote{228} 367 S.W.2d 129 (Ky. 1963).
\footnote{229} Id. at 133.
\footnote{231} KRS 3.010 (1963); see generally 54 Am. Jur. United States §§ 81-88 (1945).
\footnote{232} Commonwealth v. King, 252 Ky. 699, 68 S.W.2d 45 (1934), held that the state had no jurisdiction to try a bank cashier for false entries where the bank was on a federal reservation and under a lease from the federal government.
original unlimited consent with respect to lands acquired before the amendment.\textsuperscript{233}

The court has faced similar problems concerning the Fort Knox military reservation and its ceding statute, KRS 3.030. In \textit{Hardin County Board of Supervisors v. Kentucky Limousines},\textsuperscript{234} the court held that the constitutional provision prohibiting a surrender of taxing power by a grant of the Commonwealth\textsuperscript{235} did not prevent the cession of land to the United States for military purposes. The next year, the 1954 amendment to KRS 3.010 was ruled not to limit the Fort Knox grant made by KRS 3.030.\textsuperscript{236} The \textit{Kingwood Oil} decision goes one step further, holding the amendment ineffective as to the blanket cession granted originally in KRS 3.010 under which Camp Breckinridge was acquired.

\textbf{F. Dedication}

Two cases concerning dedication arose in Kentucky during the last term. The first case arose when the defendant city, in \textit{Pulaski County v. City of Somerset},\textsuperscript{237} sought to remove by ordinance a park located within the city. The situs of the park had been deeded in 1909 to the trustees of the city for the county's use. The park was then constructed by a local club, the city, and the county. Since the area had been designated, maintained, and used as a public park, the court of appeals ruled that the area had been impliedly dedicated for public park purposes. This ruling brings the case within KRS 97.530, which prohibits the repeal of ordinances creating parks on land given to the city for that specific purpose. The holding that an area may be impliedly dedicated to a particular purpose after long use by the public, generally fifteen years, even without formal dedication, is supported by many Kentucky cases.\textsuperscript{238} The court's construction of

\begin{footnotesize}
\textsuperscript{233} But see, ops. Att'y Gen. \# 60-561 (Ky. 1960), ruling that the state has some jurisdiction over Camp Breckinridge "for certain purposes." The opinion stated that "this question of the jurisdiction of the Federal Government and the various states over the lands ceded by the various states to the Federal Government is in a state of utter confusion." \textit{Ibid.}

\textsuperscript{234} 233 S.W.2d 239 (Ky. 1950).

\textsuperscript{235} Ky. Const. \S 175.

\textsuperscript{236} Lathey v. Lathey, 305 S.W.2d 920 (Ky. 1957). Falls City Brewing Co. v. Reeves, 40 F. Supp. 35 (D.C.W.D.Ky. 1941) held that the Commonwealth, in consenting to the acquisition by the United States of Fort Knox, did not include a reservation in the Commonwealth of any right to levy taxes against property owned or privileges enjoyed within Fort Knox.

\textsuperscript{237} 364 S.W.2d 384 (Ky. 1963).

\textsuperscript{238} See, \textit{e.g.}, City of Hazard v. Eversole, 318 Ky. 254, 230 S.W.2d 921 (1950); Board of Park Com'rs of Ashland v. Shanklin, 304 Ky. 43, 199 S.W.2d 721 (1947).
\end{footnotesize}
the special purpose provision of the statute is also harmonious with prior cases.\textsuperscript{239}

A recorded plat showing a layout for streets has always been considered a dedication of that land for public use,\textsuperscript{240} even though public authority has not obligated itself to maintain the street.\textsuperscript{241} The application of this old rule arose in the second dedication case, \textit{Hougland v. Perdue},\textsuperscript{242} where abutting property owners brought an action to allow them to build a street to provide a means of access to their properties. Although the subdivision's recorded plat showed an eighty foot roadway, the defendant had fenced half of the roadway lying next to her house. She claimed she was a trustee for the county with the right of occupation until the county assumed the responsibility of maintenance of the road. The court of appeals held that the recording of the plats and sale of the lots with reference thereto constituted a dedication of streets in the subdivision to public use. The property owners, therefore, were well within their rights in attempting to improve the street.

\section*{G. Oil and Gas Leases}

Kentucky case law has held that: (1) a mining lease which authorizes the lessee to terminate at will by written notice is also terminable at the will of the lessor,\textsuperscript{243} (2) a verbal lease containing no period of termination may be terminated on notice,\textsuperscript{244} and (3) a memorandum of agreement to lease mineral lands is considered a lease at will and therefore terminable under KRS 383.140 upon one month’s notice.\textsuperscript{245} In \textit{Berry v. Walton},\textsuperscript{246} the court of appeals held that where a mineral lease does not specify a term, nor place upon the lessee any express obligation as to the term, the lease is terminable at the will of the lessor. The court said:

\begin{quote}
But if the agreement is wholly executory and one of the parties is not obligated even to commence the performance of it, there is lack of mutuality. It is not the right of termination... but the right of non-performance, that makes the agreement unenforceable.\textsuperscript{247}
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{239}] See, \textit{e.g.}, Bedford-Nugent Co. v. Argue, 281 Ky. 827, 137 S.W.2d 392 (1939).
\item[\textsuperscript{240}] Jones v. Ramsey, 300 Ky. 692, 190 S.W.2d 37 (1945); Campbell v. Adams, 228 Ky. 156, 14 S.W.2d 418 (1929); Scheider v. Jacob, 86 Ky. 101, 5 S.W. 350 (1887); Ballard v. St. Cloud & Co., 10 Ky. Opin. 343 (1878).
\item[\textsuperscript{241}] Stepp v. Webb, 386 S.W.2d 38 (Ky. 1960).
\item[\textsuperscript{242}] 361 S.W.2d 291 (Ky. 1963).
\item[\textsuperscript{243}] Killebrew v. Murray, 151 Ky. 345, 151 S.W. 662 (1912).
\item[\textsuperscript{244}] Addison v. Brandenburg, 202 Ky. 580, 260 S.W. 381 (1924).
\item[\textsuperscript{245}] Warren v. Cary-Glendon Coal Co., 313 Ky. 178, 280 S.W.2d 638 (1950).
\item[\textsuperscript{246}] 366 S.W.2d 173 (Ky. 1963).
\item[\textsuperscript{247}] \textit{Id.} at 174.
\end{itemize}
\end{footnotesize}
In Wright v. Bethlehem Minerals Company,\(^{248}\) a mineral deed gave the grantee the right to remove coal "in any manner and by any method deemed either convenient or advisable" by the grantee, provided that no portion of the leased lands be used for the dumping of slate.\(^{249}\) The grantee, under the broad provisions of the deed, recovered the coal by rotary augering. Soil, rocks, and bushes were displaced by the excavation for the placement of the machinery. The grantor objected to this displacement as violating the provision of the deed relating to the dumping of slate. The court of appeals held that soil, rocks, and bushes are not slate within the meaning of the deed.

The requirement of an intention to abandon an oil and gas lease was presented to the court in Cameron v. Lebow.\(^{250}\) This requirement is firmly imbeded in Kentucky case law.\(^{251}\) In the Lebow case, the appellants were lessees of mineral rights in three adjoining tracts of land. Two tracts had been drilled, but no development was done on the third tract for sixteen years. The court conceded that sixteen years was a long time to allow the tract to go undeveloped, but held that the lapse of time was merely evidence of abandonment.\(^{252}\) An intention is still necessary.

\[\ldots\] The intention to abandon must be shown by "clear, unequivocal, and decisive evidence" in order for an abandonment to be established.

\[\ldots\] We have said that "abandonment of a mineral lease consists of surrender of the property, coupled with an intention to relinquish the lease and is, in fact, to be determined in each case upon the surrounding circumstances."\(^{253}\)

Here, the lease in the chain of title was sufficient to put anyone on notice of the lessee's claim, and the lessees had, in fact, stated to the appellees that they owned the lease. Although three judges dissented, they did not disagree with the rule, so the rule remains that a mere lapse of time and non-use by the lessee, unaccompanied by other evidence showing an intention to abandon, does not constitute abandonment.

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\(^{248}\) 368 S.W.2d 179 (Ky. 1963).
\(^{249}\) Id. at 180.
\(^{250}\) 366 S.W.2d 104 (Ky. 1963).
\(^{251}\) Fuquor v. Chester Oil Co., 246 S.W.2d 1007 (Ky. 1952); American Wholesale Corp. v. F. & S. Oil & Gas Co., 242 Ky. 356, 46 S.W.2d 498 (1932); Trammel Creek Oil & Gas Co. v. Sarver, 197 Ky. 594, 247 S.W. 753 (1923); Cadillac Oil & Gas Co. v. Harrison, 196 Ky. 290, 244 S.W. 669 (1923).
\(^{252}\) See Hodges v. Mud Branch Oil & Gas Co., 270 Ky. 206, 109 S.W.2d 576 (1937).
\(^{253}\) H. B. Cameron v. Lebow, 366 S.W.2d 164, 165-166 (Ky. 1963); Browning v. Cavanaugh, 300 S.W.2d 582 (Ky. 1957).
H. Wills

In *White v. White*, the decedent disposed of her property by a holographic will, leaving a legacy to her nephew for “only his lifetime, after his death what is left to come back to the immediate White heirs that are living.” The court held that the nephew took a life estate with right to encroach upon the corpus of the estate for customary living expenses, and that after his death the property remaining would pass to the decedent’s brothers and sisters. The words “what is left” were construed to have the same meaning as “remaining undisposed of.” These latter words are sufficient to create in the life tenant the power to encroach upon the principal so long as he does not waste it, give it away, or dispose of it by will.

In *Hendron v. Brown*, a holographic will was attacked because it was allegedly not wholly in the decedent’s handwriting. The appellants offered to call some of the contestants to testify that the signature on the will was not the decedent’s. The trial court refused to allow the contestants’ testimony, considering it a violation of KRS 421.210(2), which prohibits anyone from testifying for himself concerning any act done by a dead person. The court of appeals reversed, and held that testimony of the contestants, based on observation of the will, was admissible because: “(1) the testimony does not recount or describe a specific transaction or act of the deceased, and (2) it constitutes an opinion of the witness based on physical evidence which does not purport to portray a particular event.”

This case appears to be the first case holding such testimony admissible under the statute. In *Hale v. Hale*, the court had held that the statute prohibited interested parties from testifying as to an act of the deceased, except where the testimony attacked either the mental capacity of, or undue influence on, the testator, thus repudiating the assumption that the statute did not apply to will cases. The statute is now construed by the *Hendron* case to allow testimony of will contestants respecting the authenticity of the decedent’s handwriting.

The question of whether an attestation clause could be used to invalidate a will arose in *Wroblewski v. Yeager*. The probate of the

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254 365 S.W.2d 732 (Ky. 1963).
255 Ibid.
256 Collins v. Collins Ex'rs, 260 S.W.2d 935 (Ky. 1963).
257 364 S.W.2d 329 (Ky. 1962).
259 242 Ky. 810, 47 S.W.2d 706 (1932).
260 361 S.W.2d 108 (Ky. 1962).
will was contested because the attestation clause recited that the witnesses had initialed the first five pages of the will, when in fact the probated instrument had no initials on its pages. The contestants questioned the authenticity of those specific pages. The two witnesses still living testified that they had not initialed the first five pages. The court of appeals held that the will was properly admitted to probate. The court reasoned that the statement in the attestation clause did not relate to a required formality of execution and the surplusage should be ignored as hearsay, especially since the two witnesses had volunteered information contradicting the superfluous statement. The court further reasoned that the burden of proof in a will contest is on the contestant, and the mere attempt to impeach the attesting witnesses by reference to nonessential provisions of the attestation clause did not satisfy the burden. Previously, in *Poindexter's Administrator v. Alexander*, the court had held that when "the evidence of an attesting witness contradicts a positive statement ... his own testimony cannot as a matter of law overcome the prima facie case made out by the will itself." In the *Yeager* case, the court distinguished the *Alexander* case on the ground that in the latter case the testimony of the attesting witness concerned an essential formality compliance with which the propounder had the burden of proving. Thus, a jury issue was present in the *Alexander* case, while in the *Yeager* case the contestants failed to meet their burden as a matter of law.

Another will case arose in *Call v. Call*, where the plaintiff, as devisee under his paternal grandfather's will, took a life estate with the remainder to his legal heirs. The plaintiff petitioned under KRS 389.040 for the sale of the property, naming his father, his sister, his infant children, and his unborn heirs as defendants. The contestants appealed, contending that the children in being of the sister and her unborn heirs were necessary parties to the action and were not before the court. The court of appeals held that all necessary parties were before the court. The sister's children were not necessary parties because if the plaintiff had died prior to the action, the title would have vested in his children. If there were no children then living, the title would have reverted to the testator's estate to descend according to the laws of descent and distribution, in which case the title would have vested in the testator's son, the plaintiff's father. In the event of his death, the property would have vested in the sister, and as she was before the court, all the correct and necessary parties were

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261 277 Ky. 147, 125 S.W.2d 981 (1939).
262 Id. at 154, 125 S.W.2d at 985.
263 367 S.W.2d 274 (Ky. 1963).
before the court. This decision is consistent with earlier case law construing the statute.\textsuperscript{264}

I. TRUSTS

Kentucky courts have generally held that limitations of trusts are not incompatible with the devise of an absolute estate.\textsuperscript{265} Realty thus devised to someone in trust is not inconsistent with its being devised to him in fee. Such a situation arose in \textit{Barth v. Citizens Fidelity Bank & Trust Company}.\textsuperscript{266} Testatrix devised property to her nephew in fee, but subject to a trust for him during life. The nephew disposed of the property by will, whereupon residuary legatees under the testatrix' will contested the nephew's right to divide in fee simple. The court held that the nephew took the fee simple title to the estate held in trust and could devise the fee simple title held therein.

This holding is consistent with \textit{White v. White},\textsuperscript{267} where the court held that if the devisee was given unlimited powers of disposition, including the power to pass title by will, he held title in fee. In the \textit{Barth} case, the testatrix specifically devised in fee simple, so it must be assumed that she intended the devisee to have the right to dispose of the property will.

The second trust case arising during the last term concerned an attempt to create a trust. In \textit{Whitehead v. Donnelly},\textsuperscript{268} a holographic will devised the residue of decedent's property to two legatees "to distribute as I have directed."\textsuperscript{269} The trial court held this provision referred to distribution of items specifically mentioned in other parts of the will, so the legatees took the residue in fee simple. The court of appeals reversed, stating that, as the testatrix apparently assumed she had disposed of the items mentioned in the will, she could not have considered them to be a part of the residue left for distribution

\textsuperscript{264} Weddle v. Weddle, 280 S.W.2d 509 (Ky. 1955), held that in an action for the sale of remainder and contingent interests under the statute, where all contingent remaindermen joined all life tenants and contingent life tenants as plaintiffs, and infant contingent remaindermen were joined as defendants with the unborn heirs of the life tenants and contingent life tenants and were represented by guardian ad litem, then all procedural steps were complied with, and the sale was proper. Security Trust Co. v. Mahoney, 307 Ky. 661, 212 S.W.2d 115 (1948), held that in an action by the life tenant for the sale of real estate for reinvestment under the statute, only those contingent remaindermen in whom title would vest if the contingency had happened before the action was commenced need be joined.

\textsuperscript{265} Clay v. McNabb, 286 Ky. 751, 151 S.W.2d 1027 (1941); Radford v. Fidelity & Columbia Trust Co., 185 Ky. 453, 215 S.W. 285 (1919); Webster's Trustee v. Webster, 93 Ky. 662, 21 S.W. 332 (1893).

\textsuperscript{266} 368 S.W.2d 339 (Ky. 1963).

\textsuperscript{267} 365 S.W.2d 792 (Ky. 1963).

\textsuperscript{268} 368 S.W.2d 337 (Ky. 1963).

\textsuperscript{269} Ibid.
to the legatees. The contested provision, rather, was an attempt to create a trust which was unsuccessful for indefiniteness, resulting in a simple failure to make a testamentary disposition.

This appears to be a proper construction of the provision. The court said, "the residue was left to the legatees for the purpose of carrying out some plan the testatrix had in mind. The language diametrically opposes the vesting of a fee simple title in them."270 As in the usual case of failure of testamentary disposition, the residue passes to the heirs at law.271

The third trust case, Potter v. Connecticut Mutual Life Insurance Company,272 involved the "subsisting trust" doctrine. The decedent was a trustee and a life tenant under a trust with a remainder to her two children. The decedent, pursuant to her right to encroach upon the principal, purchased from the defendant endowment policies which were payable to her at maturity, or if she should die before maturity, to her two children. Later she amended the policies, the effect of which was to change the interests of the children from legal remainders to equitable remainders for life, with ultimate distribution to the children's issue. After her death, the children demanded payment from the defendant of the face amount of the policies. The defendant declined to do so without a court judgment. The children contended themselves with accepting the income payments until seventeen years after the death of the decedent. KRS 418.120(5) provides that the limitation on such a suit is five years. The children contended that the actions of the decedent in varying the terms of the trust was not a repudiation of the trust, but merely an extension of the trust by variation which was voidable. Therefore, they claimed, unless they elected to avoid it, the trust subsisted and, hence, the statute of limitation was controlled by KRS 413.340, which provides that the statute of limitation does not apply to a subsisting trust.

The court affirmed a judgment for the defendant. The court defined a subsisting trust as one in which the trustee is acting within his powers and the beneficiary has no cause of action against him. The court found that the trust which was subsisting and which operated to obstruct the right of the children to immediate enjoyment was not the same trust as the original trust which had come to an end at the decedent's death. Admittedly, the court reasoned, if the

270 Id. at 338.
271 Spradlin v. Wiman, 272 Ky. 724, 114 S.W.2d 1111 (1938); Arnold v. Clay, 262 Ky. 336, 90 S.W.2d 55 (1936); House of Mercy of N.Y. v. Cromie, 6 Ky. Opin. 363 (1882).
272 361 S.W.2d 515 (Ky. 1962).
defendant had withheld the corpus under a claim of right in itself, the statute would have begun to run at the decedent's death. A claim in behalf of the children's issue who did not derive title from the original trust was similarly inconsistent with the children's title. Therefore, the court held that the statute began to run at the death of the decedent and that the claim was barred.
VII. DOMESTIC RELATIONS

Three recent divorce cases were handed down by the court of appeals. In the first, *Dalton v. Dalton*, a mother violated the terms of the judgment relating to the custody of the children and the father's visitation rights. The court affirmed the rule that the violation did not exonerate the father of contempt for his failure to comply with a judgment requiring monthly payments for the children's support. The court referred to its prior decisions in *Campbell v. Campbell*, *Spencer v. Spencer*, and *Beutel v. Beutel*, all of which held in effect that the mother's violation of the custodial judgment could not constitute a defense to contempt charges against the father for his failure to pay child support. The court pointed out that:

> Whatever infractions there may have been on the mother's part, the children should not be deprived of their natural and legal right of support from their father on account of the dissensions of their parents for causes of which they are innocent . . . and the father may not evade his obligation to support his children on the ground of such dissensions.

This decision is illustrative of the court's attempts to insure the security of children who have suffered the misfortune of a broken home.

In the second domestic relations case, *Henderson v. Baker*, a divorce decree, pursuant to statute, provided that the parties restore to each other all the property obtained from the other by reason of the marriage. The husband and wife owned a house as joint tenants with right of survivorship. Upon the death of the husband, the wife contended that since the husband had not asserted his right to restoration of his portion of the house, she was entitled to the fee

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273 367 S.W.2d 840 (Ky. 1963).
274 213 Ky. 621, 281 S.W. 800 (1926).
275 312 S.W.2d 360 (Ky. 1958).
276 300 Ky. 756, 189 S.W.2d 933 (1945).
278 Dalton v. Dalton, 367 S.W.2d 840, 843 (Ky. 1963).
279 That the supreme and paramount consideration in domestic relations cases is the child's welfare has long been followed in Kentucky. See, e.g., Donoho v. Donoho, 357 S.W.2d 665 (Ky. 1962); Sevier v. Sevier, 260 S.W.2d 526 (Ky. 1955); Youngblood v. Youngblood, 252 S.W.2d 21 (Ky. 1952); Maynard v. Maynard, 302 Ky. 590, 195 S.W.2d 304 (1946); Clark v. Clark, 298 Ky. 18, 181 S.W.2d 597 (1944); Skidmore v. Skidmore, 261 Ky. 327, 87 S.W.2d 631 (1935); Day v. Day, 218 Ky. 562, 281 S.W. 493 (1926); Colson v. Colson, 153 Ky. 68, 154 S.W. 880 (1913); Davis v. Davis, 140 Ky. 526, 131 S.W. 266 (1910); Irwin v. Irwin, 105 Ky. 632, 49 S.W. 452 (1899).
280 362 S.W.2d 730 (Ky. 1962).
simple of the property. The court of appeals held that she was entitled to only that portion which she had contributed by reason of the marriage. The court reasoned that the right of restoration conferred by the statute is not strictly a personal right, that the personal representative for an estate is under a duty to assert the right for the estate, and that the parties to a divorce action may themselves obtain restoration in an independent subsequent proceeding.\textsuperscript{282} The court relied upon \textit{Ficke v. Prudential Insurance Company of America},\textsuperscript{283} which held that after the death of a divorced husband, his personal representative could compel restoration to the estate of the proceeds of a life insurance policy where the husband paid the premiums subsequent to the divorce, but failed to change his divorced wife as named beneficiary. This rule was extended by the court to apply where real property was jointly owned, so the divorced wife would be entitled to only the amount that she actually contributed toward the investment,\textsuperscript{284} and any domestic services which she rendered to help accumulate funds from the husband's earnings would give her no right in the property.\textsuperscript{285}

In the third case, \textit{Robinson v. Robinson},\textsuperscript{286} a decree allowing the divorced wife twenty dollars per week for the support of two minor children was held insufficient even though the father earned only sixty dollars per week. The court of appeals emphasized that the trial court should first determine the minimum amount needed for the decent support of the children, then decree that this amount should be paid regardless of the earnings of the father. If the father is unable to comply, mitigating circumstances addressed to the court in defense of any contempt proceedings affords him adequate relief against possible oppression.\textsuperscript{287} The court concluded that it was not prepared to fix the amount necessary for the support of the two children, but that twenty dollars per week was insufficient.\textsuperscript{288}

\textsuperscript{282}Mills \textit{v. Epperson}, 259 S.W.2d 687 (Ky. 1953).
\textsuperscript{283}3 05 Ky. 172, 202 S.W.2d 429 (1947).
\textsuperscript{284}Kivett \textit{v. Kivett}, 312 S.W.2d 884 (Ky. 1958).
\textsuperscript{286}363 S.W.2d 111 (Ky. 1962).
\textsuperscript{287}Id. at 113.
\textsuperscript{288}Id. at 114.
VIII. CORPORATIONS

The two cases decided during the last term involved the right of a corporate fiduciary to vote its own corporation's stock and the right of a creditor to have a receiver pendente lite appointed.

In *Graves v. Security Trust Company*, the court held that a corporation, holding some of its own stock in a fiduciary capacity, could vote the stock in favor of consolidation despite the provisions of KRS 271.135. That statute provides, in effect, that a corporation may not directly or indirectly vote shares of its own capital stock belonging to the corporation. The court reasoned that the statute did not apply because the corporation did not "own" the stock within the meaning of the statute. The stock owned by the trust estate, not the corporation.

The decision is the first to interpret KRS 271.135. Some statutes in other jurisdictions specifically provide that a corporation may vote shares of its own stock held by it in a fiduciary capacity. However, the general rule is that a corporation which owns some of its own stock may not vote that stock, and at least one statute has adopted this approach. Therefore, the decision of the court is novel since it limits the scope of the Kentucky statute.

In *Dulworth and Burress Tobacco Warehouse Company v. Burress*, the court reaffirmed a longstanding position that a receiver pendente lite could not be appointed in the absence of a showing by the shareholder or creditor, pursuant to KRS 27.061, that the corporation's property is in imminent danger of being lost, removed, or materially injured. The plaintiff was a shareholder and creditor and brought this action alleging irregularities in business conduct. An order of appointment was granted even though the defendants, who were shareholders, directors, and officers of the corporation, offered to post a bond sufficient to satisfy any judgment the plaintiff might recover against the corporation.

In reversing the appointment the court pointed out that the remedy of a receiver pendente lite, being a remedy of last resort, cannot be granted where a less drastic remedy such as the posting of a bond is available. The decision is in accord with the rule in other jurisdictions and is supported by the rationalization that so long

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289 369 S.W.2d 114 (Ky. 1963).
290 Lattin, Corporations 300 (1959).
291 Stevens, Corporations 528 (2d ed. 1949).
293 369 S.W.2d 129 (Ky. 1963).
as the shareholder’s pecuniary interests are adequately protected, the property of the corporation should not be taken out of management’s hands and placed in those of a receiver.
IX. COMMERCIAL LAW

While it might be expected that litigation involving the Uniform Commercial Code would be forthcoming, there remains a dearth of decisions on the Code in Kentucky. The court only had occasion to decide one case involving it during the year. In Spurlin v. Sloan, the court held that:

... no part of KRS 355, commonly referred to as the Uniform Commercial Code, applies to a written assignment of funds presently due and owing for the purpose of liquidation or satisfying a prior existing obligation.

In this case a debtor made a written assignment of funds due him for services rendered under a highway contract. Subsequently the plaintiff, a creditor of the assignor, secured an attachment lien against the same funds. The plaintiff avoided the common law rule in Kentucky that the assignee of a prior assignment has priority over a subsequent attaching creditor by arguing that the assignment was a "security interest" under the Code. Therefore, since the interest was unperfected and the applicable provision protects a lien creditor without knowledge of the prior assignment in this situation, the plaintiff argued that he should prevail.

In rejecting this argument, the court concluded that the assignment was not a security transaction and therefore no provision of the Code was applicable. The assignment was an absolute one of a fund that was due and owing at the time for the purpose of settling partnership accounts between the assignor and assignee, and did not involve the retention of a security interest by either party.

In Payne v. Terry, the court was concerned with whether the particular instrument involved was a promissory note. The writing signed by the defendants stated: "Borrowed $7000 to buy farm to be paid when house is sold." The court held that the instrument was an enforceable promissory note. The rule in Kentucky is that before a promissory note may exist there must be a written promise to pay a fixed sum of money at a specified time or at a time that must

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295 368 S.W.2d 814 (Ky. 1963).
296 Id. at 816.
298 KRS 355.9-301(1)(b) provides:
   Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . .
   (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected . . .
299 367 S.W.2d 277 (Ky. 1963).
certainly arrive.\textsuperscript{300} Therefore, the only question before the court was whether the words of the instrument contained a promise. Relying upon its prior decision in \textit{Harrow v. Dugan},\textsuperscript{301} the court decided the word "borrowed" imported a promise to pay and consequently that the instrument was an enforceable promissory note. While the pertinent Code provision was not applicable because the note was made prior to its adoption, the conclusion to be drawn is that the result would have been the same. This is so because the Code defines a "promise" as an undertaking to pay which is more than an acknowledgment of the obligation.\textsuperscript{302} Clearly, in view of the court's previous decision in the \textit{Harrow} case, the word "borrowed" does more than acknowledge an obligation. At the least it imports an undertaking to pay.

In perhaps the last case to be decided in Kentucky under the Uniform Sales Act,\textsuperscript{303} the court passed upon whether it was error to grant a judgment n.o.v. where a jury decided that a conditional sales contract had been rescinded within a reasonable time, but awarded less than the minimum damages to which the plaintiff was entitled upon rescission. In \textit{Chaplin v. Bissire Company},\textsuperscript{304} the plaintiff purchased a walk-in refrigerator from defendant under a conditional sales contract. The refrigerator was defective upon installation, but the defendant guaranteed it to perform and corrected certain defects which continued to appear for a period of two years. Finally, after the plaintiff incurred a substantial loss due to a rise in temperature from the failure of an electrical fuse, it notified the defendant that it was rescinding the contract and tendering a return of the box. The defendant refused to accept this tender. The plaintiff brought an action to rescind and the jury found that the plaintiff had notified the defendant of its decision to rescind within a reasonable time after it accepted the merchandise in accordance with the requirement of the Uniform Sales Act.\textsuperscript{305} The court held that it was error to award a judgment n.o.v. on the ground that as a matter of law timely notice of rescission was not given, because reasonable men could differ. Therefore, the question was properly one of fact for the jury.

\textsuperscript{300} Fidelity & Columbia Trust Co. v. Lyons, 302 Ky. 839, 196 S.W.2d 605 (Ky. 1946).
\textsuperscript{301} 36 Ky. 341 (1838).
\textsuperscript{302} KRS 361.690(3).
\textsuperscript{303} 361 S.W.2d 293 (Ky. 1962).
\textsuperscript{304} 361 S.W.2d 293 (Ky. 1962).
\textsuperscript{305} KRS 361.690(3) provides: "Where the goods have been delivered to the buyer, he cannot rescind the sale . . . if he fails to notify the seller within a reasonable time of the election to rescind."
The real significance of the case, however, concerns what is a reasonable time within which the buyer can rescind. The court suggested that the "reasonable time" for notifying the seller of rescission does not begin to run against the buyer if the latter, as in the Chaplin case, promptly calls upon the seller to make good his warranty and the seller continues to make efforts to remedy defects as they arise. While this statement by the court is dictum, it is at least strong dictum and may well be an indication of a rule of construction to be followed in Kentucky in interpreting the provision of the Uniform Commercial Code dealing with the same problem. 306

306 KRS 355.2-608(2) provides: "Revocation of acceptance must occur within a reasonable time..."
X. UNEMPLOYMENT COMPENSATION

Of the several cases decided last term involving unemployment compensation, two are particularly worthy of note. In *Kentucky Unemployment Insurance Commission v. American National Bank & Trust Company*, the issue was the effect of the “good cause” statutes, KRS 341.370 and KRS 341.530, on the termination of temporary employment. The employer began renovation of its permanent premises and moved to a temporary location in order to carry on business. Since it was necessary to employ a guard at the temporary location, the employee was hired. He worked for one year, after which time the employer returned to its renovated location where the employee’s services were no longer required. The employee, upon the termination of his employment, filed an application for unemployment benefits. The application was allowed and the payments were charged to the employer’s reserve account. On appeal to the circuit court, it was held that the employee voluntarily quit his employment within the meaning of the “good cause” statutes so that the payments were not chargeable to the employer’s reserve account, but to the pooled account. The court of appeals reversed. An employee who accepted a job which he knew to be temporary did not voluntarily leave his employment and was not, therefore, disqualified under the “good cause” statutes from receiving unemployment benefits.

The circuit court felt bound by *Kentucky Unemployment Insurance Commission v. Kroehler Manufacturing Company*. In that case, an employee voluntarily quit his employment because he had accepted a retirement plan which required him to retire at age sixty-five. It was held that such retirement was voluntary under the “good cause” statutes. The court in the principal case distinguished *Kroehler*. In *Kroehler*, there was work to do, but the employee quit; in the principal case, the employee quit, but there was no work to do. Such a decision would seem to be within the spirit of the Unemployment Compensation Acts since the purpose of these acts is to protect those persons who lose employment because of forces beyond their control.

The second case particularly worthy of interest is *Johnson v. Ken-
This case involved the effect of an injunction under the Taft-Hartley Act against striking steelworkers on their eligibility to draw unemployment benefits. The appellants were members of the United Steelworkers of America and went on strike July 15, 1959, when a nationwide strike was called. On November 7, 1959, the striking workers were ordered back to work pursuant to an injunction granted by the district court. Between November 15 and November 22, 1959, the appellants were called back to work at various times. Several months later, while the injunction was still in effect, a new collective bargaining agreement was reached. The appellants applied for unemployment benefits for the period November 8 to November 22 pursuant to KRS 341.350.

The claims were denied by the Commission and the denial affirmed by the circuit court. On appeal to the court of appeals, the judgment was affirmed.

KRS 341.360(1) provides that a worker may not be paid benefits if “...a strike or other bona fide labor dispute which caused him to leave his employment is in active progress in an establishment in which he is or was employed...” The question presented was whether a strike or dispute was in active progress within the meaning of the statute. If the effect of the injunction was to cause the active progress of the strike or dispute to cease on November 7, then, even though that period of unemployment between November 8 and November 22 may have been the result of the strike, the workers would be entitled to benefits.

The court relied on Ward v. Barnes, in reaching its decision. In that case the parties to a labor dispute had arrived at a voluntary truce with the understanding that the employer would adopt a new system of operation. As a result of the new system, a bottleneck arose, and a lay off of some workers became necessary. The union withdrew its objection to the former system and the controversy was terminated. Unemployment compensation claims of the laid-off workers were denied on the basis that work had been resumed under a mere truce and the dispute had not ceased to be in active progress until the agreement to reinstitute the old system. Ward v. Barnes, the

315 266 S.W.2d 338 (Ky. 1954).
court felt, was determinative of this issue. A voluntary truce did not terminate the dispute; a fortiori, an involuntary truce would not terminate it. In the Johnson case, the court said that "all the kept the dispute from taking the form of a strike was the existence of a temporary injunction" and the dispute was still in active progress within the meaning of KRS 341.370(1).

XI. WORKMEN'S COMPENSATION

During the past term the court of appeals handed down several noteworthy workmen's compensation cases. The most interesting of these was Leep v. Kentucky State Police, a case construing the meaning of the phrase "total disability from work" as used in KRS 342.095. In that case, a state trooper had suffered a compound fracture of his leg in 1950. After the injury, the trooper was assigned to office duty, finally resigning his employment in 1951. When evidence was taken in 1957, amputation of his leg was indicated as an eventual probability. In the interim, the trooper held a different type of job doing sedentary work, for which his earnings were approximately 4,000 dollars per year. Uncontradicted medical testimony indicated that the trooper was limited to sedentary work. The Kentucky Workmen's Compensation Board found against total disability. The court of appeals reversed, holding that the evidence compelled, as a matter of law, a finding of total permanent disability.

When the injury occurred, KRS 342.110(2) provided that in no event shall compensation for an injury to a member exceed the amount allowable for the loss of such member. A previous case, Hardy Burlingham Mining Company v. Sawyer, had held that the limitation did not apply to cases of permanent total disability. In E. & L. Transport Company v. Hayes, "total disability" was construed to mean that if a workman is totally disabled from the performance of work in his former occupational classification, and his capacity to perform other kinds of work is impaired, he is entitled to compensation of total disability. Such a construction would not seem warranted from the language of the statute. The opinion in the principal case indicated that the writer of the Hayes opinion wished to reconsider this construction, but the majority here refused to do so. Therefore, the principal case must be considered as a reaffirmation of Hayes.

Having reaffirmed the construction of "total disability," the court found that since the trooper was limited to sedentary work, his ability to secure employment as a trooper was virtually ended. Since police work was his line of work, the court held that he was totally disabled under KRS 342.095.

317 366 S.W.2d 729 (Ky. 1962). In 1960 KRS 342.110 and KRS 342.095 were amended to reflect this holding.
318 254 S.W.2d 350 (Ky. 1953).
319 341 S.W.2d 240 (Ky. 1960).
320 Lepp v. Kentucky State Police, 366 S.W.2d 729, 730 (Ky. 1962).
Another noteworthy case, *Stacy v. Noble*,\(^{321}\) clarified the judicially created exceptions to KRS 342.055. In that case, the employee was injured by a third party in the course of his employment. The employer's compensation carrier awarded the employee approximately 15,000 dollars plus 2,500 dollars for medical expenses. The employee hired an attorney to prosecute a claim against the third party and agreed to pay the attorney one-third of the amount received. In the tort action, the employee claimed 4,474 dollars for medical expenses. The jury awarded the employee a general verdict of 30,000 dollars and the third party's insurer paid 5,000 dollars, the limits of the policy, into court. The employer's compensation carrier claimed the entire 5,000 dollars under KRS 342.055, which subrogated the compensation carrier to the rights of the employee in a third party action to the extent of the award made by the compensation carrier. The employee claimed the difference between the amount he claimed for medical expenses against the third party and the amount awarded by the compensation carrier, plus one-third of the partial satisfaction of the judgment as a contractual attorney's fee.

On appeal, the court discussed the judicially made exception to the subrogation rule of KRS 342.055. Under this exception, the attorney's fees and, under certain circumstances, medical expenses are segregated from the amount to which the compensation carrier is entitled.\(^{322}\) In order to remove medical expenses from the subrogation rights of the compensation carrier, the jury in the tort action must return a special item of damages for medical expenses.\(^{323}\) In the principal case, the jury did not return a verdict including special damages for medical expenses. Therefore, the court refused to speculate as to what portion of the general verdict was for medical expenses and disallowed any segregation from the general verdict.

In the principal case, the court laid down a clear rule as to when an employee is entitled to segregate his attorney's fees from the compensation carrier's subrogation rights in a tort recovery. Until 1962, the rule was that the right to segregate attorney's fees would be denied unless there were some sort of contractual relations between the attorney and the compensation carrier.\(^{324}\) *Charles Seligman Distributing Company v. Brown*,\(^{325}\) decided in 1962, changed this rule by holding that if the compensation carrier has a reasonable oppor-

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\(^{321}\) 361 S.W.2d 285 (Ky. 1962).

\(^{322}\) Southern Quarries & Contracting Co. v. Hensley, 313 Ky. 640, 232 S.W.2d 999 (1950).

\(^{323}\) Ibid.

\(^{324}\) Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 214 (Ky. 1956); Spinner v. Fid. & Cas. Co., 245 Ky. 519, 53 S.W.2d 946 (1932).

\(^{325}\) 360 S.W.2d 509 (Ky. 1962).
tunity to intervene in the tort action, the attorney's fees for the prosecution of the action may be segregated from the verdict to which the compensation carrier is subrogated. The opinion in the principal case reads that if the "employee's counsel actually bears the burden of obtaining recovery from the third party, then whoever takes the money is chargeable with a share of the fee. The fee must, however, be a reasonable one." Thus, the principal case puts no condition on the recovery of the fee except that the fee be reasonable. The reason for the rule is clear—one should not without cost reap the benefits of the attorney's labor.

Two cases of procedural interest were decided involving appeals to the circuit court as provided by KRS 342.285. In Creech v. Roberts, the referee had prepared a report to the effect that the claimant had failed to prove that the parties were acting under the Workmen's Compensation Act and recommended dismissal of the claim. The claimant filed a motion with the Board to reopen, which was overruled on the grounds that the case had been decided by the referee's order. The claimant appealed to the circuit court, which remanded the case to the Board with directions to hear additional evidence. The court of appeals held that the circuit court had no jurisdiction to hear the appeal since there was no order which it could review. The order dismissing the claim was not an order of the Board until approved by a majority of its members. There had been no final determination of the case and hence no award that could be reviewed under KRS 342.285. The judgment was reversed with directions to enter a judgment dismissing the appeal.

It has been held on numerous occasions that no appeal can be heard if there is no final order of the Board. In Paul v. Allender Brown Company, however, it was held that an order of the Board overruling a motion to reopen appellant's claim was a final disposition of the case and was, therefore, appealable to the circuit court. This case was not expressly overruled in Creech but it would seem to have that effect.

Epling v. Ratliff was a similar case with the exception that there was no motion to reopen. The referee had made a report ruling that the employee had not lost his life in an accident arising out of the course of his employment. The case was not submitted to the

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328 Stacy v. Noble, 316 S.W.2d 285, 289 (Ky. 1962).
327 362 S.W.2d 734 (Ky. 1962).
328 Kabai v. Majestic Collieries Co., 286 Ky. 279, 150 S.W.2d 898 (1941); Spencer v. Chavies Coal Co., 280 Ky. 152, 132 S.W.2d 746 (1939).
329 249 S.W.2d 163 (Ky. 1952).
330 364 S.W.2d 327 (Ky. 1963).
331 KRS 342.005(1) was the applicable provision.
Board or any member thereof. The applicant filed suit in the circuit court praying that the order be reversed, on the theory that since the applicant did not elect to ask for a full board review, as provided by KRS 342.280 and 342.285(1), the award and opinion of the referee became final. The court of appeals held that the circuit court should have ruled that on the face of the record it had no jurisdiction and dismissed the complaint. KRS 342.280(1) provides for a hearing by the full board does not indicate that the report of the referee can ever be regarded as a decision of the Board itself. The judgment of the circuit court was declared void as to not prejudice the parties.

In the Epling case, the report was not a final order of the Board and the claimant remained free to assert his appeal to the Board, subject to the statutory provisions as to time for appeal. The claimant in the Creech case, on the other hand, appealing from an order of the Board overruling his motion to reopen, was left without a remedy of administrative or judicial review.

An area in which problems have arisen in the past, that of notice to the employer in cases involving occupational diseases, received the consideration of the court in two cases of importance. KRS 342.316(2) provides

... notice of 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.

This language was construed earlier in *Mary Helen Coal Corporation v. Chitwood*\(^3\) to mean that the duty to notify does not arise until the disease results in an actual impairment of the employee’s working capacity.

The first of the two major cases in this area to be decided this past term was *Inland Steel Co. v. Mullins*.\(^3\) The appellant sought to have judgment for the claimant reversed on the basis that the appellee had failed to give notice as soon as practicable after he learned he was disabled by silicosis.\(^3\) On August 18, 1960, the appellee quit his employment and notified his foreman that he was no longer able to work. Prior to that time, in 1958, he had consulted a company physician complaining of shortness of breath. The ailment was diagnosed as pneumoconiosis. A report of the diagnosis was sent to the appellant at this time. Subsequently, the appellee received

\(^3\) KRS 342.316(2) was the basis for this contention.
periodic examinations by company physicians and discussed his condition with a company official. In 1959, he was given an outside job, where he remained until the date he quit in 1960. The court held that these circumstances showed timeliness of notice. It further stated that the notice pursuant to KRS 342.316(2) was not required until:

(1) The employee has a disability from an occupational disease which impairs his capacity to perform his work, and
(2) the employee knows or should know by the exercise of reasonable care and diligence that he is suffering from the disease.335

The court cited the Chitwood case and Peabody Coal Company v. Guthrie336 for support.

By way of dictum, the court added that assuming appellee's health was poor and he was susceptible to illness, as was contended by the employer, "industry takes a man as it finds him."337 The Workmen's Compensation Act is not limited to employees only in good health. This statement is a reaffirmation of the present law.338

Bethlehem Mines Corporation v. Davis339 was the second important decision which dealt with the problem of notice last term. The claimant suffered from a respiratory ailment that caused him to quit his employment after working in the mines of his employer and its predecessor for over thirty years. He testified that he had been sick for two or three years but had forced himself to continue working until he had to quit. The employer, who did not know of his condition until shortly after he quit, contended that notice was not timely given as required by KRS 342.316(2). The court of appeals applied the provision as construed in the case and determined that "so long as a man is able to carry on his duties, though he may suffer while doing it, he is not yet disabled within the meaning of KRS 342.316(2)" and has no duty to notify until such disability occurs.340

335 Inland Steel Co. v. Mullins, 367 S.W.2d 250, 252 (Ky. 1963).
336 351 S.W.2d 168 (Ky. 1961).
337 Inland Steel Co. v. Mullins, supra note 19, at 253.
339 368 S.W.2d 176 (Ky. 1963).
340 Bethlehem Mines Corp. v. Davis, 368 S.W.2d 176, 177 (Ky. 1963).
XII. TORTS

The practitioner was little affected by the decisions in this field during the past term. However, there were some new rules laid down and two cases which indicated that the court may adopt different rules on two points in the future.

The indications were in the areas of last clear chance and res ipsa loquitur as they apply in negligence cases. In *Riley v. Hornbuckle*,\(^{341}\) the court of appeals held that an admission in an opening statement does not justify a directed verdict for the other party if the person can, by his direct evidence, avoid its consequences. In this case the plaintiff's counsel admitted that the deceased was a pedestrian upon an expressway. A municipal ordinance, with certain exceptions, prohibited pedestrians from traversing the expressway. The directed verdict was granted on the ground that the admitted violation of the ordinance by the deceased was negligent per se and barred a recovery. The case was reversed upon two grounds. First, the plaintiff should have been given a chance to prove by his evidence that the deceased's presence on the expressway was justified under one of the ordinance's exceptions. Second, even if he could not, the case should have been submitted to the jury on the issue of last clear chance.

The court stated it was not departing from the rule of *Saddler v. Parkam*,\(^{342}\) which required that before an instruction on the doctrine may be given, the evidence must warrant a conclusion that the defendant "must have" discovered the plaintiff's peril in time to avoid the injury. Nevertheless, the court still said that an instruction on the doctrine in the *Saddler* case should have been given. The obvious conclusion is that the court has indicated in the *Riley* case that the limited application of the doctrine is perhaps to be somewhat relaxed.

In *Kentucky Home Life Insurance Company v. Wise*,\(^{343}\) the court awarded a new trial in an action for injuries sustained by the plaintiff when an elevator in the defendant's building fell a short distance, because the instruction submitted by the lower court did not require the jury to find negligence. Its effect was the imposition of liability without fault if the jury believed that the elevator fell and the plaintiff was injured.

The court took this occasion to comment generally upon the doctrine of res ipsa loquitur, although the doctrine was unquestionably applicable in this case. The court seemed to say that in a res

\(^{341}\) 366 S.W.2d 304 (Ky. 1963).
\(^{342}\) 249 S.W.2d 945 (Ky. 1952).
\(^{343}\) 364 S.W.2d 338 (Ky. 1963).
ipsa case, if the circumstantial evidence presented justifies a mere inference of negligence, a directed verdict may never be granted and the case must be submitted to the jury. However, if the justifiable inference is very strong and goes unrebutted, then a directed verdict may properly be granted. In such a case, the permissive inference becomes a presumption. While it has been said that a defendant may be entitled to a directed verdict in a res ipsa case, the court has never gone so far as to say that the plaintiff can ever be so entitled. Yet there are jurisdictions which follow such a rule and the indication is Kentucky may follow.

In a closely related case, the court decided that mere ownership of an automobile raises a rebuttable presumption that the owner was driving at the time an accident occurred. Lee v. Tucker involved an action by the administrator of a deceased person's estate against the estate of an owner of an automobile involved in a fatal crash. The defendant contended that the deceased, not the owner, was driving at the time of the crash. The jury, in answer to a special interrogatory, decided that it could not determine which person was driving the automobile at the time of the accident. The dismissal of the action was affirmed on the ground that the defendant had put forth sufficient proof to rebut the presumption. Therefore, the presumption was reduced to a permissive inference and since the jury was unable to decide who was driving, the action was properly dismissed.

McMichael v. Shircliffe established a new rule to be followed in applying KRS 189.330(4) to cases involving collisions at intersections where traffic on a multiple-lane one-way street has the right of way. That statute requires the vehicle upon the inferior street to stop and yield the right of way to traffic on the through street which is approaching so closely as to constitute an immediate hazard. The court held that the driver on the inferior street is entitled to assume that the other driver will remain in the same lane and he may gauge the hazard before he enters the intersection based upon the lane the approaching vehicle is in.

In the interesting case of Potts v. Krey, the court held that where there is no direct evidence that a pedestrian can be seen by a driver, if the circumstantial evidence indicates that he must have been

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344 Vernon v. Gentry, 334 S.W.2d 266 (Ky. 1960).
346 365 S.W.2d 849 (Ky. 1963).
348 365 S.W.2d 467 (Ky. 1963).
349 362 S.W.2d 726 (Ky. 1962).
in a position to be seen, the jury may find the driver negligent for failure to keep a proper lookout ahead. The defendant testified that he did not see the boy until the moment of impact. The plaintiff did not testify, but the circumstantial evidence showed that there were no obstructions to vision on the street other than telephone poles, spaced seventy-five feet apart and fifteen feet from the curb. A verdict for the plaintiff was appealed and the court affirmed a denial of a directed verdict. It rested the decision upon the well settled rule that a driver not only has a duty to keep a lookout ahead, but also a duty to see what he should see.\(^3\)

Finally, in *Phelps Roofing Company v. Johnson*,\(^3\) the court upheld an imposition of liability upon a contractor for the fatal injury sustained by the guest of a lessee of an apartment. The floor and back stairway of the apartment had been removed and was being replaced. The deceased opened the back door of the lessee's apartment, stepped out, and fell to her death. The court held as a matter of law that there was a breach of a duty to keep safe a part of the premises appurtenant to those leased, which the lessees and their guests were entitled to use. The breach consisted of a failure either to bar the apartment doors opening at that point, or to post warning signs of danger. While our court has long recognized the liability of the lessor in such a situation,\(^3\) the case is of special interest because it logically extends the rule. The contractor who creates the dangerous condition has now had its liability judicially recognized.

\(^{350}\) Tuggle v. Taylor, 282 S.W.2d 615 (Ky. 1955).
\(^{351}\) 363 S.W.2d 320 (Ky. 1955).
\(^{352}\) Dixon v. Wootton, 307 Ky. 338, 210 S.W.2d 967 (1948).
XIII. CONSORTIUM

The antiquated rule that a wife cannot maintain an action for the loss or ampairment of her husband’s consortium caused by the negligence of a third party was affirmed in *Baird v. Cincinnati, New Orleans & Texas Pacific Railroad Company*. The court, while recognizing the persuasiveness of recent decisions allowing recovery in such cases in Missouri and Illinois chose to adhere to its former decisions in *Cravens v. Louisville & Nashville Railroad Company* and *LeEase v. Cincinnati, Newport & Covington Railroad Company* denying the wife’s right to recovery. Pointing out that the right of a husband to recover for the loss of his wife’s consortium due to the negligence of a third party is recognized in Kentucky, the court stated that the wife may recover only where the loss of her husband’s consortium is due to an intentional or malicious act.

The rule refusing liability to a wife for loss of her husband’s consortium is predicated upon the status and position of the wife during ancient times under common law. A wife was then subservient to her husband, a non-entity under the principal of unity, and devoid of any right to bring any action in law. The husband, however, was entitled to damages for loss or impairment of his wife’s consortium. Later courts perpetuated his right, but as the wife’s status and position in society and law evolved to a level of equality, the courts still continued to refuse the converse of the rule. Since 1950, numerous courts have divorced themselves from the old rule and recognized the wife’s right of action in such cases.

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353 368 S.W.2d 172 (Ky. 1963).
354 Novak v. Kansas City Transit Co., 365 S.W.2d 539 (Mo. 1963), reversing Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918).
355 Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960), following Hitaffer v. Argonne Co., 87 App. D.C. 57, 183 F.2d 811, cert. den. 340 U.S. 852 (1950); see also Rollins v. District of Columbia, 265 F.2d 347 (D.C. 1959). In the *Naiditch* case *supra*, the court saw no judicial sagacity in “looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal consequences of the past.” 20 Ill.2d at ......., 170 N.E.2d at 892. Three judges dissented on the ground that neither wife nor husband should have a right of action for loss of consortium. Id. at ......., 170 N.E.2d at 893.
356 195 Ky. 257, 242 S.W. 628 (1922).
357 249 S.W.2d 534 (Ky. 1952).
358 Commercial Carriers v. Small, 277 Ky. 189, 126 S.W.2d 143 (1939).
360 1 Blackstone, Commentaries 433-436, 442 (1997).
361 See Hitaffer v. Argonne Co., *supra* note 18, at ......., 183 F.2d at 819; Commercial Carriers v. Small, *supra* note 21, at 196 S.W.2d at 146.
admitted that the distinction between the husband’s right of recovery and that of the wife is “at odds with reason,” but concluded by saying, “Nevertheless, since there is a diversity of opinion among the courts in other jurisdictions and this court has heretofore declined from its earlier decision, having regard for the doctrine of stare decisis, we affirm the judgment.”

364 Ibid. Two judges dissented, criticizing the majority for applying stare decisis to continue the operation of an outmoded principle. They aligned themselves with the view expressed by Schaefer, C.J., in his dissenting opinion in the Naiditch case, supra note 18, at ..., 170 N.E.2d at 893, to the effect that neither husband nor wife should be allowed to sue for loss or impairment of consortium. See generally Annot., 23 A.L.R.2d 1378 (1952).
XIV. ETHICS

In *In re Advisory Opinion of Kentucky Bar Association*,365 the court determined that there was no conflict of interest where a law partnership was retained to prosecute a civil claim against a third class city and subsequently one of the partners was elected prosecuting attorney for the same city. The court reasoned that since the law partnership did not require the newly elected prosecuting attorney to be active in the civil suit, there was no conflict of interest within the meaning of Cannon 6.366 This was the first Kentucky case directly in point.

365 361 S.W.2d 111 (Ky. 1962).
366 American Bar Ass'n, Canons of Professional Ethics, Cannon 6, which provides in part: "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure."
XV. PROCEDURE

The procedure cases decided during the last term of the court of appeals are roughly classed into four areas: (1) pre-trial procedure, (2) trial procedure, (3) post-trial procedure, and (4) appellate procedure. Some of the cases in this survey are related; however, many others are not related to any other procedural issue decided during this term.

A. PRE-TRIAL PROCEDURE

The cases decided in the last term dealing with pre-trial procedure involved a motion to dismiss for failure to state a claim upon which relief can be granted, a similar motion treated as a motion for a summary judgment, the form of a complaint, separate trials, parties, a default judgment, a judgment on the pleadings, and res judicata pleaded as a bar.

In the case of Huie v. Jones, the court of appeals held that in considering a motion to dismiss for failure to state a claim upon which relief can be granted, the trial court should not dismiss unless it appears that the plaintiff would not be entitled to relief under any state of fact which could be proven in support of his claim. This decision indicates that the court expects trial courts to comply with the spirit of the Kentucky Rules of Civil Procedure in liberally construing pleadings, thus pointing up a change from the old Civil Code.

In the case of Spillman v. Beauchamp, the defendant moved to dismiss for failure to state a claim upon which relief can be granted and submitted a memorandum in support thereof. The trial court, in considering the motion to dismiss, did not exclude the memorandum, which set forth a statement of facts not set out in the pleadings and thus treated the motion to dismiss as one for summary judgment. On appeal, the plaintiff contended that the trial court erroneously considered the memorandum submitted by the defendant as "matter outside the pleading" as contemplated by CR 12.02. The court, in conforming to the interpretation of Federal Rule of Civil Procedure

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367 362 S.W.2d 287 (Ky. 1962).
368 Ingram v. Ingram, 283 S.W.2d 210 (Ky. 1955).
370 362 S.W.2d 83 (Ky. 1962).
371 CR 12.02 provides that, if, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . .
held that statements of fact in a legal memorandum are not within the category of "matters outside the pleading" contemplated by CR 12.02. In ruling on a motion for summary judgment, the trial court is entitled to consider any evidentiary matter that has been presented to the court at any stage of the proceedings. Statements of fact in a legal memorandum are not evidentiary matters. The court pointed out that before a summary judgment can be granted, it must appear that there is no genuine issue of material fact presented. Even if properly considered, the facts presented in the memorandum controverted allegations of the complaint, thus creating genuine issues of material fact. This case was apparently one of first impression and the court followed the federal courts.

The case of *Edester v. Heady* involved three separate procedural points. The plaintiffs were a husband and wife suing jointly for personal injuries sustained in an automobile accident. The defendants asserted a counterclaim against the husband for contribution and the trial court treated this as a third-party complaint. The plaintiffs requested separate trials, but when this was refused they attempted to make the defendant's liability insurer a party to the action. This request was also refused. On appeal, the court held that the trial court properly allowed the defendant's counterclaim for contribution to have the effect of a third-party complaint. If construed narrowly, CR 14.01, which establishes third-party practice, would require severance of the claims of the husband and wife and allow the third-party complaint to go only against the husband. The court held that formal severance was not necessary because technically the husband was not a party to the wife's claim and could properly be brought in as a third-party defendant to her claim. This decision liberally construed CR 14.01, which is substantially the same as Federal Rule of Civil Procedure 14(a). In a similar situation, a federal court construed the Federal Rule as requiring formal severance of claims. The trial court's refusal to allow separate trials was held not to be an abuse of discretion. The court indicated that as long as issues are properly triable at one time and arise out of the same transaction, there is no abuse of discretion in refusing to allow separate trials.

The court held that the trial court properly refused to join the defendant's liability insurer as a party defendant. The court distinguished between a liability insurer and a collision insurer, saying that the former does not incur any liability until judgment is entered.

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372 United States v. Tuteur, 215 F.2d 415 (7th Cir. 1954).
373 Collins v. Duff, 283 S.W.2d 179 (Ky. 1955).
374 364 S.W.2d 811 (Ky. 1963).
against him, and does not become a real party in interest until then, whereas the latter has incurred liability when damage is inflicted. The court considered this to be a well settled rule, citing *Mayer v. Dickerson*.

In considering the propriety of a default judgment in the case of *Cash v. E'Town Furniture Company*, the court held that a judgment by default may not be entered in a transitory action against a defendant who is not a resident of the county in which the action is brought, who is not served with summons in that county, and who has not made a defense to the action before a judgment is entered. Prior to the adoption of the Kentucky Civil Rules of Procedure, a default judgment entered under these circumstances would have been void. The earlier decisions were based upon the Civil Code. At the time the Civil Rules were adopted, the pertinent Civil Code sections were transferred to the statutes. Therefore, these sections are applicable unless the Civil Rules take precedence. These statutes are concerned with jurisdiction and venue over which the Civil Rules have no control. This case is a clarification of existing venue and jurisdictional requirements. No change is made in existing law. The point to take note of is that KRS 452.480 and KRS 452.485 must be complied with before a default judgment can be properly taken.

In the case of *Archer v. Citizens Fidelity Bank & Trust Company*, the court held that the trial court properly entered a judgment for the defendant on the plaintiff's motion for a judgment on the pleadings, where the plaintiff did not deny the defendant's allegations, and in applying the law to those allegations, the defendant was entitled to judgment. The court pointed out that for purposes of a motion for judgment on the pleadings, allegations which are not denied stand admitted. The case merely holds that in considering a motion for a judgment on the pleadings, allegations which are not denied stand admitted. The case merely holds that in considering a motion for a judgment on the pleadings, all well pleaded allegations are taken as true when not denied, and allegations in the defendant's answer, where the plaintiff is the movant, are likewise taken as admitted when not denied. When acting on the motion, the court may give judgment to the plaintiff or defendant, according to the effect of applying the law to the pleadings.

In the case of *Hall v. Noplis*, the court held that a judgment

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376 321 S.W.2d 56 (Ky. 1959). See also, Dunaway v. Darnell, 302 S.W.2d 122 (Ky. 1957); Wright v. Kinslow, 264 S.W.2d 373 (Ky. 1954).
377 383 S.W.2d 102 (Ky. 1962).
379 KRS 452.480, 452.485.
380 CR 82.
381 365 S.W.2d 727 (Ky. 1962).
382 367 S.W.2d 456 (Ky. 1963).
rendered prior to an intervening decision creating an altered situation is not res judicata. The earlier judgment concluded the rights of the parties as they were at the time, and under the conditions then existing. The court stated that where a continuing relationship between the parties exists, a judgment cannot fix the rights of the parties forever. This is a restatement of existing law.\textsuperscript{383}

B. TRIAL PROCEDURE

The cases decided during the last term which involved trial procedure included a motion for a directed verdict at the close of the plaintiff's opening statement, the proof required to establish the absence of a witness for purposes of introducing a deposition, prejudicial misconduct, the propriety of an instruction under the rule against giving undue prominence to specific issues or evidence, and the extent of the trial court's control over judgment once entered.

In the case of \textit{Riley v. Hornbuckle},\textsuperscript{384} the court held that a directed verdict, rendered after the plaintiff's opening statement, is made proper by what the opening statement says and not what it fails to say. This decision pointed up the fact that a party has not rested his case after giving his opening statement to the jury, but still has ample opportunity to prove his allegations. A directed verdict after an opening statement is proper only where there is an admission which is fatal to the case. This is a restatement of existing law.\textsuperscript{385}

In \textit{Potts v. Krey},\textsuperscript{386} the court considered whether the actions of the plaintiff's mother constituted prejudicial misconduct entitling the defendant to a new trial. The court held that where the mother of the plaintiff requested one of the jurors, during a recess, to ask a person in the hall to bring the injured plaintiff into the courtroom, there was no prejudicial misconduct. This case points out what seems to be a tendency of the court to apply a "totality of the facts" approach in this type of case. Earlier cases decided by the court on what constitutes prejudicial misconduct required conduct which, considered under all the circumstances, goes beyond casual contact.\textsuperscript{387} If it can be shown that someone discusses the case with a juror, this would be sufficient misconduct to require a new trial.\textsuperscript{388}

\textsuperscript{383} State Farm Mut. Ins. Co. v. Duel, 324 U.S. 154 (1945); Smith v. Campbell, 286 S.W.2d 532 (Ky. 1956).
\textsuperscript{384} 386 S.W.2d 304 (Ky. 1963).
\textsuperscript{385} Co-de Coal Co. v. Combs, 325 S.W.2d 78 (Ky. 1959); Raco Corp. v. Edwards, 272 S.W.2d 845 (Ky. 1954); Hill v. Kesselring, 220 S.W.2d 858 (Ky. 1949).
\textsuperscript{386} 383 S.W.2d 726 (Ky. 1962).
\textsuperscript{387} Ibid.
\textsuperscript{388} Ibid.
Another issue raised in this case was whether a question pro-
pounded by the plaintiff's counsel was so prejudicial that it could not
be cured by an admonition. Counsel for the plaintiff asked the
defendant whether he had been warned about speeding by the local
police, an objection was made, but in the meantime the defendant
answered in the negative. The court admonished the jury not to
consider the question and answer. The court of appeals held that
such a question, although improper, was not so prejudicial it could
not be cured by the admonition. This restates existing law.\footnote{389}

In the case of \textit{Phelps Roofing Company v. Johnson},\footnote{390} the trial
court limited instructions to salient facts in issue on which the con-
clusion of liability or non-liability depended. On appeal, the de-
fendant contended that this was error in that it violated the rule
against giving undue prominence to certain facts and issues. The
court held that where certain acts and omissions constitute negligence
as a matter of law, the plaintiff is entitled to instructions so stating.
The court further held that such instructions do not violate the "undue
prominence" rule. The court cited \textit{Barker v. Sanders},\footnote{391} which favored
simplifying the instructions to precise points in issue. Earlier cases,
however, had prohibited pointing out and emphasizing in the instruc-
tions particular parts of the evidence.\footnote{392} The instant case, together
with the \textit{Barker} case, relaxes the requirements of the "undue promi-
nence" rule in the formulating of instructions.

In the case of \textit{Carpenter v. Evans},\footnote{393} the court held that the trial
court, where timely motion is filed, has authority to reverse previous
findings and conclusions and enter new findings and conclusions and
judgment thereon. Where the trial is without a jury, the trial court
may grant a new trial or in the alternative enter new findings,
conclusions and judgment where justice requires such action.\footnote{394} The
appellant contended that the entry of prior judgment was res judicata.
The court of appeals dismissed this contention holding that under
a motion pursuant to CR 59.07, the trial court retains control over the
case although judgment has been entered. Commissioner Clay's
interpretation of this Rule is in agreement with this decision.\footnote{395}

\footnote{389} \textit{Leming's Adm'r v. Leeuchman}, 268 Ky. 781, 105 S.W.2d 1043 (1937).
\footnote{390} 368 S.W.2d 320 (Ky. 1963).
\footnote{391} 347 S.W.2d 529 (Ky. 1961).
\footnote{392} \textit{Compton v. Smith}, 286 Ky. 179, 150 S.W.2d 657 (1941); \textit{Jones v. Sharp's
Adm'r}, 282 Ky. 638, 139 S.W.2d 731 (1940).
\footnote{393} 363 S.W.2d 108 (Ky. 1962).
\footnote{394} CR 59.07.
\footnote{395} Clay, Kentucky Practice 527 (1963).}
C. POST-TRIAL PROCEDURE

The court of appeals decided several cases dealing with the time limit for filing notice of appeal, the time limit for filing record on appeal, the extension of such limitations, and superseded bonds. In the case of *Webb Transfer Line, Incorporated v. Meigs*, the court granted a petition for mandamus directing a circuit judge to hear a request for extension of time for filing a notice of appeal. The petitioner had waived notice of entry of judgment, and the respondent judge had ruled that he was precluded from considering a request for extension of time for filing notice of appeal, because CR 77.04, as interpreted by him, did not authorize the court to relieve a party for failure to appeal within the time allotted. CR 77.04, however, is conditioned on the provisions contained in CR 73.02. The court of appeals pointed out in this decision that under CR 73.02(1), an appeal may be taken within thirty days from entry of judgment, but if a party fails to learn of entry of judgment, the Rule permits an extension of thirty days upon a showing of excusable neglect. The court reasoned that since the waiver of notice of entry did not establish that petitioners had actually learned of the entry of judgment, the trial court should determine whether petitioners neglect was excusable. The opinion is a clarification of existing law.

In another case involving extension of time for making an appeal, the court held that the circuit court could not extend the time for filing the record on appeal where the order for extension was made after the expiration of the period for filing, but was mailed to the clerk prior to the end of that period. This decision was made in *Powell v. Blevins*, which involved an attempt to correct *nunc pro tunc* the failure of either the clerk or the judge in not filing an order for an extension, as requested by the appellant. The court reasoned that an order *nunc pro tunc* can only supply a record of something done at the time to which it is retroactive. The court's reasoning is supported by an earlier decision wherein the court, in speaking of a *nunc pro tunc* order, stated,

... [T]he power of the court to make such entries is restricted to placing in record evidence of judicial action which has been actually taken. It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.

396 361 S.W.2d 761 (Ky. 1962).
397 CR 77.04.
399 CR 77.04(4).
400 365 S.W.2d 104 (Ky. 1963).
401 Benton v. King, 199 Ky. 307, 250 S.W. 1002, 1003 (Ky. 1923).
The court dismissed the appellant's contention that the failure to file the signed order for extension of time was a clerical error which could be corrected pursuant to CR 75.08. The court held that an omission to have the order signed by the circuit court judge was not a "clerical error" within CR 75.08.402

In the case of Moss v. Smith,403 the court held that a surety on a supersedes bond executed in connection with appeal from a judgment and order of sale of realty, is liable for all rents, hire, and damages which might accrue during pendency of appeal, if the bond so states. The words "all rents, hire, and damages" appearing in the bond do not controverse CR 73.04. They serve only to state the purport of the bond more specifically as it applies to the particular situation. The pertinent language of CR 73.04 provides that:

... the amount of the supersedes bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the cost of the action, cost on appeal, interest, ... 404

This case clarifies CR 73.04 and establishes that the intent at the time of adoption of the Civil Rules was to re-emboby all of the essential elements of liability recited in the old Civil Code section.405

In the case of United States Fidelity and Guaranty Company v. Maryland Casualty Company,406 the court held that an entry of judgment for defendant operated to discharge an attachment and the taking of appeal from the judgment without superseding it did not suspend the operation of the judgment as a discharge of attachment. The surety on the attachment bond was held not to be liable for damages accrued during the pendency of the appeal.

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 dealing with appeals from lower court decisions.

1. Original proceedings

The cases decided in the area of original proceedings deal primarily with the writ of prohibition. In the case of Jake's Fork Coal Company v. Wells,407 petitioners were seeking to prohibit the circuit judge from

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402 Cf., Maslow Cooperage Corp. v. Jones, 316 S.W.2d 880 (Ky. 1958).
403 361 S.W.2d 511 (Ky. 1962).
404 CR 73.04.
406 367 S.W.2d 455 (Ky. 1963).
407 363 S.W.2d 728 (Ky. 1962).
presiding in a case. The court of appeals dismissed the petition holding that there will be no writ of prohibition unless the petitioners show that they will have no adequate relief by appeal, or otherwise. The requirement of showing irreparable injury, prior to the granting of a writ of prohibition, is one of long standing.408

The petitioners also sought to have the trial court's ruling on motion to vacate reviewed in this original proceeding. The court refused. In so doing, they reasoned that the damage inflicted by a refusal to vacate remains prospective in that it must result from further and subsequent conduct of the proceedings.

In Hettich v. Coleson,409 the petitioner requested a writ of prohibition from the circuit court. The circuit court had refused to take jurisdiction of an appeal from the respondent police court on the ground that the respondent was acting within its jurisdiction. Under the Civil Code, the circuit courts had no power to issue writs of prohibition against inferior courts acting erroneously within their jurisdiction.410 This power was to be exercised only by the court of appeals.411 The court pointed out that earlier decisions in similar fact situations were based upon provisions of the Civil Code, but held that CR 81 repealed the Civil Code provisions, and thus gave the petitioner relief in the circuit court. Therefore, a petition to the court of appeals for writ of prohibition was unwarranted.

The case of Commonwealth v. Bullit County Circuit Court412 was an original proceeding for writ of prohibition directing the circuit court to withhold, quash, and set aside execution issued against the Commonwealth. The petitioner did not make the circuit judge a party, and the writ was denied. The court held that a proceeding for writ of prohibition was a personal action and that the officer against whom the writ was sought must have been joined as a party. In this case only a judicial entity was named, but this entity cannot take any action except through a presiding judge.

Combs v. Matthews413 was an original proceeding wherein the Governor of Kentucky sought a declaratory judgment from the court of appeals. The court held that the rights of litigants may be declared in advance of action when a justiciable controversy is presented if the advance determination of the rights would eliminate or minimize risks of wrong action. The court herein rendered a declaratory judg-

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408 Musgrave v. Hayes, 354 S.W.2d 228 (Ky. 1962).
409 366 S.W.2d 907 (Ky. 1963).
411 Commonwealth ex rel. Breckenridge v. Noe, 858 S.W.2d 529 (Ky. 1962); Potter v. Trivitte, 303 Ky. 216, 197 S.W.2d 245 (1946).
412 365 S.W.2d 106 (Ky. 1963).
413 364 S.W.2d 647 (Ky. 1963).
ment pursuant to existing statutes.\textsuperscript{414} The court stated that justiciability turns on evaluation of both the appropriateness of issues for decision and the hardship of denying judicial relief. This indicates that the court will approach the question of justiciability on a case by case basis.

2. Appeals from lower court decisions

In Kentucky Home Mutual Life Insurance Company v. Wise,\textsuperscript{415} the court held that where a judgment was set aside on appeal, the question of excessive damages was not to be considered by the court since evidence on retrial might not be the same. If the question of liability is to be reconsidered in a new trial, the award of damages at the original trial is of no effect, and the question of whether those damages were excessive becomes moot. The court will not entertain moot questions.\textsuperscript{416} This is a restatement of prior law.\textsuperscript{417}

In Epling v. Ratliff,\textsuperscript{418} the claimant had received an adverse ruling from a referee of The Workman's Compensation Board. Instead of asserting his right to a hearing before the full board, the claimant appealed directly to the circuit court, which assumed jurisdiction and reversed the referee's decision. On appeal to the court of appeals, the appellant contended that the referee's decision was not a final order, since it remained subject to review by the full board, and therefore the circuit court acted without jurisdiction. The appellee argued that the circuit court had not yet acted on the appellant's motion to set aside the judgment, and that the court of appeals lacked the power to review a void judgment before the motion to set aside had been passed upon by the circuit court. The appellee apparently was relying on Civil Code section 763, which in essence conformed to his argument. The court of appeals held, however, that CR 60.02 and KRS 21.068 had superseded the Code provision, and since they contain no specific language prohibiting such a review, the court may consider the question of jurisdiction and in declaring the judgment void, it could restore the parties to their original positions without prejudice to either, and that a technicality should not be allowed to preclude this substantively desirable result.

An interesting point regarding land condemnation for the use of a municipal airport was involved in the case of Bowling Green-Warren County Airport Board v. Long.\textsuperscript{419} The substantive question was

\textsuperscript{414} KRS 418.040, 418.055.
\textsuperscript{415} 364 S.W.2d 338 (Ky. 1963).
\textsuperscript{416} Wilkerson v. Story, 340 S.W.2d 453 (Ky. 1960).
\textsuperscript{417} Price v. Bates, 320 S.W.2d 780 (Ky. 1959).
\textsuperscript{418} 364 S.W.2d 327 (Ky. 1963).
\textsuperscript{419} 364 S.W.2d 167 (Ky. 1962).
whether the award should include an amount for the taking of “air easements” over adjacent land, it being admitted that adjacent land was being restricted in its use by its proximity to the airfield. The procedural question was whether an award for “air easements” could be included in consequential damages, although the pleadings did not raise the issue of “air easements.” The court held that CR 15.02, which permits amendment of pleadings to conform to the issues tried, may be invoked at the appellate level. Here the pleadings did not interject the question of “air easements,” but evidence relating to them was admitted without objection. This evidence established the fact that such easements were being taken. At the trial an award for consequential damages was granted. The court of appeals treated this award as including an award for the “air easement.” Apparently amendment of pleadings to conform to the proof is an automatic process unless objection is made at the time of introduction of evidence related to issues not raised by the pleadings.\footnote{See Coleman v. Greer, 343 S.W.2d 584 (Ky. 1961).} This case is a restatement of existing law\footnote{Ibid.} and follows federal court decisions construing Federal Rules of Civil Procedure 15(b).\footnote{Purofied Down Products Corp. v. Traveler’s Fire Ins. Co., 278 F.2d 439 (2d Cir. 1960).}

In \textit{Wooley v. Spalding},\footnote{365 S.W.2d 323 (Ky. 1962).} the appellants filed a separate appeal from a modified judgment while an appeal from the original judgment was pending. The separate appeal was dismissed. The court held that the proper procedure to secure review of the modified judgment, where an appeal from the original judgment was pending, was to file a supplemental record on the original appeal and present grounds for review in a supplemental brief. This seems to be a case of first impression.