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Kentucky Law Survey: Evidence

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Evidence
By ROBERT G. LAWSON*

I. THE COTTON DOCTRINE-ANOTHER STEP FORWARD
A. Introduction

Prior to 1970 a criminal defendant who had elected to testify in his own defense could be impeached through the introduction of evidence of any prior felony conviction.¹ In that year, the Court of Appeals decided Cotton v. Commonwealth,² in which it greatly curtailed the use of such evidence. The Court ruled that a criminal conviction is admissible for the impeachment of a witness only if the crime involved dishonesty or false statement. In addition, it ruled that when the witness being impeached is a criminal defendant, a chambers hearing on admissibility must be held before the jury is informed of the prior conviction.

Although the requirements established by Cotton are clear and unambiguous, for some inexplicable reason prosecutors and trial court judges have been unable or unwilling to break with pre-1970 practices and follow the Cotton ruling. In the short time since the case was decided, the Court of Appeals has found it necessary on several occasions to restate its intention to curtail the use of this kind of evidence.³ During the past term alone the Court reversed three convictions because of the trial courts' failure to comply with the requirements of Cotton.⁴ Only an application of the harmless error rule⁵ and an inadequate preservation of error⁶ prevented reversal in two other cases.

The rulings in these five cases merely restate the principles

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¹ See, e.g., Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966).
² 454 S.W.2d 698 (Ky. 1970).
⁴ Phillips v. Commonwealth, 528 S.W.2d 940 (Ky. 1974); Graves v. Commonwealth, 528 S.W.2d 665 (Ky. 1975); Burnett v. Commonwealth, 523 S.W.2d 229 (Ky. 1975).
⁶ Pickle v. Commonwealth, No. 75-16 (Ky., June 20, 1975).
of *Cotton*. However, they are significant apart from their holdings because through them the Court of Appeals expressed in the most direct terms an understandable impatience with the failure of the lower courts to comply with *Cotton*:

> We have enunciated this rule repeatedly and in language that is easily understood. The violation in this instance was sufficient to prejudice the appellant's right to a fair trial.

On a retrial of this case the proscriptions of *Cotton v. Commonwealth* . . . must be observed.\(^7\)

* * * *

In any event, the conviction for detaining a woman against her will . . . clearly had no bearing on the question of the witness's veracity, nor did the owner's consent . . . since guilt of the latter offense does not necessarily depend upon an intent to steal or other dishonest purpose. Hence under the rationale of *Cotton v. Commonwealth* . . . they were not admissible.

. . . We are somewhat loath to reverse this conviction, but we intend to have *Cotton* followed, and if this is the way it has to be done, so must it be.\(^8\)

* * * *

The case was tried in June of 1974. Four years before that time it had been announced in *Cotton v. Commonwealth* . . . that evidence of a previous conviction for impeachment purposes would thereafter be limited to felony convictions evincing dishonesty, stealing, or false swearing and that the nature of the conviction should first be ascertained in a hearing or conference held outside the presence of the jury. There was absolutely no excuse for either the trial court or the prosecuting attorney to be oblivious to such an important and frequently occurring point of evidentiary law. Reversal in such a case does not reflect a soft attitude on the part of appellate judges toward crime and criminals. It is a direct result of the trial court's failure to recognize and comply with the law.\(^9\)

No interpretative comment about these statements is necessary. The message conveyed is clear, and it is firm.

\(^7\) *Graves v. Commonwealth*, 528 S.W.2d at 667.

\(^8\) *Phillips v. Commonwealth*, 528 S.W.2d at 942.

\(^9\) *Burnett v. Commonwealth*, 523 S.W.2d at 231.
B. Identification of the Underlying Felony

In only one case decided during the past year did the Court of Appeals modify what has come to be known as the "Cotton doctrine." That case, *Bell v. Commonwealth*,\(^{10}\) involved an issue that was virtually certain to appear sooner or later. In conformity with the requirements established in 1970, a chambers hearing was held by the trial court to pass upon the admissibility of a prior conviction. Finding that the offense underlying the conviction involved dishonesty or false statement, the court authorized the prosecution to use it for impeachment. Pursuant to this authority, and in accordance with the practice that prevailed before *Cotton*, the defendant was asked on cross-examination if he had ever been convicted of a felony offense. In framing the question, the prosecutor did not identify the felony underlying the conviction. His failure to do so was the cause for a motion for mistrial and the basis of complaint on appeal.

The appeal focused on the fundamental concern which promoted development of the *Cotton* principles. At the center of the legal doctrine that originated with this case lies a fear of distortion to the decision process, a belief that possible misuse of prior convictions constitutes a genuine threat to the reliability of judicial decisions. That this fear was involved in the most recent consideration of the problem was not left to speculation: "If the jury does not have that capability [i.e., to follow the court's admonition to use the prior conviction only for credibility purposes] the defendant unfairly may suffer the harm of the jury's being influenced to punish the defendant for his habit of criminality."\(^{11}\) Consequently, like *Cotton* and its progeny, *Bell* confronted the Court of Appeals with the task of accommodating two distinct, conflicting needs: (1) The need for evidence concerning an accused's credibility; and (2) the need to assure that this evidence does not reflect improperly on the accused's so-called "character." The resolution of this problem produced the following addition to the *Cotton* rules:

\(^{10}\) 520 S.W.2d 316 (Ky. 1975).
\(^{11}\) *Id.* at 317.
It is our opinion that if the prosecutor (after determination has been made out of the presence of the jury that the prior felony is relevant to credibility) elects to ask as to conviction of an unidentified felony, the defendant (through his counsel) should have the obligation to make a decision as to whether he wants the identity of the offense to be disclosed. If he does want it disclosed either he should request of the trial court forthwith that he be permitted to state what the prior offense was or he should, on redirect examination, make the disclosure. If he does neither, it will be presumed that he preferred that the offense not be identified.\textsuperscript{12}

C. \The Importance of \textit{Bell v. Commonwealth}\n
The issue in \textit{Bell v. Commonwealth} may well have been viewed by the Court of Appeals as involving nothing more than the method by which \textit{Cotton} errors must be preserved for appeal. The decision certainly creates no new "rights" for a criminal defendant. It recognizes no right in the accused to force a disclosure of the crime underlying a prior conviction. Nor does it provide the accused with a right to prevent disclosure of such a crime. The decision merely acknowledges that an accused may elect to disclose the underlying crime if the prosecutor fails to do so in asking the impeaching question. Nevertheless, the decision in \textit{Bell} is a step forward in the development of this area of evidence law. In the absence of an assumption that every prosecutor, in every case, on every issue takes whatever advantage of an accused the law allows, the decision provides at least a modicum of additional protection against misuse of a criminal defendant's prior record. In addition, of course, it serves the benefit of further bridging the gap between the "old" and "new" impeachment law by answering one of the few remaining questions about the vitality of pre-\textit{Cotton} cases.\textsuperscript{13} In at least these two ways then, the case is progressive. Yet, speaking in relative terms and confining it to its four corners,

\textsuperscript{12} Id. at 318.

\textsuperscript{13} Before \textit{Cotton v. Commonwealth}, the impeachment of a criminal defendant began with an inquiry as to whether he had been previously convicted of a felony offense. If he answered in the affirmative, the impeachment process was completed. The jury was never informed of the specific offense underlying the felony. \textit{See Cowan v. Commonwealth}, 407 S.W.2d 695 (Ky. 1966).
the decision is not one of monumental importance.

However, there is an unresolved issue under the *Cotton* case which could greatly magnify the importance of *Bell*, if presented in the right context. In *Cotton* the Court of Appeals imposed on trial court judges a special responsibility to protect defendants from prejudice that might result from introduction of prior felony convictions. Even for convictions that qualify for impeachment use (i.e., those involving dishonesty or false statement), the trial court is obligated under *Cotton* to exercise a "sound judicial discretion" in ruling on admissibility. At some point the Court of Appeals is certain to be confronted with a need to provide a more detailed description of this discretionary responsibility than has been provided thus far. When that occurs, there is one situation in which the *Bell* decision could assume special importance.

The risk of prejudice to a criminal defendant from evidence of a prior conviction is in a sense pervasive, for it is not tied to factors such as the nature of the prior conviction or its generic relationship to the offense charged. On the other hand, the degree of risk in a given case is almost certainly dependent upon such factors. For example, surely the risk of prejudice would differ in the following instances:

(1) A defendant on trial for an offense of violence has a prior conviction for a crime of dishonesty;  
(2) a defendant on trial for an offense of dishonesty has a prior conviction for a crime of falsehood; or  
(3) a defendant on trial for an offense of falsehood has a prior conviction for a crime of falsehood.

In other words, the intensity of the risk would seem to be at least partially dependent upon the relationship between the offense charged and the offense underlying the prior conviction. The risk of prejudice to a defendant is at its zenith when there is an absolute identity between the two offenses.

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14 Cotton v. Commonwealth, 454 S.W.2d 698, 701 (Ky. 1970).
15 Examples of such cases include a prior conviction for theft in a prosecution for theft, a prior conviction of perjury in a case involving perjury, and a prior conviction for armed robbery in a case involving armed robbery.

In imposing on trial judges the discretionary responsibility under discussion, the Court of Appeals noted the special risk in such situations:
In what fashion does the *Bell* case relate to this problem? Obviously, its holding has no direct relationship. However, the method of impeachment approved by the Court of Appeals in this decision could be utilized, with only a slight modification, to minimize the risk of prejudice to an accused when that risk is at its highest point. In cases involving absolute or substantial identity between the offense charged and the prior felony conviction, the accused's "option on disclosure" could be made unconditional. In other words, the prosecution would be prohibited from revealing the felony underlying the conviction. Lest someone conclude that this procedure is too drastic to be seriously considered, it should be noted that this proposal is virtually identical to the standard form of impeachment utilized before *Cotton*. Its reinstatement in the resolution of this important problem would seem to provide a reasonable accommodation to the conflicting interests involved. The prosecution would have the benefit of its impeachment evidence, and the risk of an erroneous decision because of prejudice would be somewhat lessened. At the very least, the person subjected to this risk would have a voice in the effort to control it. He could decide, in a theft case for example, whether the jury is to be informed that he is a "confirmed thief" or simply a "confirmed felon."

II. Hearsay and the Reported Testimony Exception

A. Introduction

*Commonwealth v. Bugg* involved the following fact situation. The defendant was charged with a crime for which a preliminary hearing was required. A witness whose testimony was crucial testified at that hearing on behalf of the prosecution and was cross-examined by counsel for the accused. All of his testimony was recorded by a stenographer selected by the accused. The witness then died before trial. Otherwise unable

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The probability of prejudice is greater where the crime for which the defendant is presently being tried is one of dishonesty or false statement, especially in those instances where he has been convicted several times previously of the same type of crime.

*Id.* at 702.

*16* 514 S.W.2d 119 (Ky. 1974).
to make a prima facie case, the prosecution offered into evidence a transcript of the witness' preliminary hearing testimony. The defendant objected on the ground of the hearsay rule, citing to the court: (1) A statute which in essence provides that a transcript of testimony otherwise unavailable is admissible in a subsequent trial of the same issue, but only in the court in which the testimony was originally given;\(^7\) and (2) provisions in the Kentucky Rules of Criminal Procedure which provide in combination that a transcript of testimony from a previous trial is admissible in a subsequent trial of the same charge if the witness is dead, but only in the same court in which the testimony was first given.\(^8\) The trial court sustained the objection to the transcript, and thereby brought the case to a premature termination. The correctness of this ruling was considered and upheld by the Court of Appeals.

The Court's interpretation and application in Bugg of the above mentioned statute and court rules could easily be the subject of an interesting discussion, one that could have no objective, however, except scholarly exercise.\(^9\) Unfortunately, such a discussion would probably obscure an unquestionably sound decision, and at the same time squander an opportunity to focus attention upon an area of Kentucky evidence law that is subject to a substantial degree of uncertainty. The circumstances that developed in Bugg presented an occasion for application of the hearsay exception known as "reported testimony." This exception, as the following discussion will reveal, exists in this jurisdiction in a form that is unconventional in structure, if not in substance. Its involvement in Bugg makes the case worthy of comment.

\(^7\) Ky. Rev. Stat. § 422.150 (1971) [hereinafter cited as KRS].

\(^8\) Ky. R. Crim. P. 7.20, 7.22.

\(^9\) This is particularly true of the two rules of criminal procedure involved in the case. The Commonwealth had urged the Court of Appeals to view Rules 7.20 and 7.22 as discovery rules, having only an incidental bearing on admissibility of evidence. The Court properly refused. Would the Court have done so, however, if the Attorney General had argued instead that the two rules are for the perpetuation of evidence in criminal cases? When one considers the two as a part of the series contained in Part VII of the Kentucky Rules of Criminal Procedure, the latter argument is far more persuasive.
B. "Reported Testimony" in Kentucky

The hearsay rule of every jurisdiction in this country contains an exception for "reported testimony," the purpose of which is to allow the use of hearsay evidence that has been tested through cross-examination in an earlier proceeding.\(^2\) Admissibility of the evidence is uniformly dependent upon a showing of unavailability of the witness who earlier gave the testimony. The Kentucky Court of Appeals has described the exception as follows:

It is a well-settled rule that whenever necessity exists, such as arises when a witness dies after testifying, the testimony of such witness upon a former trial may be shown upon another trial, by one who heard the original testimony, provided that the issue in the two trials be substantially the same, and provided that the party against whom the evidence is offered upon the second trial cross-examined upon the former trial the witness, since deceased.\(^2\)

As indicated by this statement, the exception consists of three elements—necessity, a prior opportunity to cross-examine the witness and identity of issues.

The first of these elements needs little description. It is satisfied by the witness' death, absence from the state,\(^2\) mental incompetence or physical impairment,\(^3\) or by other conditions or circumstances which make the evidence unavailable except in hearsay form. The second requirement, that an opportunity for cross-examination have existed at the prior proceeding, is largely self-explanatory and, as the exception is typically applied, practically inconsequential. Except in highly unusual circumstances, the party against whom the prior testimony is offered will have been a litigant in the proceeding in which the evidence was initially generated.\(^4\)

\(^2\) "The reason of the law for recognizing the admissibility of the testimony . . . is that it was given under the solemnity of an oath, and with an opportunity for cross-examination." Fuqua v. Commonwealth, 81 S.W. 923, 925 (Ky. 1904).

\(^2\) North River Ins. Co. v. Walker, 170 S.W. 983, 984 (Ky. 1914).

\(^2\) See Harbison & Walker Co. v. White, 114 S.W. 250 (Ky. 1908); Reynolds v. Powers, 29 S.W. 299 (Ky. 1895).

\(^2\) See Louisville Taxicab & Transfer Co. v. Johnson, 224 S.W.2d 639 (Ky. 1949).

\(^2\) One such exceptional case is Kentucky Traction & Terminal Co. v. Downing's Adm'r, 167 S.W. 683 (Ky. 1914), which involved a claim that had to be tried twice.
The third element, substantial identity of issues in the two proceedings, is more difficult both to describe and to apply. It is designed, of course, to assure that the hearsay evidence admitted under the exception has been adequately tested through cross-examination in the first proceeding. The identity requirement is easily satisfied when the two proceedings involve a trial and retrial of a single case. The matter becomes substantially more complex, however, when the two proceedings do not involve a single case, or, as in Bugg v. Commonwealth, they involve a single case that has two distinct “trial-type” stages. The manner in which the reported testimony exception is applied to this situation is illustrated well by the case of North River Insurance Co. v. Walker.²⁵

In Walker the plaintiff sued the defendant insurance company for recovery under a fire insurance policy. The fire giving rise to the suit had earlier led to a criminal arson charge against the plaintiff. At the examining trial in the criminal proceeding a witness, who died before institution of the civil action, testified to facts tending to prove an intentional burning. In the civil action the insurer asserted the defense of fraud and offered into evidence the prior testimony of the deceased witness. Two circumstances surrounding this offer were obviously important. The testimony was offered against the same party in both proceedings, and, more importantly, it was offered for the same purpose (i.e., to prove an intentional burning) in both proceedings. Consistent with decisions from other jurisdictions, the Court of Appeals ruled in favor of the admissibility of the reported testimony. Through this decision a relatively narrow definition of the identity requirement was provided. Only on the issue toward which the reported testimony is offered is there a need for identity between the two proceedings.

Although the Kentucky law on “reported testimony,” as presented to this point, is neither unique nor uncertain, it takes on both of these characteristics when the following statute is considered:

After the first trial the plaintiff died and was replaced by a representative. The Court of Appeals ruled that testimony given by the plaintiff in the first trial could be introduced on behalf of the representative party in the second trial.

²⁵ 170 S.W. 983 (Ky. 1914).
The testimony of any witness taken by a stenographic reporter pursuant to KRS 28.430 may, in the discretion of the court in which it is taken, be used as evidence in any subsequent trial of the same issue between the same parties, where the testimony of such witness cannot be procured, but no testimony so taken shall be used in any criminal case without the consent of the defendant.26

This, of course, is the statute that was involved in the Bugg case. It came into existence in 1893 as a small part of an enactment, the purpose of which was to provide for the appointment of official stenographic reporters for full-docket courts.27

Although the statute purports to authorize the introduction of hearsay evidence, it suffers from its own paralytic limitations. For example, it is applicable only to testimony that has been stenographically reported, and because of the phrase “in the discretion of the court in which it is taken,” the statute applies only when a case is tried twice in the same court, as noted in the Bugg opinion. Furthermore, the last phrase, which gives a criminally accused a veto over admissibility, obviously restricts its usefulness in criminal litigation. Since the common law rule suffers none of these limitations, it was inevitable that the Court of Appeals would ultimately have to define the statute’s relationship to the common law exception for reported testimony.

In two cases28 decided within a few years of the statute’s enactment the Court moved toward providing such a definition. The first one29 involved a criminal case that had to be retried. In the interval between the first and second trials, a witness died. The death created a need for the prosecution to salvage the witness’ testimony by use of a transcript from the first trial. The defendant resisted introduction of the transcript on the basis of the “veto” clause in the statute. On appeal, following the trial court’s admission of the evidence, the Court of Appeals ruled that the statute was inapplicable to prior testimony of deceased persons: “[I]t applies alone to the testi-

26 KRS § 422.150.
28 Austin v. Commonwealth, 98 S.W. 295 (Ky. 1906) and Fuqua v. Commonwealth, 81 S.W. 923 (Ky. 1904).
29 Fuqua v. Commonwealth, 81 S.W. 923 (Ky. 1904).
mony of living witnesses . . . whose presence and oral testimony cannot be procured for use in the subsequent trial.\textsuperscript{23} Of greater importance, however, was the Court's ruling that the common law exception for reported testimony fully justified admissibility of the evidence in question.

The second case\textsuperscript{31} was nearly identical to the first one. It involved a retrial of a criminal charge, a witness who died during the interval between trials and an evidentiary offer of the deceased witness' prior testimony at the second trial. The two cases differed only with respect to the method of proving the prior testimony. In the second case, bystanders at the first trial were permitted to testify to the substance of the prior testimony. The Court of Appeals again rejected a claim that error had been committed by the trial court. In so doing it made what is probably its most significant pronouncement about the statute under discussion:

It is beyond question that the testimony of the deceased witness was relevant on this trial. The ordinary method indeed, the method of proving it under the practice in this state, was to introduce some person who heard it when given by the witness, and who remembered it, or remembered the substance of it . . . . Unless the statute relating to official court stenographers has changed the practice, the same rule must still prevail. Chapter 121, Ky. St. 1903 (being the act of July 13, 1893) . . . contains the law regulating the appointment of official stenographic reporters, their duties, compensation, and purposes for which their notes may be used. The primary object of such notes is to make them, when extended and signed by the presiding judge and stenographer, a part of the bill of exceptions to be used on an appeal of the case. They take the place of the witnesses' statements otherwise set out in the bill of exceptions . . . . There is no provision of the statute that makes the stenographer's "bill of evidence," as it is sometimes called, the best evidence of what the witnesses may have deposed, so that it will exclude all other evidence on the subject. Least of all is there room for the contention that it is made so in the trial of criminal cases.\textsuperscript{32}

\textsuperscript{23} Id. at 924-25.
\textsuperscript{31} Austin v. Commonwealth, 98 S.W. 295 (Ky. 1906).
\textsuperscript{32} Id. at 296.
Several important messages are conveyed by this statement: One, the statutory provision under discussion had no evidentiary objective or character at the time of its enactment; two, it was neither designed nor intended to have an impact upon the common law exception for reported testimony; and three, the common law exception most certainly survived the enactment of the statute.

During the 70 years that have elapsed since these two decisions, the Court of Appeals has made no additional pronouncements of importance about the relationship of the statute to the common law rule. Perhaps nothing more remains to be said. When these two cases are given thoughtful consideration, the following conclusion concerning the importance of the statute seems inescapable: In every instance in which evidence is made admissible by the statute, it is simultaneously admissible under the common law rule. To be more emphatic, to the extent that the statute enunciates an evidence principle, it is completely redundant. However, it has not been expressly recognized as such by the Court of Appeals, perhaps only because no litigant has yet provided an opportunity. The lower courts apparently have not detected the redundancy. The result has been unnecessary confusion and difficulty, typified by that which existed in Bugg v. Commonwealth, where the issue was presented to the Court of Appeals in a state of grossly exaggerated complexity. Fortunately, the Court confronted the issue as a simple, fundamental one.

C. A Modification of the Exception

The importance of the Court's decision in Bugg, that testimony given in a preliminary hearing is not admissible under any circumstances at a subsequent trial, is largely concealed by the technical considerations of the case. On two prior occasions, when faced with identical evidentiary circumstances, the

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This particular historical fact has been concealed by reorganization of the Kentucky statutes. In 1936, the provision was still contained in the form in which it was enacted, i.e., as a part of the law on "stenographic reporters." See Carroll's Ky. Stat. ch. 121, § 4643 (1936). At the present time, it appears in KRS ch. 422 as an "evidence" provision, totally separated from the other provisions of the enactment of which it is a part. As a consequence, the statute appears to be something which it is not.
Court of Appeals ruled in favor of admissibility of the prior testimony.\textsuperscript{34} Although the Court did not expressly overrule these earlier cases, it effectively deprived them of any prece-
dential value.

The Court's rationale for modifying the reported testimony exception is partially revealed by the following statement in Bugg:

\begin{quote}
[T]he purpose of an examining trial and the issue to which it is directed, that is, whether there is enough evidence to justify holding or requiring security of the defendant pending further proceedings, is entirely different from the purpose and issue to which a trial on the merits is directed, which is a final determination of the ultimate question of guilt or innocence.\textsuperscript{35}
\end{quote}

Admissibility of "reported testimony," as described above, is dependent upon a substantial identity of issues between the proceeding from which the testimony is taken and the one in which it is offered. The Court of Appeals has expressed its judgment that this prerequisite is lacking when the first proceeding is a preliminary hearing in a criminal case. The reason for this conclusion was expressed well by another court:

\begin{quote}
At the preliminary hearing . . . the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilt beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial.
\end{quote}

\textsuperscript{34} See Lake v. Commonwealth, 104 S.W. 1003 (Ky. 1907); O'Brien v. Commonwealth, 69 Ky. (6 Bush) 563 (1869).

\textsuperscript{35} 514 S.W.2d at 121.
Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing.\textsuperscript{36}

In other words, given the nature and purpose of a preliminary hearing and the motivation and interests of an accused at such a proceeding, a searching cross-examination of testimony is not a realistic expectation.

When reduced to its bare essentials then, \textit{Bugg v. Commonwealth} represents a judgment that the reason for excluding hearsay evidence is not rendered inoperative by the circumstances that prevailed in that case. A cross-examination of testimony in a preliminary hearing is not, in the opinion of the Court, equivalent to a cross-examination of the same testimony at trial. The soundness of this judgment seems to be beyond reasonable debate. Yet, few other courts have imposed this limitation on the reported testimony exception to the hearsay rule.

\section*{III. Two Important Changes in Prior Law}

\subsection*{A. Heilman v. Snyder—Learned Treatises}

1. \textit{Introduction}

\textit{Heilman v. Snyder}\textsuperscript{37} is probably the most important evidence case decided during the past year. It involved a malpractice action against a physician for negligently administering medical injections. In his defense, the doctor attempted through his own testimony to introduce a medical treatise on the subject of injection procedures. Although rejected by the trial court when offered on direct examination, the evidence was accepted when offered on redirect. After a verdict for the defendant, the plaintiff appealed on the ground that the admission of this evidence constituted reversible error.

The prevailing rule at the time of this case favored the plaintiff’s position. It had been described by the Court of Appeals as follows: “The rule is that medical books are not admis-

\textsuperscript{36} Government of Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967).

\textsuperscript{37} 520 S.W.2d 321 (Ky. 1975).
sible as affirmative evidence . . . but the standard authorities may be read as a part of a question to a witness, or cross-examination, to test the accuracy of his information and the value of his expert testimony.\textsuperscript{38} Thus, statements from learned treatises could not be introduced as testimonial assertions of truth, but they could be used in the cross-examination of an expert witness for impeachment purposes.

In the \textit{Heilman} case the Court of Appeals overruled its earlier decisions, and substituted the following principle to govern the use of data contained in treatises:

\begin{quote}
We now adopt the Uniform Rules of Evidence that publication by experts should be admitted in evidence to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical, or pamphlet is a reliable authority on the subject.\textsuperscript{39}
\end{quote}

2. \textit{The Requirement of a Witness}

The Court of Appeals not only overruled its own prior decisions in \textit{Heilman}, it also adopted an evidence principle that does not comport with the law of most other jurisdictions. As might be expected, the Court exercised a degree of caution in reaching its decision. It restricted the new rule to prospective application, affirming the lower court by finding that the "treatise" evidence was merely cumulative. More importantly, the Court did not use the case to attempt a full development of this area of evidence law. Instead, it did nothing more than provide a new exception to the hearsay rule for future use. Consequently, one can confidently predict that the final word on learned treatises is yet to come. Several significant questions about this new hearsay exception were not presented by the facts of \textit{Heilman}, and, therefore, were not considered by the Court of Appeals.

Probably the most critical question still to be answered concerns the manner in which evidence from learned treatises must be introduced. Is a litigant to be permitted to arm himself

\textsuperscript{38} Travelers' Ins. Co. v. Davies, 153 S.W. 956, 959 (Ky. 1913). \textit{See also} Kentucky Pub. Serv. Co. v. Topmiller, 263 S.W. 706 (Ky. 1924).

\textsuperscript{39} Heilman v. Snyder, 520 S.W.2d 321, 323 (Ky. 1975).
with loads of professional books and journals and to read to the jury from the great works of science, medicine, art, or history? Or will he be required to produce an expert witness and introduce the data from the treatise through that witness? It is arguable, although far from certain, that the decision in Heilman resolves this issue. The Court stated that evidence from treatises should be admitted "if the judge takes judicial notice . . . that the treatise, periodical, or pamphlet is a reliable authority on the subject."\(^4\) Does this mean that the evidence need not be introduced through an expert witness? The answer to this question, when it comes, may turn upon the Court's use of the following provision from the Uniform Rules of Evidence:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

> . . .

> (31) *Learned Treatises.* A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.\(^4\)

This provision, which was part of the 1953 edition of the Uniform Rules, contains no prohibition against the "mere introduction," without the use of a witness, of a learned treatise. In late 1974 a revised version of the Uniform Rules of Evidence was adopted by the National Conference of Commissioners on Uniform State Laws. The provision in the 1974 version corresponding to the one used in Heilman v. Snyder reads as follows:

> The following are not excluded by the hearsay rule . . .

> (18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a

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\(^4\) *Id.*

\(^4\) *Uniform Rules of Evidence* 63 (31) (1953).
reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.\(^4\)

The principal difference between the two rules is the prohibition in the 1974 version against the "mere introduction" of a learned treatise.

For all practical purposes this new provision was not available to the Court at the time it decided *Heilman*. The case was probably considered by the Court in late 1974 or early 1975, since the opinion is dated March 7, 1975. The briefs of the parties were filed before the end of 1972, two years before adoption of the new Uniform Rules. An examination of the briefs reveals that the parties did not address the manner in which learned treatises should be introduced.\(^4\) Consequently, it seems almost certain that the Court of Appeals did not consider the issue. It must be acknowledged, however, that there is at least a particle of doubt in this conclusion, for the Court quoted a provision from the Federal Rules of Evidence that is identical to the revised version of the Uniform Rules. Nevertheless, when all aspects of *Heilman* are taken into account, including the fact that at trial the evidence was introduced through an expert, the question of whether a learned treatise must be introduced through the testimony of an expert witness remains open.

Consequently, pending further action by the Court of Appeals, the trial courts of this state will have to decide for themselves the manner in which treatises are to be introduced. In confronting this issue, it is important that trial judges give thoughtful consideration to the rationale underlying the recent change of attitude concerning the evidentiary use of scholarly materials. Until quite recently, most authorities have concluded that juries should not be given the benefit of data contained in scholarly works.\(^4\) Only two reasons have been prominently offered to support this conclusion. First, a treatise,
being an extrajudicial utterance, is hearsay evidence and therefore not subject to cross-examination. Second, because of its technical and complex nature, a treatise is subject to great risk of misuse and misapplication by judicial decision-makers. The new attitude toward the evidentiary use of treatises does not emanate from a rejection of these thoughts, but instead from a judgment that the long-standing objections to this evidence can be substantially satisfied by controlling the circumstances under which a jury is allowed to receive the data. The best indication of this judgment is contained in a comment by the drafters of the new federal rules:

The rule [i.e., the learned treatises exception] avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired.\(^45\)

In other words, adequate understanding of the evidence can be guaranteed through a requirement that it be introduced by a witness who is expert in the subject matter of the treatise. At the same time, this requirement would provide the opponent of such evidence an opportunity for some measure of cross-examination.

In the absence of this control over the circumstances under which a treatise can be introduced, the previously described reasons for exclusion are as compelling as ever. Consequently, until the Court of Appeals has had an opportunity to speak directly to this issue, lower courts would be well-advised to adopt the prevailing practice in federal courts, under which learned treatises are admissible only "to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination."\(^46\)

3. The Treatise as an Exhibit

One other question concerning the new hearsay exception, although of lesser importance, is worthy of brief mention. The 1953 version of the uniform rule, to which reference was made

\(^{45}\) Fed. R. Evid. 803 (18).

\(^{46}\) Id.
in *Heilman*, contained no prohibition against the introduction of a treatise as an exhibit. The federal rule, to which reference was also made, and the revised uniform rule provide that a treatise may be read to the jury but may not be introduced as an exhibit. Does this combination of circumstances mean that the Court of Appeals intends to allow the introduction of treatises as exhibits?

At an earlier time the Court believed that such a practice was ill-advised: "The printed word has an unconscious influence over us all. What is read from a book, recognized as authority, has more weight than the same expression from the mouth of a witness." Apparently, this belief was repudiated in *Heilman*. After referring to its prior observation, the Court of Appeals said: "We have recognized the sophistication of modern jurors when we deal with problems of evidence in the field of criminal law. Surely the juror of today is no less sophisticated in a civil case." It seems virtually certain, from the context in which this observation was made, that the Court intended to approve the introduction of treatises as exhibits. In the absence of actual experience with this new hearsay exception, there seems to be no rational basis upon which to prefer the federal rule prohibiting use of medical treatises as exhibits over the one which the Court apparently adopted.

B. *Rachel v. Commonwealth—The Best Evidence Rule*

In many instances when a litigant is attempting to prove the contents of a writing, the particular writing required by the "best evidence" rule will be obvious. Frequently, there is only one writing, as the choice presented is between a writing and oral testimony about the writing. In other instances, however, choice must be made between two writings, a so-called "original" and a "copy." In such situations the "best evidence" is not always readily apparent. Although the terms "original" and "copy" have a precise, well-understood relationship to each other, they have no inherent relationship to the best evidence rule.

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18 520 S.W.2d at 323.
For many years the law of Kentucky has treated a certain kind of copy as equivalent to an original for purposes of this rule. The nature of such a copy is described in the following statement:

A carbon copy of a letter, i.e., a carbon impression made simultaneously with the original, is a duplicate original and not a copy thereof. The carbon impression may be used, as well as the impression made by the type or the pencil causing the indentation; and, when properly authenticated, as it was in this case, becomes an original for all purposes.

As implied by the label “duplicate original,” qualification for treatment as an original is limited under this rule to a copy made simultaneously with the original. Recently, however, the Court of Appeals has broadly expanded the admissibility of so-called duplicates.

In the case of Rachel v. Commonwealth a criminal defendant argued that the best evidence rule had been violated when the prosecution introduced a thermofax copy of a written confession. In resolving this issue against the defendant, the Court of Appeals recognized that the only legitimate reason for preferring an “original” over a “copy” is to avoid errors on the part of the copyist, and held that in applying the best evidence rule a trial court need not distinguish between a “photo copy” and a “duplicate original.” As a consequence of this decision, a copy made by a modern reproduction technique is equivalent to an original for evidence purposes and may be introduced without explanation of non-production of the original.

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49 See, e.g., Gus Dattilo Fruit Co. v. Louisville & N. R.R., 37 S.W.2d 856 (Ky. 1931).
50 Liberty Nat'l Bank & Trust Co. v. Louisville Trust Co., 175 S.W.2d 524, 528 (Ky. 1943).
51 523 S.W.2d 395 (Ky. 1975).
52 The precise ruling of the Court of Appeals was as follows:

Where a photo copy of the original is produced, there is no chance of a mistake upon the part of the scrivener in copying it, and exact replicas of handwriting and figures are produced. In the absence of some showing that the copy was altered or otherwise not an accurate copy—or that the watermark or quality of the original paper was an important evidentiary factor, there does not appear to be any real reason for distinguishing between a photo copy and a duplicate original although such a distinction prevails in most jurisdictions.

Id. at 401.