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JEOPARDY—MEANDERING THROUGH MANDATES AND MANEUVERS

Bernard J. Gilday, Jr.* and Stephen E. Gillen**

I. INTRODUCTION

Complicated constitutional concepts continually confront courts, counsel, and commentators. More than any other, jeopardy rides constantly the crest of the crispest waves and has created unusual, unparalleled curiosity, concern, and confusion. No complete, competent, or conscientious unraveling of the magnificent mess in which this primary principle finds itself could be accomplished in any one article by any one team of authors. Thus, we have boldly, if not brazenly, chosen to pay homage to history, to dissect deceptive decisions, and to suggest to trial counsel avenues and areas, paths and pastures for consideration when and where a jeopardy issue raises its regal rump.

II. THE HOMAGE TO HISTORY

The protection against multiple trials for the same offense is fundamental. It is a cornerstone of the criminal justice system; it has, in fact, been described as a part of all advanced systems of law.1 Few of the prevailing principles of criminal justice possess a pedigree as long and as rich as that of the protection against multiple trials for the same offense. Its evolution can be traced back literally through the ages—from the Constitutional Convention, to the common law of England, through the Dark Ages, and deep into Greek and Roman times.2 Nevertheless, the precise form and breadth of the prohibition have varied widely throughout its history, and while the concept has slowly crystalized over the centuries, its boundaries are not

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2. This article is intended as a practical guide for the practicing attorney and, as such, a protracted examination of historical precedent, no matter how intriguing, would be, if not distracting, at least frivolous. However, those scholarly, curious, and ambitious, who are predisposed to such a journey into the past are invited—nay encouraged—to begin at once, armed with the authors' blessings, a feather duster, and an extensive list of references, such as the one provided by Justice Black in Bartkus v. Illinois, 359 U.S. 121, 151-55 nn. 3-14 (1959) (Black, J., dissenting).
yet without their vagaries.

The underlying premise, the catalyst in the crystalization process, is that a defendant should not be twice tried or punished for the same offense. As early as the 15th century the English courts had begun to attach the term "jeopardy" to this concept. In the 17th century, Lord Coke described this double jeopardy protection as a combination of three related common law pleas: (1) *autrefois acquit* (prior acquittal); (2) *autrefois convict* (prior conviction); and (3) pardon. Blackstone subsequently described the double jeopardy protection as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 

A. Carryover of the Prohibition to the United States

This common law double jeopardy protection was not broadly constitutionalized by the original thirteen colonies. At the time of the First Congress, only New Hampshire's constitution contained any sort of prohibition of double jeopardy. However, during the course of the ratification proceedings, New York and Maryland suggested that a double jeopardy clause be amended to the Federal Constitution.

In response to these suggestions, James Madison added a ban against double jeopardy to the proposed version of the Bill of Rights that he presented to the House of Representatives in June of 1789. Madison's version was rejected, however, in favor of this language, patterned after Blackstone's broad based expression of the common law jeopardy protection: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

4. 3 E. COKE, INSTITUTES 212-13 (6th ed. 1680).
5. 4 W. BLACKSTONE, COMMENTARIES* 335-36.
6. N. H. CONST. OF 1784, pt. I, art. XVI.
7. The clause suggested by New York read as follows: "That no person ought to be put twice in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence." 1 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 328 (1876).
8. The Maryland suggestion read: "That there shall be . . . no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces." 2 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 550 (1876).
9. Madison's version read as follows: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 ANNALS OF CONG. 434 (Gales & Seaton eds. 1789).
10. U.S. CONST. amend. V.
While early English common law seems to suggest that this protection did not extend to a government appeal from a verdict in favor of the defendant,\textsuperscript{10} by 1847 it seems to have been well settled in England that the government had no common law right to appeal an unfavorable verdict.\textsuperscript{11} In \textit{United States v. Sanges},\textsuperscript{12} the United States Supreme Court officially recognized this interpretation of English common law. Thus, the common law rules, as generally understood and administered in the United States, provide that absent express statutory provision, the government has no right to appeal in criminal cases.\textsuperscript{13}

With the \textit{Sanges} decision, the evolution of the jeopardy concept took two paths—the protection against multiple trials for the same offense being developed and refined through case and common law, and the government's right of appeal in criminal cases being determined by statute. Fifteen years after \textit{Sanges}, Congress passed the first Criminal Appeals Act,\textsuperscript{14} which conferred jurisdiction on the Supreme Court to consider criminal appeals by the government in limited circumstances. The Act permitted the government to take an appeal from a decision dismissing an indictment or arresting judgment where the decision had been based on "the invalidity, or construction of the statute upon which the indictment is founded"\textsuperscript{15} and from a decision sustaining a special plea in bar when the defendant had not been put in jeopardy. The Act was construed in accordance with the common law meaning of the terms employed, and the rules governing the conditions of appeal became highly technical.\textsuperscript{16} The Supreme Court had a number of occasions to struggle with the vagaries of the Act; in one of these unhappy efforts, it concluded that the Act was "a failure . . . a most unruly child that has not improved with age."\textsuperscript{17}

Congress finally disposed of the statute in 1971 and replaced it with a new Criminal Appeals Act\textsuperscript{18} intended to broaden the government's appeal rights. While the language is not dispositive, the

\textsuperscript{10} United States v. Sanges, 144 U.S. 310, 312 (1892).
\textsuperscript{11} Id.
\textsuperscript{12} 144 U.S. 310 (1892).
\textsuperscript{13} Id. at 318.
\textsuperscript{15} Id.
legislative history makes it clear that Congress intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit. Thus, at least in the federal practice, the two aspects of jeopardy are back on the same path.

B. The Underlying Principles

The common law and constitutional ancestry of the double jeopardy protection have provided certain underlying principles, an awareness of which is invaluable in untangling the knotted string of decisions that represent the law of jeopardy as it exists in current practice. The most frequently quoted expression of the first of these principles is a passage from *Green v. United States*:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Obviously, Justice Black in *Green*, was expressing a concern for the rights of the accused. However, Justice Black's eloquent expression of the rationale for the jeopardy protection can be further particularized into three significant policies:

1. The individual has a right to be tried once, and only once, on the factual issues of the crime with which he is charged.
2. Once a trial has commenced and his life and property have been subjected to the danger of an adverse determination, the individual has a right to pursue that trial to its conclusion so that he need not again face the uncertainty present in even the strongest defense.
3. The individual has a right to have any determination of the factual issues in his favor conclusively bind the government.

This first principle, protection of the accused from harassment, is the most obvious aspect of the law of jeopardy. There are, however, two more principles of equal, though countervailing import. The second principle is that the jeopardy protection is personal to the accused and may be "waived" by him. The third principle is

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that the public has a right to vigorous prosecution of those guilty of crimes. In the words of Justice Black: "[T]he defendant’s valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public’s interest in fair trials designed to end in just judgments." It is the shifting balance between the first principle on the one hand, and the second and third principles on the other, which is responsible for most of the uncertainty in the current law of jeopardy.

III. DISSECTING DECEPTIVE DECISIONS

The jeopardy protection has a number of applications which are clear in both theory and practice. There are, however, a great many applications where neither the theory nor the practice can be so characterized. Cases in these areas are marked by plurality decisions, separate opinions, and strong dissents. A careful dissection of these decisions is a prerequisite to any understanding of the law of jeopardy—the way it was, as well as the way it is.

A. The Law of Jeopardy—The Way it Was

At this point it is useful to examine the federal law of jeopardy from two perspectives. The policies behind the law are most evident where the original trial ended with a verdict of acquittal. These same policies become much more difficult to discern and apply where the trial ended prior to a verdict. With this examination accomplished it will then be possible to see how that law is applied to the states.

(1) The acquittal—

Well, there once was a fellow, acquitted,  
Of a crime that he’d really committed;  
So the Government swore  
That they’d try him once more,  
But the Judge said it wasn’t permitted!

As the limerick suggests, a final verdict of acquittal, no matter how erroneous, operates as an absolute bar to retrial of the accused for the same crime. This principle was firmly established in United States v. Ball and remains one of the unyielding tenets of the law of jeopardy.

Ball involved three defendants who had been jointly indicted for

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23. 163 U.S. 662 (1896).
murder. At trial, one of the defendants, the appellant in this case, was acquitted and the other two defendants were convicted. The two convicted defendants appealed alleging among other things that the original indictment was fatally defective because it did not aver when and where the victim had died. Their challenge was sustained, their convictions were reversed, and their case was remanded to the trial court with directions “to quash the indictment, and to take such further proceedings in relation to them as to justice might appertain.” The original indictment was subsequently dismissed and a corrected indictment was returned by the grand jury—charging all three original defendants. Ball must have been quite dismayed at finding himself again before the circuit court on a charge of which he had previously been acquitted, and it was that court’s denial of his former jeopardy plea that prompted his appeal.

The United States Supreme Court ruled that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, was a bar to a second indictment for the same killing. The Court noted that the fifth amendment prohibition was not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, was equally put in jeopardy at the first trial.

The ruling in Ball represents what is probably the strongest form of double jeopardy protection from the point of view of the accused. However, in order to make full use of Ball, it is important to be able to recognize an acquittal. This is, in some cases, not the simple task it would appear to be. The precise nature of the disposition of a criminal case can be an elusive prey. Camouflaged by judicial rhetoric, careless terminology, and procedural error, its features are difficult to discern in the shadow cast by United States v. Martin Linen Supply Co. Martin Linen involved a deadlocked jury which was discharged when unable to agree upon a verdict at the criminal contempt trial of Martin Linen Supply Co. The district judge granted Martin’s

24. Id. at 664-65 (citing Ball v. United States, 140 U.S. 118, 136 (1891)).
25. Call it speculation, but it would appear that, despite his namesake, Millard Fillmore Ball was unpopular with Texas grand juries.
26. The Court distinguished an acquittal before a court having no jurisdiction because such a proceeding is absolutely void and of no effect and not merely voidable. United States v. Ball, 163 U.S.-662, 669 (1896) (dictum).
motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c) which allows the trial judge to enter a judgment of acquittal when the jury fails to return a verdict or when the government's case is legally deficient. The government appealed pursuant to the Criminal Appeals Act, which allows an appeal by the United States in a criminal case "to a court of appeals from a . . . judgment . . . of a district court dismissing an indictment. . . ." The court of appeals dismissed the appeal, holding that the double jeopardy clause bars appellate review following a judgment of acquittal entered under Rule 29(c). The Supreme Court affirmed the court of appeals, but emphasized that the judgment of acquittal entered by the district court was an acquittal in substance as well as in form. The strong inference seems to be that a Rule 29(c) "acquittal" which was not based on any of the factual elements of the offense charged is not an "acquittal" in substance and, therefore, does not stand as a bar to government appeal or retrial.

Thus, it appears certain that the trial judge's characterization of the disposition of a criminal case as a "dismissal" or as an "acquittal" is not conclusive. It is the nature of the ruling then, and not its nominal description, that is controlling. One commentator,

28. Fed. R. Crim. P. 20 provides:
Motion for Judgment of Acquittal
(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

recognizing the potential difficulty that this holding represents for counsel and courts alike, has endeavored to shed some light in this area by providing a definition of an acquittal as "a legal determination, made after jeopardy has attached, which is based on facts adduced at trial and relating to the general issue of the case and which terminates the prosecution in favor of the defendant." 31

As if it were not already difficult enough to recognize an acquittal, there is a related issue involving the extent to which a verdict of guilty on a lesser included offense implies a verdict of acquittal on the greater offense. The Supreme Court touched upon this issue in Green v. United States. 32 There the defendant, Green, was tried in United States District Court under an indictment charging arson in the first count and murder in the first degree in the second. As to the second count the jury was instructed on both first and second degree murder. The jury returned a verdict finding Green guilty of arson under the first count and of second degree murder under the second—the verdict was silent on the charge of first degree murder. The trial judge accepted the verdict, entered the proper judgments, and dismissed the jury. Upon Green's appeal from his conviction of second degree murder, the court of appeals reversed that conviction because it was not supported by the weight of the evidence and remanded the case for a new trial. On remand Green was found guilty of first degree murder and sentenced to death. The court of appeals affirmed his conviction, rejecting his defense of former jeopardy. The Supreme Court reversed, holding that, when the jury was dismissed without returning a verdict on the charge of first degree murder, Green's jeopardy on that charge came to an end so that he could not be retried for that offense. However, Justice Black, speaking for the Court, said in what borders on dictum:

In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. 33

Another related issue involves the extent of the protection afforded by an acquittal, or for that matter a conviction, with respect

32. 355 U.S. 184 (1957).
33. Id. at 190-91 (alternative holding) (emphasis added) (footnote omitted).
to subsequent charges based upon acts which were a part of the same criminal transaction involved in the first prosecution. The object is, of course, to prevent the government from harasing the accused with a constant barrage of closely related statutory charges; yet, at the same time, society must retain its ability to prosecute offenses which are separate, though closely related.

The test for determining whether two offenses are sufficiently distinguishable to permit successive prosecutions was stated in Brown v. Ohio. There the defendant, Brown, was arrested nine days after he had stolen an automobile. He pleaded guilty to a misdemeanor charge of joyriding—taking or operating a car without the owner's consent—the joyriding charge having been based on Brown’s driving of the auto on the last day of his nine day joyride. Thereafter, Brown pleaded guilty in a state court to a felony auto theft charge based on his original taking of the auto. The trial court rejected Brown’s double jeopardy objections and the Court of Appeals of Ohio affirmed, holding that while joyriding was a lesser included offense of auto theft since every element of the crime of joyriding was also an element of the crime of auto theft (the latter having the additional element of intent to permanently deprive the vehicle owner of possession), nevertheless the two prosecutions were based on two separate acts. Thus the double jeopardy clause did not bar the second prosecution. The Supreme Court of Ohio denied leave to appeal and the United States Supreme Court then granted certiorari.

In a decision reversing the Court of Appeals of Ohio, Justice Powell quoted from Blockburger v. United States: “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . .” Justice Powell went on to explain that a lesser included offense required no proof beyond that which was required for conviction of the greater offense, the greater offense thus being the “same” for double jeopardy purposes as any lesser offense included in it; and that since

35. Id. at 166 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). The issue in Blockburger was whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment. However, Justice Powell noted that “[i]f two offenses are the same under this test for barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.” Id.
joyriding was a lesser included offense of auto theft under Ohio law, the double jeopardy clause barred prosecution and punishment of the defendant for auto theft. It was considered immaterial that the prosecution for auto theft was based on the original taking of the auto, whereas the earlier joyriding prosecution had been based on the defendant's driving of the auto on the last day of his nine day joyride, since there was no Ohio statute providing that joyriding was a separate offense for each day in which a motor vehicle was operated without the owner's consent nor any state court interpretation of the Ohio joyriding statute to such effect.\footnote{36}

Where the verdict of acquittal results from a jury verdict of guilty which has been reversed by the trial judge, the double jeopardy protection may or may not prevent a government appeal. As previously noted, the federal government's right to appeal a verdict of acquittal directed by the trial judge pursuant to Federal Rule of Criminal Procedure 29(c) is no longer statutorily limited. Thus the policies and constitutional issues which operate to limit reprosecution are also the sole limitations on the federal government's right to appeal. Again, the object is to prevent the accused from twice running the gauntlet of trial on the factual issues of the offense with which he is charged. However, society's interest in vigorous prosecution is preserved by allowing government appeals where a ruling favorable to the prosecution would not require retrial of the factual issues.\footnote{37}

(2) \textit{Trial terminated prior to verdict}—Thus far this discussion of the law of jeopardy has dealt with cases where the original trial was terminated with a verdict, whether returned by the jury or directed by the trial judge. However, where a trial is terminated prior to a verdict of acquittal or guilty, the accused may still find shelter in the jeopardy rule. In the words of Justice Black,

\begin{quote}
[A] defendant, put to trial before a jury, may be subjected to the kind of “jeopardy” that bars a second trial for the same offense even though his trial is discontinued without a verdict. . . . The
\end{quote}

\footnote{36. However, Justice Blackmun argued that the decision of the Ohio Court of Appeals which found that the two prosecutions were based on Brown's separate and distinct acts committed nine days apart gave just such an interpretation to the Ohio statute. Brown v. Ohio, 432 U.S. 161, 172 (1977) (Blackmun, J., dissenting).}

same may be true where a judge trying a case without a jury fails for some reason to enter a judgment.\textsuperscript{38}

The question is at what point in the proceeding does jeopardy attach? The answer depends upon the nature of the proceeding.

In a jury trial the well established rule in the federal practice is that jeopardy attaches when the jury is empaneled and sworn. Chief Justice Burger applied this rule in Serfass v. United States,\textsuperscript{39} where Serfass, who was charged with failing to report for induction into the Armed Forces, filed a motion to dismiss the indictment in United States District Court. The district court, deriving material facts from Serfass' affidavit, from his Selective Service file, and from the oral stipulation of counsel at argument, entered a pretrial order dismissing the indictment. Asserting jurisdiction under the Criminal Appeals Act of 1970, the government appealed to the United States Court of Appeals for the Third Circuit. The court of appeals reversed the district court's decision and rejected Serfass' double jeopardy objection. The United States Supreme Court affirmed, holding that the double jeopardy clause did not bar the appeal by the United States from a pretrial order dismissing an indictment based on a legal ruling made by a district court after an examination of records and an affidavit setting forth evidence to be adduced at trial. The Court emphasized that jeopardy had not attached, despite the fact that material evidence had been heard by the trial judge, because Serfass had not been put to trial before the trier of facts.\textsuperscript{40}

In a bench trial, the rule is similarly well established in the federal practice—jeopardy attaches when the court begins to hear the evidence.\textsuperscript{41}

(3) Losing the jeopardy protection—The rules as to when jeopardy attaches are clear and long standing. However, as is usually the case, there are exceptions, and the jeopardy protection can be lost under certain circumstances. As is also usually the case, these exceptions are by no means as clear as the rules they modify.

Perhaps the classic exception is that of the hung jury, illustrated in United States v. Perez.\textsuperscript{42} There, Josef Perez was tried on a capital

\begin{thebibliography}{9}
\bibitem{39} 420 U.S. 377 (1975).
\bibitem{40} Prior to dismissal, Serfass had not waived his right to a jury trial. Thus, the trial judge had not yet become the trier of fact. \textit{Id.} at 389.
\bibitem{42} 22 U.S. (9 Wheat.) 194 (1824).
\end{thebibliography}
offense and the jury, being unable to agree, was discharged by the court without having returned a verdict. Perez claimed that since he had not consented to the discharge of the jury the double jeopardy clause prohibited his retrial. Justice Story had little difficulty in reaching the conclusion that the double jeopardy clause was not violated. Writing for the Court, he said:

We think, that in all cases of this nature, the law has invested the courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. 3

It was Justice Story's next sentence that opened Pandora's Box and released the devilish judicial discretion which resulted in a string of decisions that has twisted and turned, snarled and stretched, a string of decisions that to this day remains tangled with every effort to draw them into line seeming only to tighten the knots. Still referring to the courts of justice, he said, "[t]hey are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." 4

One hundred twenty-five years later, Justice Black focused on this language from Perez in writing the Court's opinion in Wade v. Hunter. 44 Wade, a soldier participating in the invasion of Germany, had been put on trial before a court-martial for an offense punishable under the Articles of War. After hearing evidence and arguments of counsel and taking the case under consideration, the court-martial continued the case to procure the attendance of witnesses who were ill at the time of the hearing. Subsequently, the Army's advance having so increased its distance from the residence of the witnesses that the case could not be completed within a reasonable time, the charges were withdrawn and transmitted to another military unit stationed in the vicinity of the alleged offense, by which a court-martial was convened. Wade's plea of former jeopardy was overruled and he was found guilty.

The Supreme Court, denying a petition for habeas corpus, held that the right to have a trial continued to judgment is subordinate to the public interest in fair trials designed to end in just judgments and that the plea of former jeopardy was therefore properly overruled.

43. Id.
44. Id.
In the setting of a military trial in a war zone a strong case can be made that the "manifest necessity" test of *Perez* was satisfied. In his opinion, Justice Black emphasized the broad nature of the *Perez* test and the discretion which should be allowed the Commanding General under these circumstances.\(^46\)

However, it is also true that these circumstances do not present as clear a case for permitting retrial as the hung jury situation in *Perez*. In a dissenting opinion Justices Murphy, Douglas, and Rutledge argued that "[t]he guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions... Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution."\(^47\) And therein lies the difficulty—a broad test which is at once easily adaptable to the diverse situations to which it must be applied and, at the same time, difficult to apply with consistency.

The knots in this string of decisions were pulled still tighter by *Downum v. United States*.\(^48\) Downum was being prosecuted in United States District Court. His case was called, both sides announced ready, and a jury was selected, sworn, and instructed to return that afternoon, at which time the prosecution requested that the jury be discharged because its key witness had not yet been found. Over Downum's objection, the court discharged the jury and two days later impaneled a second jury, which found Downum guilty. The court of appeals affirmed on the grounds that the trial court had not abused its discretion by discharging the first jury and that the impaneling of the second jury had not subjected Downum to double jeopardy.

The United States Supreme Court reversed, holding that Downum had been subjected to double jeopardy because the prosecution's negligence in failing to produce its key witness despite having announced ready and in allowing the jury to be selected and sworn though the witness had not been found, did not constitute an "imperious necessity" allowing the first jury to be discharged and a second jury impaneled to try the accused.\(^49\) However, it appears that Justice Douglas recognized that the Court's position in *Downum*

\(^{46}\) Id. at 690.
\(^{47}\) Id. at 694 (Murphy, J., dissenting).
\(^{49}\) Id. at 736.
was not beyond question. Speaking for the Court, he perhaps understated the problems encountered in applying the "manifest necessity" test when he said, "Differences have arisen as to the application of the principle." 5

The dissenting opinion of Justice Clark, joined by Justices Harlan, Stewart, and White, was more emphatic on the point:

I cannot see how this Court finds that the trial judge abused his discretion in affording the Government a two-day period in which to bring forward its key witness who, to its surprise, was found to be temporarily absent. I believe that the "ends of public justice," to which Mr. Justice Story referred in *Perez*, require that the Government have a fair opportunity to present the people's case and obtain adjudication on the merits, rather than that the criminal be turned free because of the harmless oversight of the prosecutor. 51

Having identified prosecutorial negligence as a major factor in *Downum*, the Court gave another mighty tug at the string in *Illinois v. Sommerville*. 52 Sommerville had been convicted of theft in an Illinois state court after the court, at an earlier trial for the same offense, declared a mistrial on the state's motion, and over Sommerville's objection, because the indictment was fatally deficient under Illinois law. On Sommerville's petition for habeas corpus, a United States District Court dismissed the petition, but was reversed by the United States Court of Appeals for the Seventh Circuit.

The Supreme Court reversed the court of appeals, holding that since under Illinois law the defect in the indictment was not curable by amendment, could not be waived by Sommerville's failure to object, and could be asserted on appeal or in a postconviction proceeding to overturn a final judgment of conviction, the continuance of prosecution under the first indictment would have been pointless. Therefore, the trial judge had not abused his discretion by declaring a mistrial, and Sommerville's subsequent trial had not violated the double jeopardy clause.

While conceding that "virtually all of the cases turn on the particular facts and thus escape meaningful categorization," 53 Justice Rehnquist did provide a clue to unraveling the tangle, which clue he characterized as "a general approach, premised on the 'public

50. *Id.*
51. *Id.* at 743 (Clark, J., dissenting).
53. *Id.* at 464.
justice' policy"^{54} of Perez. Continuing, Justice Rehnquist advised that "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial."^{55} Tempering this advice, he cautioned that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question."^{56}

However, the strong dissent of Justice Marshall indicates that the knots have not yet been untangled. Comparing Sommerville to Downum, he stated, "I cannot understand how negligence lends itself to manipulation. And even if I could understand that, I cannot understand how negligence in failing to draw an adequate indictment is different from negligence in failing to assure the presence of a crucial witness."^{57}

It should be noted that Wade, Downum, and Sommerville share a common element. These cases all involved some action by the prosecution which resulted in the declaration of a mistrial. The primary question in each case was whether that prosecutorial act or error was unjustifiable or motivated by bad faith, and if not, was a mistrial the only viable means of correcting the error.

While the cases present no clear guidelines, it is apparent that the more justifiable the prosecutor's error and the more necessary the mistrial, the more likely it is the double jeopardy clause will not bar retrial of the accused. The answers to these questions are, of course, highly dependent upon the unique facts of each individual case and the light in which those facts are cast. It is obvious from the separate opinions filed in the aforementioned cases, that the Justices did not often share the same interpretation of what actually transpired at the original trial of each.^{58}

It might be suspected that the emphasis would be different where the mistrial was not the direct result of the act or error of the prosecution. Such was the case in Gori v. United States^{59} where the trial

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54. Id.
55. Id.
56. Id.
57. Id. at 482 (Marshall, J., dissenting).
judge, acting on his own motion and with neither approval nor objection by the defense, withdrew a juror and declared a mistrial. At a subsequent trial, the defendant was convicted, his claim of double jeopardy to no avail. The Supreme Court affirmed the conviction emphasizing the discretion to be accorded the trial judge in declaring a mistrial and ordering retrial, particularly when it appeared that the mistrial had been granted in the sole interest of the defendant.

Justices Douglas, Black, and Brennan and Chief Justice Warren had no little difficulty with this notion, however. In the dissent, Justice Douglas expressed the view that a trial judge's discretion to declare a mistrial and order retrial was not as broad as the majority had intimated and, in fact, was limited by the same "imperious necessity" test applied in Wade.60

This view of the limitations on the trial judge's discretion received some support in United States v. Jorn.61 That case involved a defendant, Milton Jorn, who had been brought to trial in United States District Court on an information charging him with willfully assisting in the preparation of fraudulent income tax returns. The trial judge, acting on his own motion without Jorn's consent, discharged the jury and declared a mistrial when he concluded that taxpayers who were to be called as witnesses by the government, and who allegedly had been aided by Jorn in preparing their returns, had not been properly advised on initial contact by the Internal Revenue Service of their constitutional rights against self-incrimination and thus should have been allowed to consult with attorneys, notwithstanding that the first taxpayer to be called as a government witness and the prosecuting attorney both stated that the taxpayers had been warned of their constitutional rights when first contacted. The case was set for retrial, but on motion by Jorn, the trial judge dismissed the information on the ground of double jeopardy.

On direct appeal by the government, the United States Supreme Court affirmed. In a portion of the Court's opinion in which four members of the Court joined, Justice Harlan expressed the view that absent a motion by the defendant for a mistrial in circumstances as existed here, the trial judge must not foreclose the defendant's option under the double jeopardy clause to have his trial completed by a particular tribunal until a scrupulous exercise of judicial

60. Id. at 371 (Douglas, J., dissenting).
discretion resulted in the conclusion that the ends of public justice would not be served by a continuation of the proceedings.\(^{62}\) Applying that standard to the facts of this case, Justice Harlan concluded that the district judge, who had given no consideration to the possibility of trial continuance, had abused his discretion in discharging the jury and declaring a mistrial, thus rendering the reprosecution of Jorn violative of the double jeopardy clause.\(^{63}\) However, Chief Justice Burger and Justices Stewart, White, and Blackmun balked at the idea that society’s efforts at prosecution could be so easily frustrated by a misstep on the part of the trial judge.\(^{64}\) Justices Stewart, White, and Blackmun were of the opinion that Jorn should have been required to show prejudice resulting from the trial judge’s actions such as to outweigh society’s interest in the punishment of a crime.\(^{65}\)

While Jorn seems to represent a less stringent application of the “judicial discretion” and “manifest necessity” concepts, the most liberal application of these rules occurs where the mistrial is declared as a result of an act or error of the defense. Such was the case in Arizona v. Washington,\(^{66}\) where, because the prosecution in George Washington, Jr.’s\(^{67}\) murder trial in an Arizona state court had withheld exculpatory evidence from the defense, Washington was given a new trial. At the beginning of the retrial the trial court granted the prosecutor’s motion for a mistrial based upon defense counsel’s opening statement in which defense counsel had alluded to the prosecutor’s having hidden evidence from the defense at the previous trial. The trial judge did not expressly find that there was “manifest necessity” for a mistrial. Nor did he expressly state that he had considered alternative solutions and concluded that none would be adequate. After the Supreme Court of Arizona refused to review the mistrial ruling, Washington filed a petition for a writ of habeas corpus in United States District Court, alleging that another trial would violate the double jeopardy clause. Although agreeing that defense counsel’s opening statement had been improper, the district court held that because the record contained no finding by

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62. Id. at 485.
63. Id. at 486.
64. Id. at 487 (Burger, C.J., concurring) and at 488 (Stewart, J., dissenting).
65. Id. at 492 (Stewart, J., dissenting).
67. To paraphrase, truly “all citizens [whoever their namesake] are equal before the law.” Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
the trial court that there had been "manifest necessity" for a mistrial, Washington could not be placed in further jeopardy. The United States Court of Appeals affirmed, but was reversed by the Supreme Court. In the Court's opinion, Justice Stevens indicated that the "manifest necessity" test was applicable in this case. However, he found that the test had been satisfied by the mere fact that the record showed that the trial judge had not acted precipitely in declaring the mistrial because he had allowed both the prosecutor and defense counsel an opportunity to present their positions on the propriety of such an act. 68

A related issue involves the trial judge's discretion under circumstances which would justify the declaration of a mistrial, to elect instead to direct a verdict of acquittal. Such was the case in *Fong Foo v. United States*, 69 where during a criminal trial before a jury in United States District Court, after three government witnesses had appeared and while a fourth was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants. A formal judgment of acquittal was subsequently entered as to each defendant on one or both of two grounds: supposed improper conduct of the Assistant United States Attorney who was prosecuting the case and supposed lack of credibility in the testimony of the government witnesses who had testified up to that point. The United States filed for a writ of mandamus in the court of appeals, asking that the judgment of acquittal be vacated and the case be reassigned for trial. The court granted the petition on the ground that the trial court was without power under the circumstances to direct the judgment of acquittal.

The Supreme Court reversed the court of appeals in a brief per curiam opinion, seeming to ignore two legitimate issues. Justice Harlan pointed out one of these issues in a concurring opinion where he discussed the possibility that the district court's judgment of acquittal might have been based solely on the Assistant United States Attorney's alleged misconduct. 70 Were such a conclusion possible, the verdict of acquittal would have been clearly outside the limits of the district judge's discretion and the retrial would have been barred only absent the finding of manifest necessity for a dismissal.

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70. *Id.* at 143 (Harlan, J., concurring).
The other issue was the basis of a strong dissent by Justice Clark. He argued, quite persuasively, that the district court had no power to direct a verdict of acquittal until the government had concluded its main case. The idea, of course, is that where the trial judge has authority to terminate the proceeding at such an early stage with a verdict of acquittal (and thereby eliminate any possibility of retrial) society has been frustrated in its legitimate prosecution of crime.

It is society's interest in the legitimate prosecution of crime that has given rise to another theory every bit as complex and confusing as the concepts of "manifest necessity" and "judicial discretion." Sometimes referred to as "waiver," sometimes as "continuing jeopardy," it amounts to another maneuver by which the prosecution may sidestep the jeopardy protection.

In *Green v. United States*, Justice Black discussed the evolution of the concept of waiver or continuing jeopardy with respect to a defendant's appeal, saying:

[I]f a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense. Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had "waived" his plea of former jeopardy by asking that the conviction be set aside. Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final. But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense has been set aside on appeal.

Whatever the theory, it is clear from *Green* that the "waiver" is only effective with respect to the conviction which is appealed. Hence, *Green*, by appealing his conviction on the lesser included offense, had not "waived" his jeopardy protection with regard to the greater offense of which he had been impliedly acquitted.

This same theory, however it is characterized, is similarly applied where a mistrial is declared on the motion of the defense. Under these circumstances, the defendant's right to have his trial completed by a particular tribunal is "waived."

71. Id. at 144 (Clark, J., dissenting).
73. 355 U.S. 184, 189 (1957).
74. Id.
Such was the case in *United States v. Dinitz*, 75 where the judge presiding at Dinitz's criminal trial in United States District Court excluded one of Dinitz's counsel from the trial as a result of the attorney's conduct in delivering his opening statement. Thereafter, on an unopposed defense motion, the judge declared a mistrial. Dinitz, representing himself, was retried and convicted in the district court. A panel of the United States Court of Appeals reversed the conviction, however, holding that the double jeopardy clause barred the second trial because there had been no manifest necessity requiring the expulsion of the attorney at the first trial.

The United States Supreme Court reversed the court of appeals, holding that the double jeopardy clause was not violated by Dinitz's retrial. While the Court rejected the notion that traditional waiver concepts applied, *i.e.*, that the knowing, intelligent, and voluntary standards had to be met, 76 the Court noted that it is apparent that a defendant can elect to surrender his right to have his trial completed by a particular tribunal. Where circumstances develop, not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. The Court emphasized that the defendant was not waiving his double jeopardy protection but merely electing to pursue one of the alternatives which the double jeopardy clause affords. Query whether this is a realistic appraisal of the actualities or merely complicated constitutional camouflage. 77

The concept of "waiver" or "continuing jeopardy" was also applied in *Jeffers v. United States*, 78 though neither term was used in conjunction with the facts of that case. At trial, Jeffers expressly requested that he be tried separately on what were arguably greater and lesser included offenses, despite the prosecution's motion to try both charges in the same proceeding. Jeffers was subsequently convicted of the lesser offense. At a later trial on the greater offense, his claim of double jeopardy was rejected. The Supreme Court affirmed in an opinion by Justice Blackmun, noting that, as was the case in *Dinitz*, Jeffers had simply elected to pursue one of the alternatives available to him. He could have allowed the two charges to be joined in one proceeding wherein he could have requested that

75. 424 U.S. 600 (1976).
76. Id. at 609 n.11.
77. See the Court's discussion, id. at 608-11.
the jury receive a lesser included offense instruction. Instead, he requested separate trials and thereby lost his right to raise a jeopardy issue at the second proceeding.

And so it is that the criminal practice in the federal courts is tangled with the interwoven threads of complex jeopardy questions for which there are many vague guidelines but few clear answers. This tangle, sadly enough, is not limited to the federal practice.

(4) The Jeopardy Rules as Applied to the States—In 1937, the Supreme Court decided the landmark case of Palko v. Connecticut. Palko, although indicted for first degree murder, had been convicted of murder in the second degree after a jury trial in Connecticut state court. The state appealed and won a new trial. Palko argued that the fourteenth amendment requirement incorporated, as against the states, the fifth amendment requirement that no person "be subjected for the same offence to be twice put in jeopardy of life or limb." The Supreme Court disagreed, holding that federal double jeopardy standards were not applicable against the states; only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our policy will not endure it" did the fourteenth amendment apply.

The Palko standard was applied until 1969, when the Court expressly overruled Palko in Benton v. Maryland. Benton involved a Maryland state court trial on charges of burglary and larceny. The jury found John Benton not guilty of larceny but convicted him of burglary, for which he was sentenced to ten years in prison. Because both the grand and petit juries in the case had been unconstitutionally selected, the Maryland Court of Appeals remanded the case to the trial court, where Benton was given the option of demanding reindictment and retrial, which he did. At the second trial, again for both larceny and burglary, Benton's motion to dismiss the larceny charge as subjecting him to double jeopardy was denied. He was found guilty of both offenses and given concurrent sentences of fifteen years on the burglary count and five years on the larceny count. Benton's double jeopardy claim was rejected by the Maryland Court of Special Appeals, and the Maryland Court of Appeals denied review.

In a decision consistent with the clear and undeniable trend of

80. Id. at 328.
applying specific guarantees of the Bill of Rights to the states through the fourteenth amendment, the United States Supreme Court reversed, holding that the states are constrained by the double jeopardy clause of the fifth amendment. While the Court's position on this issue met with no little resistance from Justices Harlan and Stewart, their vigil is a lonely one and it appears certain that state practitioners will continue to be confronted with the same complex constitutional questions that have constantly commanded the concentration of the Supreme Court whenever it has entered the jeopardy arena.

B. The Law of Jeopardy—The Way It Is

In its October, 1977 term, the Supreme Court handed down an array of five decisions which substantially affects the law of jeopardy as it is currently perceived. The first four of these decisions have the effect of reinforcing a criminal defendant's jeopardy protection and broadening the scope of that protection as it is applied in state criminal proceedings. However, continuing the confusion, the fifth decision hedges on this expansive trend and reasserts society's right to vigorous prosecution.

In Burks v. United States, the Court limited an appellate court's options where it had reversed a conviction for lack of sufficient evidence to sustain the jury's verdict. At Burks' trial in United States District Court for the crime of bank robbery, his principal defense was insanity. Before the case was submitted to the jury, the district court denied a motion for judgment of acquittal. The jury subsequently found Burks guilty as charged. He then filed a timely motion for a new trial on the ground that the evidence was insufficient to support the verdict. This motion was denied by the district court, but the United States Court of Appeals reversed the conviction (holding that the United States had not fulfilled its burden of proving sanity beyond a reasonable doubt) and, rather than terminating the case against the defendant, remanded to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered.

In a unanimous decision, the Supreme Court reversed the court

82. Id. at 801 (Harlan, J., dissenting).
84. 437 U.S. 1 (1978).
of appeals and shored up what had appeared to be a weakening double jeopardy protection. Writing for the Court, Chief Justice Burger said that when a conviction in a prior trial is reversed by a reviewing court solely for lack of sufficient evidence to sustain the jury’s verdict, the only just remedy is the direction of a judgment of acquittal, even where the defendant had sought a new trial as one of his remedies or as his sole remedy. Eschewing the concepts of “waiver” and the balancing of interests that had heretofore dominated double jeopardy controversies, the Court said, “where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no ‘equities’ to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.” It thus appears that a ruling by an appellate court that a conviction must be reversed because of a lack of sufficient evidence to sustain it joins a verdict of acquittal at the pinnacle of jeopardy protection.

As if to reinforce the already strong language of Burks, the Court next addressed nearly identical facts in Greene v. Massey. Greene, after being convicted of first degree murder, appealed his conviction to the Supreme Court of Florida. That court reversed his conviction and ordered a new trial, holding in a per curiam opinion that the evidence failed to establish beyond a reasonable doubt that Greene had committed murder in the first degree, and that the interests of justice required a new trial. Three of the four justices who had joined in the per curiam opinion filed a separate special concurrence, stating that the judgment should be reversed and remanded for a new trial because of trial error and agreeing with the per curiam opinion doing so. Greene was retried and convicted of first degree murder, after unsuccessfully contending in the state courts that the per curiam opinion was tantamount to a finding that the trial court should have directed a verdict of not guilty and, therefore, that a second trial would constitute double jeopardy. He subsequently appealed his second conviction in the state courts but was unsuccessful in that effort. Greene then brought his double jeopardy challenge to the United States District Court via a petition for a writ of habeas corpus. The district court dismissed his petition and the United States Court of Appeals affirmed.

85. Id.
86. Id. at n.6.
In an opinion by Chief Justice Burger, the bulk of which puzzled over the actions of the several Florida appellate courts, the Court reversed the decision of the United States Court of Appeals and remanded to that court for a determination of what ground the Florida Supreme Court's ruling was based upon. The Court noted that if the Florida Supreme Court's decision was, in fact, based upon lack of sufficient evidence to sustain the conviction, then the rule announced in *Burks* required that the state be precluded from subjecting Greene to a second trial.

The idea that, as in *Greene*, the jeopardy rules should be binding upon the states was reinforced and enlarged upon in *Crist v. Bretz*. That case involved a Montana criminal trial where, after the jury was empaneled and sworn, but before any witnesses were sworn, the trial court granted a prosecution motion to dismiss the information. A second information, not containing the error for which the first information had been dismissed, was then filed. After a second jury had been sworn, the defendants moved to dismiss the new information, claiming that the double jeopardy clauses of the United States and Montana Constitutions barred a second prosecution. The motion was denied and the Supreme Court of Montana denied habeas corpus relief on the ground that a Montana statute provided that jeopardy does not attach until the first witness is sworn. After the defendants were convicted in a second trial, they brought a habeas corpus proceeding in United States District Court, alleging that their convictions had been unconstitutionally obtained because the second trial violated the fifth amendment guarantee against double jeopardy as it is applied to the states. The district court denied the petition, but the United States Court of Appeals reversed, holding that the federal rule that jeopardy attached when the jury was empaneled was an integral part of the constitutional guarantee, and thus was binding on the states under the fourteenth amendment. The Supreme Court affirmed the court of appeals, noting that the federal rule reflects and protects the defendant's interest in retain-

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89. MON. REV. CODES ANN. § 95-1711 (3) (1947) provides in pertinent part:

[A] prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances: . . . (d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict . . . .
ing a chosen jury and is therefore at the core of the double jeopardy clause. Accordingly, the Court held that the Montana statute, which attempted to provide a different rule as to when jeopardy attaches in jury trial, was impermissible under the fourteenth amendment. While the facts of this case involved a jury trial, it seems clear that the federal rule as to when jeopardy attaches in a bench trial is similarly binding upon the states.

In the next case, *Sanabria v. United States*, the Court struggled with the proper characterization of a trial court ruling for purposes of double jeopardy protection. Sanabria had been charged, along with several others in a single count indictment, with violating a federal statute by participating in a gambling business involved with numbers betting and betting on horse races in violation of a specified Massachusetts statute. After the close of the government’s case in United States District Court, Sanabria moved for an acquittal, arguing that the government had failed to prove that there was a violation of the state statutory section as alleged in the indictment. That statute, as construed by the state courts, did not prohibit numbers betting but applied only to games of competition such as horse races. The district court denied the motion, but after the defendants had rested, granted a motion to strike all evidence of numbers betting, apparently believing such action to be required by the indictment’s failure to set forth the proper state statute. Sanabria then moved for a judgment of acquittal, arguing that there was no evidence to connect him with the horse betting activities. The district court granted this motion. On the government’s appeal under the Criminal Appeals Act of 1970, from the order excluding the numbers betting evidence and from the judgment acquitting Sanabria, the United States Court of Appeals vacated the judgment of acquittal and remanded the case for a new trial on the numbers betting charge. In reaching this result, the court of appeals found that it had jurisdiction of the appeal from the dismissal on the numbers betting charge under the provision of the Criminal Appeals Act which authorized government appeals from orders dismissing an indictment as to any one or more counts, since the district court’s action constituted a dismissal of the numbers charge, and that there was no double jeopardy bar to a new trial, since Sanabria had voluntarily terminated the proceedings on the numbers portion of the count by moving, in effect, to dismiss it.

In an opinion by Justice Marshall, the Supreme Court reversed the court of appeals. Backing away from the position established in Martin Linen, Justice Marshall noted that the form of the proceedings and the district court's subsequent ruling were not controlling but, nevertheless, could not be entirely ignored. Under the facts of this case, Justice Marshall reasoned that the government's undisputed theory had been that there was a single gambling business, which engaged in both horsebetting and numbers betting. With regard to this single business, participation in which was concededly only a single offense, Sanabria had been acquitted. Taking the next logical step, Justice Marshall said, "Where a trial terminates with a judgment of acquittal, as here, 'double jeopardy principles governing the permissibility of retrial after a declaration of a mistrial' . . . have no bearing." 91

The prospective effect of the Court's ruling in this case is not clear. While the decision, like others in this area, is probably sharply limited by the facts of this case, the Court seems to have deepened the shadows originally cast by Martin Linen. Furthermore, the decision intimates, over the strenuous objection of Justice Stevens, 92 that the Criminal Appeals Act allows government appeal from the dismissal of a portion of a count, provided that the portion establishes a discrete basis of liability. Query whether that result complies with the strict construction traditionally applied to criminal statutes.

In the latest reconsideration of the balance between the accused's rights and society's interest in the vigorous prosecution of crime, the Court retreated from its previous position established in Jenkins, and held in United States v. Scott 93 that it had overemphasized "the defendant's right to have his guilt decided by the first jury empaneled to try him so as to include those cases where the defendant himself seeks to terminate the trial before the verdict on grounds unrelated to factual guilt or innocence." 94 Scott, charged in a three count narcotics indictment, moved, both before his trial in United States District Court and twice during trial, to dismiss two of the counts on the ground that his defense had been prejudiced by preindictment delay. At the close of all the evidence, the court granted the motion. The government sought to appeal the dismissal of the

91. Id. at 75.
92. Id. at 78 (Stevens, J., concurring).
94. Id. at 87.
two counts to the United States Court of Appeals. The court of appeals, relying on Jenkins, concluded that any further prosecution of the defendant was barred by the double jeopardy clause and therefore dismissed the appeal.

In an opinion by Justice Rehnquist, the Supreme Court reversed the court of appeals. Finding that Scott had sought to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, the Court held that the government's appeal invaded no interest protected by the double jeopardy clause and was therefore not barred by the Criminal Appeals Act.

The strong dissent of Justice Brennan, joined by Justices White, Marshall, and Stevens, argued that Jenkins should not be overruled and that the principle that an appeal of a midtrial termination did not lie if a reversal would require further proceedings devoted to the resolution of the factual issues relating to the offense charged was vital to the values protected by the double jeopardy clause. Perhaps the stage has been set for a return to the Jenkins rule. After all, nothing in the history or language of the Clause has changed. To paraphrase Justice Black's dissatisfaction with the overruling of Sinclair Refining Co. v. Atkinson in Boys Markets, Inc. v. Retail Clerks Union Local 770, "Nothing at all has changed... except the membership of the Court and the personal [views of the Justices]."

With these five decisions, the Court has significantly altered the robes of public policy and constitutional theory that cloak the jeopardy protection with all its stately stature. But are these robes even yet capable of covering all the contortions that a jeopardy issue can assume? And what if a jeopardy issue does expose itself—what tactics should trial counsel consider on spotting the rise of this regal rump?

IV. THE RISE OF THE REGAL RUMP

The professional life of a prosecutor and of criminal defense counsel has never been and, perhaps, should never be one of calm and tranquility. Without stress and strain, anguish and anger, each exchanges his crispness and clout for shuffling and stumbling. Potentially treacherous trails remain open in the jeopardy enclave which beckon the unwary, tempt the timid, and challenge the cautious. Special and specific spheres of strategy are to be explored, employed, or ignored, not the least of which are:

95. Id. at 102 (Brennan, J., dissenting).
(1) A practical recognition of same offense.
(2) The protection of what is recognized as same offense.
(3) The effective use of new trial motions.
(4) The pursuit of trial terminating defects which fall short of true acquittal.
(5) The prevention of serial prosecutions in separate sovereigns.

A. Same Offense

What the Supreme Court has found appropriate to give explanation of, meaning to, and vitality for the fifth amendment words, "same offense," is a natural blending of the included offense doctrine with all the acquired, available, usable proof. This approach is designed to preserve and satisfy jeopardy guarantees, for allegedly it gives guidance and direction to the disposition of multiple count and multiple charge causes. The principle requiring combination of crime elements and proof of facts further means that fifth amendment, "same offense," includes both the limiting of prosecution and punishment. Easy it is to recite this rule and easier still is it to state and comprehend included offense regulation. A mere comparison and contrasting of crime elements is all that is required to determine whether or not one crime is included in another. If certain or some, but not all elements of the crime charged in and of themselves constitute a defined offense, the included offense rule is satisfied. When all of the elements of a separate offense are contained

97. U.S. Const. amend. V.
99. Harris v. Oklahoma, 433 U.S. 682 (1977); In re Neilson, 131 U.S. 176 (1889); Ky Rsv.
Stat. § 505.020 (1975) which states:
Prosecution for multiple offenses.—(1) When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when:
(a) One offense is included in the other, as defined in subsection (2); or
(b) Inconsistent findings of fact are required to establish the commission of the offenses; or
(c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.
(2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
(c) It differs from the offense charged only in the respect that a lesser kind of culpa-
in the crime charged, then the same evidence proves both the charged and the uncharged offense. The included offense/same evidence test makes good sense, a good final result, we, at first blush, say. For if, in the same kingdom, a single act or transaction appears to violate two or more separate and distinct statutes, we need simply to decide whether each law demands proof of an element—a fact—which the other does not, to reach the conclusion that multiple prosecutions and multiple punishments are or are not constitutionally tolerated. But ease of recitation and understanding and ease of application are often at opposite ends of the poles and such is the present case. The same evidence test, which was conceived in 1932, is not free from contamination and murkiness, and it is not the answer to the lawyer's prayer. Its disagreeable qualities include an open invitation for crime re-definition by legislatures, it cannot be applied to multiple victim cases, it is to be ignored where successive trials result from the action or inaction of the criminally accused, and it has no chilling effect on the dual sovereignty doctrine.

The crimes charged separately in Brown are noteworthy. For if joyriding was "a separate offense for each day in which a motor vehicle is operated without the owner's consent," the Court acknowledged "we would have a different case." Thusly stated is the judicial invitation to dissect criminal activity, to make ever smaller acts characterized as criminal and the vesting of lawmaking bodies with complete authority to avoid the same evidence test of same offense, by defining new or redefining old crimes. Legislative intent was a major interest and concern before Brown's adoption of the same evidence rule. Ianelli v. United States found the Court concluding that a legislative awareness of the nature and severity of certain offenses coupled with the desire and decision to treat one act as two separate offenses allows multiple prosecutions. The substan-

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bility suffices to establish its commission; or
(d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

100. Sherley v. Commonwealth, 558 S.W.2d 615 (Ky. 1977); Muse v. Commonwealth, 551 S.W.2d 564 (Ky. 1977); State v. Ikner, 44 Ohio St.2d 132, 339 N.E.2d 633 (1975); State v. Best, 42 Ohio St.2d 530, 330 N.E.2d 421 (1975).


tive offense of operating, managing, and conducting a gambling enterprise and the conspiracy to engage in illegal gambling are separate offenses, the Iannelli Court ruled, and each may be prosecuted and punished. Wharton’s Rule,\textsuperscript{104} that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two persons for its commission, is only a judicial presumption and “an aid to the determination of legislative intent.”\textsuperscript{105} No jeopardy principle is involved. Since, to establish a conspiracy, proof of an agreement is essential, the substantive offense which does not require proof of an agreement, even where two are needed to commit it, is separate and apart and the same evidence test permits multiple prosecutions. There is that additional fact, the existence of the agreement, and thereby the crimes are not, by any test or standard, the same offense. Reason suggests that far closer judicial scrutiny of legislative intent and a sharper zeroing in on multiperson substantive provisions is bound to occur. Cautious drafting of statutes to provide for an additional element or fact and an avoidance of the same evidence test is to be anticipated. Under existing organized crime/criminal syndicate and conspiracy statutes,\textsuperscript{106} prosecutors are not to be denied the right twice to try and twice to convict, and the cry of jeopardy falls on deaf ears.

The identity of each crime victim is surely proof of an additional

\textsuperscript{104} 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932).
\textsuperscript{105} Iannelli v. United States, 420 U.S. 770, 786 (1975).
\textsuperscript{106} See, e.g., Ky. REV. STAT. § 506.040 (1975) (criminal conspiracy); Ky. REV. STAT. § 506.050 (1975) (conspiracy, general provisions); Ky. REV. STAT. § 506.120 (Supp. 1978) (criminal syndicate); Ohio REV. CODE ANN. § 2923.01 (Page Supp. 1978) (conspiracy); Ohio REV. CODE ANN. § 2923.04 (Page 1975) (engaging in organized crime), declared unconstitutional in State v. Young, No. C-780309 (Ct. App. Ohio, Apr. 4, 1979). But see Ky. REV. STAT. § 506.110 (1975) which states as follows:

**Multiple Convictions**-(1) A person may not be convicted on the basis of the same course of conduct of both the actual commission of a crime and:
(a) A criminal attempt to commit that crime; or
(b) A criminal solicitation of that crime; or
(c) A criminal facilitation of that crime; or
(d) A conspiracy to commit that crime, except as provided in subsection (2) of this section.

(2) A person may be convicted on the basis of the same course of conduct of both the actual commission of a crime and a conspiracy to commit that crime when the conspiracy from which the consummated crime resulted had as an objective of the conspiratorial relationship the commission of more than one crime.

(3) A person may not be convicted of more than one of the offenses defined in KRS 506.010, 506.030, 506.040 and 506.080 for a single course of conduct designed to consummate in the commission of the same crime.
and with co-defendants, Jeffers counsels that a severance of counts is the vehicle to both fair trial and assurance that jeopardy rights are not relinquished. To proceed otherwise is to prompt and promote separate trials about which one may not later complain. When confronted with separate indictments that contain charges which do or could fall within the included offense doctrine, failure to move to consolidate for trial or resistance to the opposition’s consolidation motion may well deny a future claim of jeopardy attachment, particularly where a degree of certainty of lesser included offense application is, or should be, obvious to counsel. The better course of action is to identify sharply the greater/lesser offense situation and to seek a single trial on all offenses so that blame for successive trials cannot be focused on the accused. What little consolation, if any, there is for him who twice or more walks the plank is the minimal guaranty against multiple punishments for the same offense. 109

Even the alert and informed defendant has been blessed with a choice between bad and worse. He may decide upon one multicount trial contaminated with prejudice and, therefore, unfair, but which preserves double jeopardy protections, or he may opt for two or more single count trials which are fair because they are stripped of prejudice but which promise and provide no jeopardy protections. Each route is potentially one of disaster and destruction and relief is not in sight.

C. The Demise of Peril in New Trial Motions

Habit, custom, and the expected generally guarantee the filing of a new trial motion and few of us, indeed, give consideration to, if in fact we knew, that until 1978, the mere fact of filing this pleading often accomplished exactly what it sought after appellate court reversal. The new trial motion had opened wide the door for the appellate court to order whatever relief was “appropriate” or “equitable” regardless of what considerations prompted reversal. 110 New trials could be and were ordered where the defendant requested, even where evidentiary insufficiency dictated the reversal. 111 Many a defendant was caught in this trap—a low, but nonetheless a ruled, fair blow was struck because the defendant invited it. Only when it was

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fact, and absent the Ashe collateral estoppel rule107 which prevents any reconsideration of an issue necessarily decided in a defendant's favor at the first trial, jeopardy has not attached at the conclusion of the first prosecution and the imposition of the first sentence. What is currently critical for counsel is not only an understanding of what is same offense but what probably will come of it and what now, if anything, is to be done with it. Even with the single offense charge, danger lurks. A plea of guilty thereto, without agreement, may well develop other law violations and serial penalties from which there is no escape. The meager answer is binding agreement with counsel and an effort to achieve it should never be ignored.

B. The Protection of the Recognized Same Offense

Jeffers v. United States108 decrees that separate prosecutions in the same sovereign for greater and lesser offenses are not constitutionally condemned when:

1. The facts which constitute the greater crime have not happened and do not exist when trial of the lesser offense has commenced;
2. Discovery of the greater offense was not had before the trial of the lesser crime despite reasonable effort and the exercise of due diligence;
3. The defendant moves for separate trials and, thusly, is the cause of multiple prosecutions; or,
4. The defendant in moving for separate trials fails to present the greater/lesser offense issue to the trial court for resolution and, instead, relies on the presence of prejudice and confusion.

The initial answers supplied by Jeffers prompt minimal concern and hoist no substantial burden on the criminally accused. While he does and should have interest in law enforcement, diligence in uncovering crime details he, alone, controls the events which make up the greater crime as well as the time when they be unveiled. Yet Jeffers awards to the criminal defendant who seeks to protect his jeopardy rights, tactical, testy pre-trial choices or obligations which must gravely concern him. In a multiple count indictment, a defendant who moves to sever and for separate trials now probably surrenders his jeopardy rights unless he timely presents and effectively argues that one offense either is, or could be, lesser or greater and included in the other. When faced with a multiple count indictment

too late did counsel realize and understand the folly of his practice. He had surrendered jeopardy support without the opposition firing a shot.

In *Burks v. United States*\(^{112}\) the Chief Justice, writing for the Court, noted specifically that many appellate opinions, since *United States v. Ball*,\(^{113}\) failed generally in distinguishing between trial error and weight of the evidence reversals and it was high time something was done about it. With one sweep of the pen, all prior cases which penalized new trial seeking defendants who won evidence insufficiency reversal by forcing them again to stand trial, were overruled.\(^{114}\) The Chief Justice stated tersely,

> [W]hen a Defendant's conviction has been overturned due to a failure of proof at trial, [it] means that the Government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.\(^{115}\)

Striking swiftly for the jugular, Burger said that the post conviction new trial motion does not "'waive' his right to judgment of acquittal,"\(^{116}\) and he laid to rest a maze of glaring, glowing inconsistency. The retrial reality or risk upon reversal for failure of proof has been flung into the discarded decisions dump and, with confidence, counsel may now file and effectively argue the new trial motion as part of his remedies and strategies in defending. While *Burks* addresses itself to reviewing courts, it is suggested that its principles are logically extended to trial court decision. Where and when it is seen that the jury should not have been given the case because of inadequate proof at trial level, new trial should not be ordered. In such cases, *Burks*' rule requires a judgment of acquittal. The troublesome, tantalizing and unresolved issue, which directly flows from *Burks*, revolves about the case where both trial error and evidence insufficiency simultaneously vie for appellate favor. The too easy and too obvious answer is that inadequate evidence weight would and should prevail. But what of those causes where the evidence insuffi-

\(^{112}\) 437 U.S. 1 (1978).
\(^{113}\) 163 U.S. 662 (1896).
\(^{114}\) Burks v. United States, 437 U.S. 1, 18 (1978).
\(^{115}\) Id. at 16.
\(^{116}\) Id. at 17.
ciency is directly traceable to or indirectly results from trial error? Consider, where substantial trial error, such as the unlawful sustaining of a defense suppression motion, denies the prosecution the sum total of all evidence which should have been received, is such trial error second and subservient to the strength of the evidence issue which is the illegitimate child of trial court mistake? Both reason and common sense dictate that reversal and re-trial in such cases is proper and nonviolative of jeopardy principles. What remains, however, is a locating of the line between substantial and inconsequential trial error. To the prosecution and defense alike this promises to be a thorny thicket, passages through which will be, at least, bloody.

D. True Acquittal

*Jenkins v. United States*\textsuperscript{117} found the Supreme Court saying:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .\textsuperscript{118}

And with that decision, whether or not a dismissal of an indictment after jeopardy had attached amounted to an acquittal on the merits, the government had no right to appeal, because “further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.”\textsuperscript{119} *Jenkins* survived for a meager three years and died on June 14, 1978, when *United States v. Scott*\textsuperscript{120} found the Court admitting that “our vastly increased exposure to the various facets of the double jeopardy clause has now convinced us that *Jenkins* was wrongly decided”\textsuperscript{121} because it “placed an unwarrantedly great emphasis on the defendant’s right to have his guilt decided by the first jury empaneled to try him so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence.”\textsuperscript{122}

\textsuperscript{117} 420 U.S. 358 (1975).
\textsuperscript{118} Id. at 370 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).
\textsuperscript{119} Id. at 370.
\textsuperscript{120} 437 U.S. 82 (1978).
\textsuperscript{121} Id. at 86-87.
\textsuperscript{122} Id. at 87.
Jenkins, an alleged draft dodger who sought and was refused conscientious objector classification, selected a bench trial to decide the government’s claims and his defense. All of the evidence was presented, the cause submitted, and sometime later the district court found for the defendant, reasoning that when Jenkins was ordered to report for induction, prevailing law entitled him to a postponement until the local board considered his conscientious objector claim, which it had not done. Though it was unclear whether the district court had dismissed or acquitted Jenkins on a resolution of the factual issues against the government, he was off the proverbial hook. Reversal and remand would have required some further resolution of factual issues going to the elements of the crime and such would violate the double jeopardy clause.

Scott, a Muskegon, Michigan police officer was charged in a three count indictment with distribution of narcotics. Pre-trial, he moved to dismiss two counts because of pre-indictment delay and twice, in trial, renewed the motion. At the close of all the evidence the court granted his motion and the jury acquitted him of the third count. The government appeal of the dismissal by the trial court was tersely dismissed by the Sixth Circuit Court of Appeals which found that under Jenkins further prosecution was barred. But Scott’s confidence and elation were shattered when the Supreme Court found that his further prosecution is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government’s case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

The lesson that we learn from Jenkins-Scott is that a determination of the prosecution in a defendant’s favor after trial is commenced and evidence taken is final only in those cases where the trial court has resolved a consequential, controlling issue of fact in the defendant’s favor. Trial court decisions on the law during trial in favor of a defendant and against the prosecution which terminate

the proceedings are not cause for the defendant to take heart and to celebrate victory—jeopardy has not attached.

Legal issues, including but not limited to indictment defect and denial of speedy charge and trial, are not now to be considered as mere time wasting tactics, though this is obviously the end result of Scott. The office of all is still to put the government to the task of doing it right and to insure that every conviction is without taint. For counsel, it is gravely important that the criminally accused understand that unless a true factual acquittal appears of record there is no jeopardy protection even though the government has rested its case. To allow less is effective misrepresentation.

E. Separate Sovereigns and Separate Prosecutions

Neither due process nor double jeopardy protections bar successive state-federal or federal-state prosecutions for a single criminal act which violates both state and federal laws. To many this rule is fundamentally unfair, oppressive, and violative of basic principles of justice. No satisfaction or consolation is found in the explanations that citizens do owe allegiance to two sovereigns, that the sovereignties derive power from different sources, and each sovereign has particular, peculiar, personal interest to serve and protect. State and national peace and dignity can be simultaneously offended and punishment administered by each government without trampling any right of one who has committed only one act or is involved in only one event or transaction. The double jeopardy doctrine is not offended by trials in different jurisdictions and neither conviction nor acquittal has an effect upon the rule. What has been said about the same evidence test for the same offense is of no consequence when and if separate sovereigns decide to prosecute. True it is that

128. Compare with Ky. Rev. Stat. § 505.050 (1975) which states:

Effect of former prosecution in another jurisdiction—When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

1. The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for an offense involving the same conduct unless:
the government's *Petite* policy, which urges federal-state cooperation and sparse use of federal prosecutions after state conviction or acquittal, is honored by the High Court. But in the absence of statute, states have the unfettered right to charge, convict and punish one who is fresh from federal conviction. That defendant who believes that his guilty plea to a federal charge isolates and insulates him from further wrath of state law either slumbers in a dream world or worse yet, has been deceived by counsel. Failure to consider the likelihood of successive prosecutions at different jurisdictions is unforgiveable. The defense counsel who neglects to confer with all prosecutors who could be involved, who leaves unexplored opportunities to secure commitments that serial prosecutions will not be instituted is hardly worth the title Defense Lawyer.

V. CONCLUSION

A bare majority of the United States Supreme Court found itself enlightened enough to discard *Jenkins* while all members of the Court appear bent on both close examinations and refinement of jeopardy issues. Distinctions, reconciliations, erroneous foundations, findings, and new significant interest determinations lurk in the future’s dark corners. The acknowledgement of *Burks* that “the present state of conceptual confusion existing in this area of the law” suggests that counsel who persist in “enlightening” the Court will, on each and every jeopardy concept, accomplish the same dismal, damaging losses the criminal defendant has lately suffered in the fourth amendment search and seizure sector. Vim and vigorous pursuits of those fact patterns which do not justify appellate review and cry out to be left alone should be recognized for exactly what they are—opportunities for the Court to meditate, modify, restrict, and retreat. We can, as we have, legally survive with inconsistencies. The burn off of fog from the heat of the sun often occasions our search for shade and the admission that we were far better sheltered by curtains and clouds.

(a) Each prosecution requires proof of a fact not required in the other prosecution; or.
(b) The offense involved in the subsequent prosecution was not consummated when the former prosecution began; or
(2) The former prosecution was terminated in a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution.


Lay people love to use legal sounding phrases without knowing what they really mean or how they may be construed by the courts. One of these frequently misused terms is the word "issue" which is often interpreted as a descriptive word for "children." Actually, at common law, "issue" was construed as meaning children, grandchildren, and all direct descendants. For example, at common law a limitation to A and his issue was construed as creating a fee tail in A. Another favorite lay phrase is "die without issue," as in the gift "to A and his heirs, but if A dies without issue, then to B and his heirs." The use of this phrase presents severe construction problems and has accounted for much litigation. This phrase seems to be the "key to the courthouse door" for devisees, legatees, relatives, and disappointed heirs. At common law, the above phrase "die
without issue" was construed as meaning an indefinite, not a definite failure of issue, i.e. when A's line of descendants runs out.133 This act is like a fee tail, and the early precedents construed the above language to create a fee tail in A with a vested remainder in fee in B.134 Also at common law, by a common recovery collusive suit, A could disentail the land and defeat the remainder.135 Later, this construction of the term as an indefinite failure of issue fell into disrepute and the pendulum swung to a definite failure of issue.136 The courts looked for any indication in the instrument that would lead to a definite failure of issue construction; so if the testator used the phrase "after his death," he ruled out an indefinite succession by pinpointing the time when B's remainder will take effect.137 Similarly, the courts picked on phrases such as "without leaving issue" or "leaving no issue behind him."138 In England, the indefinite failure of issue construction was finally laid to rest by statute in 1837.139 Historically, the American courts followed the English precedents in dealing with this construction problem until statutes passed in some thirty states made the construction definite.140 Here and there court decisions without the aid of statute adopted the definite failure of issue construction.141 Interestingly, some states still use the old common law formula of construction, including Arkansas,142 Indiana,143 and Maine.144

In Clore v. Nichols,145 the court was called upon to construe the phrase "die without issue" where the owner of land conveyed it to his wife for life, and then to his daughter Effie for life, and at her death to her bodily issue; and if Effie should die without heirs of her body, the title was to revert to the heirs of the grantor. Later the original grantor sought to reinvest himself with the title to the land.

134. Id. at 332; V AMERICAN LAW OF PROPERTY § 21.49 (A. Casner ed. 1952).
137. See Warren, supra note 133 at 335-336.
138. Id. at 336.
140. See Warren, supra note 133 at 337.
141. Moore v. Moore, 51 Ky. (12 B. Mon.) 651 (1851); Niles v. Gray, 12 Ohio St. 320 (1861); Parish v. Ferris, 6 Ohio St. 563 (1866).
143. Huxford's Adm'r v. Milligan, 80 Ind. 542 (1875).
145. 199 Ky. 581, 251 S.W. 846 (1923).
In an effort to do this, he and his wife conveyed the land by warranty deed to a third person. The third party, along with the original grantor’s wife and daughter, executed a deed of general warranty back to the original grantor. Subsequently, the original grantor died with his wife and daughter still residing on the land. At the time of his death, the daughter was married with three children. Suit was brought by the wife and daughter claiming as heirs. The court held that neither was entitled, inasmuch as their conveyance back to the father/husband affected the legal rights in the land derived from the original conveyance. By this decision, the court seemed to construe “issue” as “children.” The court, in dictum, added that the only way to divest title from infants is by the statutory remedy in equity.  

Inherent in the problem of construction of the phrase “die without issue” are the problems of when the issue will take and whether they must survive to take. In *Weber v. Schroeder*147 a mother devised land to her daughter, and after the daughter’s death to the daughter’s bodily heirs, the will declaring that the interest of the daughter is for and during her natural life; and in case the daughter should die without leaving bodily heirs, then there was a gift-over to the testatrix’ brothers and sisters. The daughter, plaintiff in the action, had a daughter, Ruth, who survived the testatrix but predeceased the plaintiff. The plaintiff contended that her daughter, Ruth, had only to survive the testatrix and, therefore, she died owning the remainder in fee which, upon Ruth’s death, passed to her mother, the plaintiff, by heirship. The court, however, rejected this contention stating that the testatrix intended a definite failure of issue at the death of the life tenant, and, therefore, Ruth’s failure to survive her mother divested her of any interest in the estate. The court held that, presumptively at least, the testatrix’ brothers and sisters were entitled to the remainder, but their interest could still be divested by the plaintiff having a child or children who would survive her at her death. In effect, the court construed “dying without issue” as requiring a wait until the death of the life tenant ancestor to see if the condition is fulfilled. So, the phrase means death before the life tenant, not the testatrix.  

147. 218 Ky. 442, 291 S.W. 739 (1927).  
The court of appeals applied the rule of *Weber v. Schroeder* in the case of *Rankin v. Rankin*,149 where a life estate was devised to A with a remainder to B, but if B dies without issue, then to C. B takes indefeasibly when he survives the life tenants. Here the court held that where an estate is devised to one for life, with remainder to another, with a provision that the property shall go to a third person if the first remaindeman die without issue, the condition of death without issue is restricted to death before the termination of the life estate.

A similar result was reached in *Perkins v. Clark*150 where there was a devise of a remainder to a surviving granddaughter with the heirs to take if the granddaughter died before or after the testatrix. The court held that the reversion of this defeasible fee was contingent only upon the granddaughter dying during the life of the life tenant. If the granddaughter lived to survive the life tenant, the fee in remainder became indefeasible. The court rejected the contention of the testatrix' heirs that the remainder was divested whenever the granddaughter died without issue, so that the fee in remainder became indefeasible upon the granddaughter's survival of the life tenant.

An allied problem of construction arises where the testator neglects to expressly state a particular disposition in the event of contingencies that are not provided for. These cases of incompleteness of disposition frequently occur.151 Typical of these cases is the following problem:

Testator devises to A, and provides that if A die without issue, then to B and his heirs. Thereafter A dies, survived by a son, S, and a wife, W, to whom A has devised all of his property. As among B, S, and W, who is entitled?

In this illustration, the testator has inadvertently left his plan or scheme of disposition incomplete. He has provided for what is to happen to the devise if A dies without issue, but the will is silent as to what will happen if A dies leaving issue, which is exactly what occurred. This precise situation came before the Ohio Supreme Court in *Anderson v. United Realty Co.*152 One possible solution was for the court to complete the disposition for the testator by implying

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149. 227 Ky. 69, 12 S.W.2d 319 (1928).
150. 242 Ky. 782, 47 S.W.2d 705 (1932).
152. 79 Ohio St. 23, 86 N.E. 644 (1908).
a gift in the son. That is, a gift by implication as if the testator had included the words “and if A dies with issue, then to such issue,” etc. The Ohio court refused to raise up a gift by implication on these facts, noting that A was given a fee simple and not a life estate, and construed the gift strictly: A took the fee, and it will be divested if and only if he dies without issue. The express divesting event did not occur, so A died vested with the fee which passed to his wife by his will. This construction makes much sense. If both A and B are heirs of the testator, to hold that he died intestate would permit B to take a bigger share of the estate then intended, since there was no express devise to A’s heirs, and B was to take only if A died without issue.

Sometimes, however, a court will find an implied gift in the limitations created by a testator where there is an instance of “incompleteness of disposition.” Thus, in Renaker v. Tanner,153 the father (testator) had devised separate tracts of land to each of his three children for life, providing further that if any of the children died without issue, then the land “must go to the survivors and their heirs for life.” There was, however, no express provision made in the testator’s will if the respective devisee’s children should die with issue living. The court had no difficulty in finding a gift by implication to the children (issue) of each devisee as to the remainder, so that each of the testator’s children took a mere life estate with remainder to their children in fee as members of a class which could not be determined until the devisees’ deaths. Specifically here the issue was whether the daughter, during her lifetime, could convey good title. The argument accepted by the Ohio courts in Anderson v. United Realty Co.,154 that the remainderman (who was subject to the limitation) took a fee simple subject to divestment only if she had no issue, was made in the Renaker case. This argument, however, cannot succeed on the facts of Renaker, because the remaindersmen were given only life estates. The lower court did hold that the daughter and her children could pass a fee, i.e. convey good marketable title, but the Kentucky Court of Appeals reversed this holding.

Ironically, the testator instructed his children in the will involved in Renaker “to keep away from all courts as far as you can.” But with an incomplete will left behind, resort to the courts was impera-

153. 260 Ky. 281, 83 S.W.2d 54 (1935).
154. 79 Ohio St. 23, 86 N.E. 644 (1908).
tive, as the testator left a severe problem of construction because of the incompleteness of disposition.

Another "dying without issue" gift had to be resolved by the courts in *Pegram v. Kaufman*. In this case, the testator devised realty to his wife for life, and at her death, to a certain niece. There was added a provision that if the niece "died without issue," then the land was to revert back to the testator's heirs. The elision here is patent: No provision was made for disposition in the event the niece died with issue. In solving this case, the court fell back on an old rule of construction holding that what the testator meant was that if the niece died without issue during the lifetime of the wife, then the reversionary interest would activate. When the wife died with the niece surviving her, the gift became indefeasible and absolute in the niece. The niece survived the life tenant by twenty years, and, although she died without issue, she left a will by which she devised the land to her husband. The court held that the fee, which had vested absolutely in the niece at the wife's death, passed to her husband by her will, thereby rejecting the contention of the testator's heirs that the phrase "dying without issue" meant dying at any time without reference to whether she had survived the life tenant. In this holding, the Kentucky Court of Appeals declined to apply a Kentucky statute:

> Every limitation contingent upon a person dying without heirs, etc. shall be construed a limitation to take effect when such person shall die . . . unless a different intent be plainly declared in the will.

According to the court, this statute had no application to these facts where the estate in remainder to end upon the devisee's death without issue is preceded by a life estate. According to the court the purpose of this statute was to change the common law construction of "dying without issue" from an indefinite failure of issue (when the devisee's line runs out) to a definite failure of issue construction in cases such as, O to A and his heirs, but if A dies without issue, then to B and his heirs. Further, the court stated that the statute would not apply when the testator, by his will, evinces a contrary intention. And here the testator intended some form of substitutiohal gift, i.e., if my niece is not alive at the death of my wife, and she dies without issue, then the land shall revert back to my heirs. If my niece does survive my wife, she will get absolute title regard-

155. 261 Ky. 50, 86 S.W.2d 1042 (1935).
less of whether she later dies without issue. It is to be noted that the problem of whether to invoke the implied gift to issue doctrine will not arise unless the niece dies during the lifetime of the wife, "leaving issue." The majority of cases is in accord with the Pegram holding.\textsuperscript{157} In the familiar limitation "to A for life and if A dies without issue, then to B and his heirs," where A dies leaving issue, the Kentucky courts have found gifts by implication to the issue of A in several cases.\textsuperscript{158} But if the devise is "to A but if A dies without issue, then to B and his heirs," Kentucky precedent requires that A take a defeasible fee subject to defeasance upon his death without issue, B taking then by way of an executory devise and not by implied gift.\textsuperscript{159} But if the limitation can somehow be construed to devise only a life estate in A as the testator intended, the stage is set for a gift by implication by way of an "unexpressed remainder."\textsuperscript{160}

The court followed the Pegram rule in \textit{Ashland Oil & Refining Co. v. Rice},\textsuperscript{161} where the testator devised the residue of his estate to his wife for life, and on her death, to three named children, providing that in case any one of the children should die without issue, then the estate is to be divided equally between the heirs of his body. The court here held that the reference to the death of the children without issue was restricted to their death during the tenure of the life tenant. When all three children survived their mother, their interests in the land vested irretrievably, indefeasibly and absolutely, even though one of them, Karen, was childless. After their mother's death, one of the children died devising her interest in the land to her sister, Karen, and when a brother died survived by children, he having previously conveyed his interest after the death of the mother to Karen, Karen ended up with good title which she could convey to a grantee in fee.

An implied gift may also be found where there is a devise to the testator's widow for life, or until she remarries, "and upon her remarriage to B and his heirs." If the widow dies unmarried, by the

\begin{itemize}
\item \textsuperscript{157} See 69 Corpus Juris § 1333.
\item \textsuperscript{158} Vittitow v. Keene, 265 Ky. 66, 65 S.W.2d 1083 (1936); Renaker v. Tanner, 260 Ky. 281, 83 S.W.2d 54 (1935); Bowne v. Johns, 233 Ky. 448, 26 S.W.2d 13 (1930); Froman v. Froman, 175 Ky. 536, 194 S.W. 809 (1917).
\item \textsuperscript{159} Cleveland v. Cleveland, 5 Ky.L.Rep. 56 (1883); Accord, Thurman v. Northwestern Mut. Life Ins. Co., 245 Ky. 281, 53 S.W.2d 668 (1932); Fox v. Van Fleet, 160 Ky. 796, 170 S.W. 185 (1914); Elkins v. Thompson, 155 Ky. 91, 159 S.W. 617 (1913).
\item \textsuperscript{160} Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948).
\item \textsuperscript{161} 383 S.W.2d 369 (Ky. 1964).
\end{itemize}
majority view, B will take the fee, as the intention of the testator is construed such that the remainder shall take effect upon the termination of the life tenancy by death as well as by marriage, although the testator did not say so in his will. Kentucky followed this majority view and raised gifts by implication in such cases. However, the "death at any time" rule, as dictated by section 381.080, is applied by the Kentucky courts to create a defeasible fee where the devise is a direct gift in the present (i.e. there is no intervening estate), there is no other period to which the limitation could refer, and no other intent is apparent in the instrument creating the estate. In Atkinson v. Kern, the testator gave the residue of his property to a son and daughter, but provided that if "my daughter should marry and die without heirs, then her portion of my estate is to go to her brother. The court applied section 381.080 and held that since this was an immediate gift, the daughter's interest was defeasible should she die at any time without issue. The court rejected the argument that "dying without issue" in this instance meant dying during the life of the testator, for in this event, the testator could have changed his will.

In accord with Atkinson is Lightfoot v. Beard, where again there was a direct immediate gift to the testator's children with a gift over if any child should die without children. The court held that the defeasance clause operates regardless of when the children die, and it is not enough to prevent divestment that a child survive the testator.

This type of construction problem is severe, for we do not know what the testator intended. If he wrote his own will, his ignorance of proper terminology to effect the desired disposition is understandable, but if the instrument was lawyer-drawn, there is no excuse for such an ambiguity. Did the testator really mean that a child should lose his or her share in the estate if he or she dies after the testator, married, but having no children? A careful interview might have revealed that the testator meant for the child to lose his or her interest only if he or she fails to survive the testator.

Again following Atkinson, the court in Littell v. Littell, applied the death at any time construction. Here a devise was made to

162. Taylor v. Taylor, 266 Ky. 375, 99 S.W.2d 201 (1936); Aulick v. Wallace, 75 Ky. (12 Bush) 531 (1877).
163. 210 Ky. 824, 276 S.W. 977 (1925).
164. 230 Ky. 488, 29 S.W.2d 90 (1929).
165. 232 Ky. 251, 22 S.W.2d 612 (1929).
testator's son and his bodily heirs, but if the son should die without issue, then to the son's brothers and sisters. The court held that the son's death at any time would defeat and divest his defeasible fee, rejecting the contention that the son took a fee tail converted by statute to a fee simple estate.

In the case of Fulton v. Teager, the court answered the question of whether a provision "dying without children" constituted a cloud on the title in a suit for specific performance. The case had its origin in a will which devised land to the testator's wife for life, with a remainder to his son and a niece in equal shares, with a provision that if the niece died unmarried and without children during the life of the wife, the land was to revert to the wife for life with the remainder to the son. The court held that the state of the title immediately upon the death of the testator, when all the beneficiaries were alive, was: Wife had a life estate, vested remainders in son and niece in fee as co-tenants, with the son having a vested remainder in fee as to a one-half undivided interest in land, and the vested remainder in fee in the niece was subject to divestment by way of executory devise in favor of the son in fee upon the niece's dying unmarried and without children during the tenure of the wife's life estate. So, when the son purported to convey his interest, joining in the deed with the wife and niece with covenants of warranty, they could pass good title; and in their suit for specific performance where the purchasers claimed the grantors did not have good title, the court enforced the contract. The court said that the son had a saleable interest under Kentucky law; and since the deed was joined in by his mother and the niece, they could convey good title, estopping the son and his heirs from claiming any interest in the event the contingency happened later. This is good solid law, and the court would not consider this as a sale of a mere expectancy because of the vested interest in the land held by the son as remainderman. The testator had the good sense to state expressly the limitation as to the time the niece's interest would cease by dying unmarried and without children, the express limitation being during the life of the testator's wife, the life tenant.

E. Will "Children" Include Grandchildren?

Ordinarily, the terms "child" or "children" in a will, absent some indication to the contrary, will not be construed to include grand-

166. 183 Ky. 381, 209 S.W. 535 (1919).
children. But in *Hodge v. Lovell's Trustee*, it was held that it would when such a construction would carry out the testator's intentions, when the will would be ineffective without such a construction, or when the statutes require such a construction. In this case, the testator's will created a trust for his widow, and upon her death, the remainder was divided into three separate trusts for each of his daughters. Each daughter took a life estate, and on the death of each, a gift over to their "child or children, the issue of the body of the one so deceased;" and if none, that one third was to form a trust corpus for the benefit of the other daughters. One of the daughters died with no living child surviving her, but a grandchild of the issue of her body did survive. Another daughter died leaving no issue. The contest was between the surviving daughter and the great-grandchild of the testator. The court held in favor of the great-grandchild, saying that presumptively the word "children" means "immediate offspring," but this presumption must yield to a construction of inclusion of grandchildren when to do so will carry out the testator's dispositive scheme and intentions.

The court was aided in its construction by a specific provision in the will under consideration: "or if any one or more of them [testator's daughters] be then dead [at death of life beneficiary] leaving children to survive him or her then the child or children the issue of the body of the one so deceased shall take the share that would have gone to their deceased parent or ancestor." The court hangs its hat on the phrase "or ancestor" to conclude that the testator intended to include grandchildren as well as children.

In agreement with the *Hodge* case is *Tucker v. Tucker*, where a similar construction resulted due to a Kentucky statute, which provided that "children" will include grandchildren "when there are no children, and no other construction will give effect to the devise."

Therefore, a well-tailored will should carefully define all significant terms therein, for example:

"Children." The use of the word children in this will shall be construed as meaning any child or grandchild or great-grandchild of the testator whether naturally born or legally adopted.

A peculiar and unusual construction problem was presented to

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168. 252 Ky. 509, 90 S.W.2d 683 (1936).
169. *Id.* at 512, 90 S.W.2d at 685 (emphasis added).
170. 259 Ky. 361, 82 S.W.2d 458 (1938).
the court in the case of *Bourbon Agricultural Bank & Trust Company v. Miller.* 172 A testamentary trust was created in favor of the testator's son for life, and on his death, the trust corpus was to be conveyed to the son's children or descendants. By codicil the testator devised some after acquired realty to the trustee with a provision that one half thereof was to be applied to the testamentary trust and one half was to be held in trust for the testator's wife for life, with remainder to be administered in accordance with the terms of the trust created for the son's benefit. The codicil also contained the provision that if the son died without children or descendants of the body and the testator's wife survived, the remainder in the trust corpus was to go to the wife. Both the son and the wife survived the testator, but the wife predeceased the son, who died leaving no children or other descendants. A controversy arose between the heirs of the wife and the heirs of the son; and the court determined that the heirs of the son were entitled because the son, as sole heir of his father, took a reversionary interest subject to divestment if he left descendants. Since the son died without leaving children or descendants, the divesting clause never applied, and the son's interest became indefeasible allowing title to his heirs at his death.

A similar result was reached in *Newton v. Southern Baptist Theological Seminary,* 173 where a devise was made to the testator's daughter, the sole heir of the testator, by way of a remainder if she survived the life tenant. The daughter died during the life of the life tenant, leaving a will devising all of her property to a seminary. The court held that the seminary was entitled, since the ineffectual devise went by intestate succession to the daughter as sole heir, which in turn passed by her will regardless of whether she survived the testator. 174

**F. When Will the Future Interest Accelerate?**

A problem that frequently arises before the courts is where a life estate with a remainder is created, and, for some reason, the life tenant renounces raising a construction problem as to whether the creator of the interests intended for the future interest holder to wait until the death of the life tenant to possess or enjoy, or whether the remainder person's interest will be "accelerated" to allow immedi-

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172. 205 Ky. 297, 265 S.W. 790 (1924).
ate enjoyment because the creator of the interest made no provision for a renunciation. This occurs sometimes when the testator gives a life estate to his widow, and the widow renounces her rights under the will to elect to take her statutory share. A review of the cases elsewhere reveals that the courts will generally find an intent that the future interest be accelerated on the theory that the testator only intended to preclude immediate enjoyment by the remainderman during the existence of the life estate. 175 If by acceleration the remainder person will "get more" than he is entitled to, the court will sometimes sequester the life estate for the benefit of residuary beneficiaries who would otherwise be disappointed. A renunciation of a life interest, of course, can upset a well-planned estate disposition scheme, so a testator should always make certain that his spouse will get more from the will than she or he would by a renunciation of the gifts in the will.

The Kentucky Court of Appeals, in Sisters of Divine Providence v. Whalen, 176 held that the testator intended an acceleration of the future interest. However, in an old Kentucky case, Augustus v. Seabolt, 177 the court refused to accelerate the interest of the remainderman where a testator had devised a life estate to his wife and a remainder to the children of his brothers living at his wife's death. Further, the wife was to retain the life estate only so long as she remained unmarried. The widow remarried, and the court held that it was not the testator's intention that the remainder interest of his nephews and nieces accelerate, since he expressly limited the future interest to those children "living at the time of her death."

IV. POWERS OF APPOINTMENT

A review of the pertinent litigation over powers of appointment reveals that the Kentucky courts are generally in agreement with other American courts. There are, however, some exceptions. For example, Kentucky still applies the doctrine of illusory appointment 178 which has been abandoned in England 179 and in many American courts 180 as impossible to apply. It is the feeling in England and in American courts rejecting the illusory appointment doctrine that

176. 524 S.W.2d 631 (Ky. 1974).
177. 60 Ky. (3 Metcalf) 155 (1860).
178. 2 Geor. IV and I William IV, ch. 46 § 1 (1830).
179. 37 & 38 Victoria Cap. 37 (1874).
there is no real measure applicable to determine whether a particular exercise of a nonexclusionary power is capricious and arbitrary. This problem arises only when the power of appointment is deemed to be nonexclusive, in other words, if the power is created in terms imposing a duty to give something to each class member. The Kentucky court determined that since it could not abolish the distinction between exclusive and nonexclusive powers of appointment, it could not do away with the doctrine of illusory appointment, which invalidates the illusory appointment and requires that each potential appointee of a nonexclusive power get "a substantial share" of the fund to be appointed.181

Another departure of the Kentucky courts from generally accepted law of powers is found in the rule that an unpaid creditor of a donee of a general testamentary power cannot reach the appointed property in the hands of the appointee to satisfy the donee’s unpaid debts.182 In *St. Matthews Bank v. De Charette*183 the donee of a general testamentary power exercised it in favor of appointees and died leaving unpaid debts and a personal estate “insufficient, by a large sum”184 to satisfy her debts. The donee’s unpaid creditors sought to reach the assets subject to the power exercised by the donee to satisfy the donee’s debts. The Kentucky court rejected the contentions of the creditors on the ground that the appointed assets were not the property of the donee.

A troublesome area for the courts is a determination of whether the donee intended to execute the power by his will. At common law, in order for a power to be properly exercised, there had to be a reference to the power in the will, or a reference to the property which is the subject matter of the power, or the provisions of the will would otherwise have been ineffectual unless an intention to exercise the power was deduced from the will.185 Generally, it is held that a bequest of the testator’s residue alone is not an exercise of the power.186 This area was clarified for the Kentucky courts by the adoption of Kentucky Revised Statutes section 394.060:

181. Barret’s Ex'r v. Barret, 166 Ky. 411, 179 S.W. 396 (1915).
183. 259 Ky. 802, 83 S.W.2d 471 (1935).
184. 259 Ky. at 808, 83 S.W.2d at 473.
186. RESTATEMENT OF PROPERTY § 343 (1940); *In re Froestler’s Will*, 232 Iowa 640, 5 N.W.2d 922 (1942).
A devise or bequest extends to any real or personal estate over which the testator has any power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of such power, unless a contrary intention appears in the will.\textsuperscript{187}

In \textit{McGaughey's Administrator v. Henry},\textsuperscript{188} the court held that a failure to exercise a special power to appoint to any one or more of the testator's children resulted in an implied gift to them as devisees. Here, the testator devised lands to his wife for life for her exclusive benefit, to be disposed of in any way she may think proper as a life interest, and, at her death or before, to any one or more of his children as she may believe most worthy or needy. The wife died shortly after the testator, having made no disposition of her husband's estate. The court held that each of the testator's children took equal shares in his lands, taking not by intestacy, but under their father's will. The court based its application of the "implied gift" theory on the fact that there was no gift over in default of appointment. This would appear a weak indication that the donor intended to confer mandatory duties of execution on the donee in light of the guidelines he gave concerning the exercise of the power which rested in the donee's belief as to worthiness and need. Perhaps the wife found none of the testator's children worthy or in need. Had the testator intended to have his children share in the estate after the death of his wife, he would have had no reason to create a power in the wife. Certainly, where the power of disposition is given to the mother, the children will be less solicitous of her welfare if they knew they would share in the estate whether or not they were "worthy" children or in need.

An unusual formulation of a power was created in \textit{Dudley v. Weinhart},\textsuperscript{189} where the testator made certain specific bequests followed by a provision permitting his wife to "change or cancel any such disposition by an instrument in writing attested by two witnesses." Before the gifts became effective under the terms of the will, which was thirteen days after the will was probated, the wife exercised her "right" to revoke and cancel her husband's disposition. Apparently, the domination of the testator by his wife persisted even after his death. The court of appeals quite correctly deter-

\textsuperscript{188} 54 Ky. (15 B.Mon.) 383 (1854).
\textsuperscript{189} 93 Ky. 401, 20 S.W. 308 (1892).
mined that the testator had given the wife a power of appointment, the exercise of which served to defeat the dispositions made in the will. The court rejected the argument that the power was an invalid attempt to change a will other than by strict adherence to statutory revocation requirements. The lower court had voided the power on this basis because in other parts of the will, the testator had made ample and generous provision for his wife. This problem could have been avoided and the power made unassailable by a specific provision for a gift over in default of appointment.

The doctrine of “fraud on powers” is applied strictly in Kentucky, and the donee of a special power cannot in any way exercise the power for his or her own benefit, directly or indirectly. In Degman v. Degman,190 the testator left a will creating a life estate in his widow coupled with a power of appointment among the testator’s children. The wife remarried, and thirty years later attempted to convey a tract of land subject to the power to her son in consideration that he pay her debts and take care of her second husband and herself. Calling the conveyance a patent fraud on the power, the court set the deed aside and declared all four of the testator’s children entitled equally to the land conveyed.

In Columbia Trust Co. v. Christopher,191 the court dealt with a power “appendant” which it distinguished from a power simply “collateral.”192 The testator had devised land, one-half in fee to his wife and one-half to his mother for life, and upon the mother’s death

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190. 98 Ky. 717, 34 S.W. 523 (1896).
191. 133 Ky. 335, 117 S.W. 943 (1909).
192. The Kentucky courts accept the common law precedents establishing terminology of powers, and agree that there may be different results if a power is defined as “appendant” or “collateral” or “in gross.”

It was established in England as far back as 1665 in Edwards v. Sleator, (Hardes, 410) by Chief Baron Hale: “Powers to raise estates [can be] collateral (as where the donee has not, nor ever had any estate in the land which is the subject-matter of the power) as where such a power is reserved to one, a stranger to any estate created, and therefore it cannot be destroyed (released) by such donee.” A ‘power in gross’ is one in which the donee has an interest in the subject-matter of the power but will not be affected by its exercise. With a ‘power appendant,’ the donee has an interest or estate in the land that will be affected by its exercise.

Collateral power example: A conveys Blackacre to A in fee with a power in C to appoint the land to and among the children of C. C has a special power simply collateral.

Power in gross example: A bequeaths his residuary property to B for life with a power to B to appoint the remainder to any person whomever. B has a general power in gross.

Power appendant example: A devises Whiteacre to such persons as B may appoint, and in default of appointment to B in fee simple.

to the wife, with a provision that should his wife elect to establish or aid a benevolent institution with a part of her devise, the mother’s share should be paid to such institution. Further, should the wife fail to elect to establish or aid such an institution, the mother’s share was to be paid upon the wife’s death to the YMCA and First Presbyterian Church of Nashville, Tennessee, in equal shares. The widow, the mother, and her husband, trustees of the two named associations, joined in a conveyance of the land to the appellee, the wife further agreeing in writing that if she thereafter elected to aid or establish an institution, she would do so in a manner that would not interfere with the appellee’s interest. The court upheld the conveyance because the will gave the wife a power appendant, which, when coupled with the conveyance by the two associations, effectively passed the whole estate in the land. Furthermore, the court said the transfer was not subject to defeat by the later establishment of an institution by the testator’s widow, because a power appendant may be extinguished or released by the donee of the power. In dicta, the court said that a special power, purely collateral, may not be released thereby accepting the common law view on that issue also.

As previously stated in the introductory material on powers, the doctrine of illusory appointment was applied in *Barret’s Executor v. Barret*. In this case, the testator gave his son a special testamentary power to appoint his one-fifth share of his father’s estate to his wife and heirs at law, and in default of appointment, to his widow and heirs at law as if the son/donee had died intestate owning the share in fee simple. The son’s interest in the trust was $150,000, and he purported to exercise the power by will, giving $147,000 to his wife and $1000 to each of his three heirs at law. The heirs attacked the exercise of the power claiming that it was an “illusory appointment.” The Kentucky Court of Appeals agreed and affirmed the decision of the lower court, setting aside the appointment and ruling that the heirs were entitled to one-half of the appointed property, thus establishing a precedent requiring Kentucky courts to supervise the exercise of a power. The court said the appointment was

193. Note that the Restatement questions whether the power appendant is part of the American common law. It certainly is not looked upon with favor. In *Browning v. Blue Grass Hardware Co.*, 153 Va. 20, 149 S.E. 497 (1929), the Virginia court rejected it as supernumerary meaningless since the power appendant merges with the estate already vested in the donee.

194. 166 Ky. 411, 179 S.W. 396 (1915).

195. As indicated earlier, the doctrine of illusory appointment was abrogated by statute
illusions because it was not "a beneficial interest in the fund," fairly proportioned to the amount for distribution. But what is fair? Must it be 50-50? How about 75-25 or 90-10? Why shouldn't a donee be permitted to favor his wife over his other heirs? If the donor wanted a 50-50 split of his son's trust estate at his death between the son's widow and heirs, he would not have created a special power of appointment. Therefore, the decision is incorrect in that it hands a key to the court house door to every heir who feels slighted by the exercise of a power intended to permit the donee of that power to exclude that heir in the class of possible appointees.

In another departure from the general rule, the Kentucky court in *St. Matthews Bank v. De Charette* held that the donee of a general testamentary power can, by the exercise of the power, defeat the rights of unpaid creditors by appointing to "volunteers." Equity has no power in Kentucky to seize the assets in the hands of an appointee to pay the debts of an insolvent decedent-donee. This is strictly a minority view also followed in Pennsylvania, Rhode Island, and Maryland and is based upon the theory that the subject-matter of the general testamentary power is the property of the donor and not the donee. The position taken by the Kentucky courts prohibiting appointment to the estate or unpaid creditors of the donee of the general testamentary power is also consistent with the minority view in American courts.

An unusual situation arose due to the limitations created in a will in *Hall v. Hall*, where a husband devised his estate to his wife for life and authorized her to make any changes she desired in the will. Upon her death any remainder was to go to testator's brothers, if they survived the wife. The court construed this as a power to dispose and decided that the husband intended to have the entire estate pass to his wife with right of possession and control and power to dispose. Further, the court held that if the wife failed to dispose, the brothers would take only if they survived the wife, and if not, the wife's heirs would take at her death.

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in England in 1830 as a mischievous and unworkable doctrine, since such an exercise of power is incapable of judicial supervision. See text accompanying notes 178-80 supra.

196. 259 Ky. 802, 83 S.W.2d 471 (1935).
200. *See also* *De Charette v. De Charette*, 284 Ky. 525, 94 S.W.2d 1018 (1936).
201. 314 Ky. 733, 237 S.W.2d 55 (1951).
A lawyer's will came up for construction in *Creason v. Prince*,\(^1\) wherein the testator devised all of his estate other than his law library and office furnishings to his wife in fee and gave her "full right to dispose of any property . . . as she sees fit." A later clause in the will provided that "[i]f there is any of my estate left" at the wife's death, the residue was to go to Marvin Prince, absolutely and in fee simple. Surely a lawyer ought to be capable of drafting a will better than this one, which is ambiguous to say the least. Did he intend to give his wife a mere life estate coupled with a general power to convey to anyone? Did he contemplate that his disposition would subject the fee simple to divestment?

Problems arose when the wife conveyed the devised land by deed of trust to her brother, who was instructed therein to divide the remainder at her death equally among Marvin Prince, himself, a sister and a sister-in-law. The lower court found for Marvin Prince, set aside the trust deed, and awarded the property to him in fee despite the fact that the will expressly conferred upon the wife the power to dispose of the land as she saw fit, and this would certainly include a transfer by deed during the wife's lifetime. The Kentucky Court of Appeals reversed, holding that the will did confer upon the wife a power to dispose, and that her transfer operated to divest Marvin of the gift over created in the will.

In a similar situation, the court held in *Chaffin v. Adams*,\(^2\) that there could be no divestment of an estate in fee created by will due to a subsequent incomplete devise over in the same instrument in the event the devisee in fee died without naming a remainderman.

V. **Kentucky Rule Against Perpetuities**

In 1960, Kentucky adopted the old common law rule against perpetuities:

> No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. It is the purpose of this section to enact the common law rule against perpetuities . . . .

This statute applies only to inter vivos instruments and wills taking effect after July 1, 1960, and to appointments made after July 1, 1960, including appointments by inter vivos instrument or will under powers created before July 1, 1960.

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1. 415 S.W.2d 89 (Ky. 1967).
2. 412 S.W.2d 663 (Ky. 1967).
At the same time, the Kentucky legislature also adopted the "wait and see" recommendation in reform of the earlier statute. In determining whether an interest would violate the rule, the period of perpetuities is measured by actual rather than possible events. Also, the period is not to be measured by any lives whose continuance "does not have a causal relationship to the vesting or failure of the interest." Another reform gives authority to the court to modify or reform any interest which would violate the rule to approximate more closely the intention of the creator of the interest. Pension trusts are made exempt from this rule.

The earlier Kentucky statute incorporated the English common law rule against perpetuities with one addition: "plus ten months." Early Kentucky decisions under the statute conceived of the rule as one which prohibited the suspension of alienation for a longer period than during the life or lives in being, plus twenty-one years and ten months thereafter. This explains the "liberal" view taken by the courts in Kentucky in permitting the suspension of alienation for periods that would not be permitted at common law or in the vast majority of American jurisdictions. Later decisions of the Kentucky Court of Appeals conceived of the rule against perpetuities as one designed to prevent and prohibit the remote vesting of interests.

In *Stevens v. Stevens*, the suspension of alienation application of the Kentucky rule against perpetuities rendered void a testamentary trust wherein the trustee was directed to keep the trust estate intact for forty years and then to distribute it equally among any of the testator's living children. An intestacy resulted. This is really an attempted disposition that runs afoul of the rule against accumulations which originated in the famous *Thellusson Case* in England. *Thellusson* resulted in reform legislation known as the *Thellusson Acts*, passed by some state legislatures and patterned...
after the original act in England. For example, the Alabama statute permits trusts for ten years or a period of minority in its trusts-for-accumulation statute. States having adopted a Thellusson act will permit an accumulation for minority years of a beneficiary, an accumulation during the life of the creator, etc. States still using the span of time of the rule against perpetuities permit accumulations for twenty-one years after lives in being, and if no lives, then a straight twenty-one year period in gross. In most jurisdictions, a no-limit rule is applied in accumulations for the benefit of charitable institutions.

In *Dohn's Executor v. Dohn*, the testator's will created a trust to his wife for life, and out of the trust income, seventy-five dollars per month was to be paid to each of the testator's children until the youngest reached the age of twenty-five. The court held that the gifts to each child were valid under the rule against perpetuities as the children were all lives in being at the creation of the interest. Since many of the cases involving the rule against perpetuities also deal with the problem of suspension of alienation, it is not unusual to have them intertwined. In *Fidelity Trust Co. v. Lloyd*, the testator's will provided that the land devised was not to be sold for forty years after his death, and then it was directed that the land be divided among those who would then be his heirs at law. The court declared the provision against alienation for forty years void, unenforceable, and unreasonable, since the provision violated the Kentucky statute that provides that the power of alienation shall not be suspended for a longer period than life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. The court held that the testator died intestate as to the land and that his heirs became immediately entitled at his death. In this opinion is the statement: "If by any possibility, the vesting may be postponed beyond this period, [the Kentucky rule against perpetuities] the limitation over will be void." 2

In 1904, the court of appeals did a little reforming of a disposition on its own, and then sustained the gift. In *Johnson's Trustee v. Johnson's Executor v. Dohn*, the testator's will created a trust to his wife for life, and out of the trust income, seventy-five dollars per month was to be paid to each of the testator's children until the youngest reached the age of twenty-five. The court held that the gifts to each child were valid under the rule against perpetuities as the children were all lives in being at the creation of the interest. Since many of the cases involving the rule against perpetuities also deal with the problem of suspension of alienation, it is not unusual to have them intertwined. In *Fidelity Trust Co. v. Lloyd*, the testator's will provided that the land devised was not to be sold for forty years after his death, and then it was directed that the land be divided among those who would then be his heirs at law. The court declared the provision against alienation for forty years void, unenforceable, and unreasonable, since the provision violated the Kentucky statute that provides that the power of alienation shall not be suspended for a longer period than life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. The court held that the testator died intestate as to the land and that his heirs became immediately entitled at his death. In this opinion is the statement: "If by any possibility, the vesting may be postponed beyond this period, [the Kentucky rule against perpetuities] the limitation over will be void." 2

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212. See Ala. Code tit. 35, ch. 4 § 252 (1975); I A. Scott, Trusts § 62.11, n. 10 (2d ed. 1956).
213. 110 Ky. 884, 62 S.W. 1033 (1901).
214. 78 S.W. 896 (Ky. 1904).
215. Id. at 1929-30, 78 S.W. at 898. This was before the adoption of the "wait and see" reform statute of 1960. See text accompanying note 205 supra.
Johnson, the testatrix had created a trust for her son, for life, and then provided that the trust income should go to his children until the youngest child attained the age of twenty-five, when the estate was to be distributed. The court noted that the gifts-over as written were an unenforceable violation of the Kentucky rule against perpetuities, but rejected the contention of the life tenant’s widow that the gifts-over were void to enable her to inherit the reversion in her husband on his death. The court said that the giving of the income immediately to the children resulted in the estate, by way of remainder in them, vesting upon the death of their father, a life in being. The court struck down only the unlawful portion which would have delayed enjoyment until the youngest child attained the age of twenty-five. The children became entitled to their distributive share immediately upon the death of their father. Interestingly enough, the will was construed as if the illegal restriction as to time of distribution was not contained in the will.

A familiar application of the rule against perpetuities as applied to a special power of appointment is seen in Brown v. Columbia Finance and Trust Co. A donee of a special power, in exercise thereof, created remainders which, if related back to the time of the creation of the power by the donor, would render the vesting too remote. The testator had devised property to his daughter in trust for life and conferred upon her a special power of appointment among her children or descendants in remainder. In default of the appointment, the children and descendants would take the remainder. The donee’s will attempted to exercise the power by appointing to her children for their lives, with a fee in remainder in their children. The court struck down the exercise of the power because the law will not permit a testator to do indirectly what the law forbids him to do directly. The exercise of the power by the donee vested the estates in the grandchildren of the donee (great-grandchildren of the testator) too remotely and beyond the permissible period of the Kentucky rule against perpetuities. The court held that the donee-life tenant’s children took in default of an effective appointment according to the will of the testator on the death of their mother, a life in being at the creation of the remainders. This view is almost universally followed in the United States.
Future interests that vest upon the termination of a life in being are good under the rule. In Enven v. Air, the court sustained the gifts-over by way of remainder. Here, the will of the testator gave to his widow for life, and then to the testator’s children for their lives, and then to their offspring in fee. The pertinent lives in being here are the testator’s own children, all lives in being at the creation of the future estate in their offspring. The future interests are not violative of the rule against perpetuities.

In Lindner v. Ehrich, the court struck down a remainder as violative of the rule against perpetuities because it could vest too remotely. Testator died in 1880 leaving a wife, a son, and a daughter who claimed the fee. Testator’s will created a life estate in his wife, and then provided life estates for his son and daughter, followed by life estates for his grandchildren, and then over to testator’s kindred. While the son and daughter could qualify as lives in being, the grandchildren could not, since the son and daughter could have offspring born after the death of the testator when the future interests were created. The gift-over to “kindred” is bad under any application of the rule against perpetuities, including the Kentucky statute. However, instead of declaring an intestacy of the property after all of the lives in being, as sought by the wife and two children, the court held that the grandchildren of the testator took the fee. Inasmuch as the daughter had two children, one of whom had died during her lifetime, the daughter took a one-half interest from that deceased child. Apparently, the son of the testator did not appear and made no claim. The court thought that the conversion of the life estates of the grandchildren into a fee more nearly carried out the intention of the testator, who obviously desired to give no more than life estates to his own children, but did want the land to go over to the grandchildren on the death of their parents. This thought was also expressed in the federal case of Maher v. Maher, where the rule is applied, citing Kentucky precedents, that the intention of the testator must be followed as far as possible. The estate had to progress under the will to the point where the rule against perpetuities began to operate and a fee vested in the last person authorized to take it under the law. Thus, the rule in Kentucky is that where the testator devises an estate to take effect after the permissi-

219. 104 S.W. 960 (Ky. 1907).
220. 147 Ky. 85, 143 S.W. 778 (1912).
221. 139 F. Supp. 294 (E.D. Ky. 1956).
ble period of limitations, the limitation over would be void, and the person who took the preceding estate would have the fee simple title to the estate devised. This departure from the common law disposition by intestacy of the portion of the estate voided under the rule probably carries out more nearly the intention of the testator. Note that the *Lindner* case voided the future interests created after the attempted life estates in the grandchildren. The future interests of the children of testator's son and daughter would have to vest, perforce, at the end of the lives of their parents who were lives in being at the creation of their interest.

Prior to the adoption of the "wait and see" reform statute in 1960, the Kentucky precedents would not "wait and see" but would strike down an offending future interest *ab initio* if the interest could vest too remotely. Thus, in *Tyler v. Fidelity Trust Co.*, the testator, by will in 1861, created a trust to pay the income therefrom to his son's wife, Rebecca, for life, and her children, now in being or to be born. The will further provided that at the death of the testator's son, Henry, and his wife, Rebecca, the income was to go to the grandchildren "and their descendants," and on the death of the last surviving grandchild, the corpus was to be distributed to the great-grandchildren and their descendants. Henry and Rebecca died leaving 5 children, never having had any more after testator's death. But the court declared the remainder interests in the great-grandchildren void as violative of the rule against perpetuities, although under "wait and see," the gifts-over would be valid since their interests would all vest at the death of their parents who were all lives in being at the death of the testator. In so holding, the Kentucky court followed the holding in the famous English case of *Jee v. Audley*, where the court solemnly held that despite the age of a female she is always in the law presumed to be capable of child bearing. The English rule was also followed in *Rand v. Smith*.

A wise testator familiar with the rule can effectively create a trust calling for distribution of the trust corpus twenty-one years after the death of the last survivor of his children and grandchildren living at his death. But an unwise testator unfamiliar with the rule can

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222. 158 Ky. 280, 164 S.W. 939 (1914). The *Tyler* case has been abrogated by statute as to future interests created by instruments after Jun. 16, 1960. See Ky. Rev. Stat. § 381.216 (1972).
224. 152 Ky. 516, 155 S.W. 1134 (1913).
have his attempted dispositions declared void and have an intestacy result when his directions for distribution go beyond the permissible period of the rule. This was the case in *Fidelity and Columbia Trust Co. v. Tiffany*,²²⁸ where a trust was created for a class of testator’s grandchildren living at the testator’s death and born within ten years of his death. Here the grandchildren of the testator cannot be the lives in being because of the ten year stipulation. The testator provided that each grandchild would receive a monthly income from the trust of twenty dollars until he attained the age of twenty-two, and if he died before that age, his share would be held by the trustee for the other grandchildren who survived. Clearly, there could be a disposition that would vest too remotely, and since this was a direct gift in trust with no effective estate created, the court had to declare an intestacy. Also, the court refused to hold the trust gifts good as to those grandchildren who were living at the testator’s death, and bad as to those born after the death of the testator. The refusal to do so follows the general rule that unless the testator makes two distinct classes, the court will not do so. There are many precedents for sustaining the good and rejecting the bad where the testator himself has made two classes by his will.²²⁷

An instance of the famous “unborn widow” trap appears in the Kentucky case of *Chenoweth v. Bullitt*.²²⁹ There the testator’s will created a life estate in his widow, and remainder for life in his son, and a life estate in the son’s widow, then to the survivor for life, and on the death of the survivor, to their children or lineal descendants in fee. The testator’s widow and his son are the lives in being, but the widow of the son cannot be even though the son is married to a woman at the death of the testator. It is possible that the son’s present wife could die and he marry a woman *who was unborn at the time of the death of the testator* when the interests were created.

²²⁶. 202 Ky. 618, 260 S.W. 357 (1924).
²²⁷. J. Gray, *Perpetuities* §§ 251-58 (3d ed. 1915). It is said by Professor Gray:

Very often, indeed generally, a future contingency which is too remote may in fact happen within the limit prescribed by the rule against perpetuities, and a gift conditioned on such contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be bad altogether.

See *Quinlan v. Wickland*, 233 Ill. 39, 84 N.E. 38 (1908); *Armstrong v. Armstrong*, 53 Ky. (14 B. Mon.) 269 (1853); See also, Leach, *supra* note 218 at 657.

²²⁸. 224 Ky. 698, 6 S.W.2d 1061 (1928). This trap was stressed by Professor Leach in his celebrated law review articles: Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938); Leach, *Perpetuities: The Nutshell Revisited*, 78 Harv. L. Rev. 973 (1965).
Since the vesting time of the future interests of the children of the testator's son and descendants were postponed until the death of the son's widow, such throws the interests beyond the permissible period of the rule against perpetuities. Even so, the life estate of the widow is good under the rule. The case is not clear as to whether the son and the widow got a fee, or whether the court declared an intestacy. Consistency would call for the giving of the fee simple to the last valid estate.

The courts in the United States are divided on the issue of whether an option to repurchase is within the rule against perpetuities. The majority rule is that an option is within the rule. Therefore, unless the legal draftsman is careful to limit the period in which the option may be exercised, the court may find the option void and unenforceable. The Kentucky courts follow the minority view on this question and hold that an option to repurchase is not within the rule, and is enforceable regardless of whether the option is limited to the permissible limitations of the rule. Logic would seem to favor the minority view on this question because an option is not an interest in land but a contract. Traditionally, the rule has been applied to vesting of property rights, not contractual rights. In *Coley v. Hord*, the deed of a grantor contained an option of the vendor and his heirs to buy back the land at any time the grantee or his heirs desired to sell the land. Since there was no language limiting the exercise of the option to lives in being, etc., this option would be bad by the majority view. But the Kentucky court ruled the option valid and not in violation of the rule. As the court stated, such an option does not restrict alienation nor does it violate public policy.

The doctrine of *Coley v. Hord* was severely watered down by a recent Kentucky case suggesting that a "perpetual option" would be bad as repugnant to the rule against perpetuities. This involved a suit for specific performance of a "perpetual option" for the sale and purchase of an easement and right of way. The lower court voided the option as being in violation of the common law rule against direct and unreasonable restraints on alienation. The option was given on December 19, 1961, and on November 5, 1968, a written notice of the election to exercise the option was duly delivered,

229. Leach, supra note 218 at 661 nn. 65-66.
230. 250 Ky. 250, 62 S.W.2d 792 (1933).
231. Three Rivers Rock Co. v. Reed Crushed Stone Co., 530 S.W.2d 202 (Ky. 1975).
but the optionee declined to recognize the option. The court of appeals disagreed with the lower court and rejected the view that the option was not limited to the permissible period of the common law rule against perpetuities, saying that if anything it violated the Kentucky statute on the rule against perpetuities, and, in any event, would be enforceable for the first twenty-one years of the life of the option. It appears that the court considered the new Kentucky statute of the rule against perpetuities with its “wait and see” reform provision as a turning point in construing option cases. The Three Rivers Rock case put Kentucky back into the fold of the majority jurisdictions by holding that an option now is subject to the rule against perpetuities. It would appear that inferentially Coley v. Hord is overruled. A Kentucky lawyer, after the Three Rivers Rock case, would be well advised to limit carefully the period in which the option can be exercised in strict conformance with the new statute.232

The Kentucky courts have adopted a familiar rule of construction favoring and enforcing that construction which renders the disposition valid under the rule and rejecting a construction that would render it bad under the rule with possibly an intestacy resulting. In Emler v. Emler’s Trustee,233 the court was called upon to construe the will of the testator in which a testamentary trust was created. Specifically, the will read:

Fourth After my wife’s death, my estate shall be held in Trust and the interest [income] therefrom shall be divided equally among my three children, Flora, A.M., Jr., and H.H. Emler, as long as they live. After their death, it [ambiguous-income or corpus] shall be divided among my grandchildren that are here now or may hereafter be born to either one of my sons and daughter. Should any one of my sons have no children, it is to go back to his legal heirs. after his death [sic].234

The court construed the confusing word “it” as pertaining to corpus and not to interest (income) from the trust. Hence, the future share in the principal is good under the rule, since all of the testator’s children were lives in being at the time of the creation of the future interest. If “it” had been construed as income from the trust, the interest of the grandchildren might have vested too remotely as

233. 269 Ky. 27, 106 S.W.2d 79 (1937).
234. Id. at 28-29, 106 S.W.2d at 79 (emphasis added).
the trust would continue, and would not have terminated with a
distribution of the corpus. The court noted that any other construc-
tion could result in an intestacy, as there was no provision for distrib-
ution of the trust principal.

When future interests are created by a deed of conveyance rather
than by a will, the interests become particularly vulnerable where
they are to vest on the death of the grantor's children. In the deed
situation, the children of the grantor cannot be taken as the lives
in being for the reason that the grantor, still living, could have
additional children. Thus, in Mounts v. Roberts, the grantor con-
veyed land by deed to his wife for life, and then to his sons for life,
and finally to the sons' heirs in fee. The deed also conveyed coal
royalties to the wife for life, then to the grantor's children for life,
and finally to the children's heirs. The court held that the rule
against perpetuities was violated as to the mineral rights which
consequently reverted to the grantor and to which the children of
the grantor would be entitled equally at the termination of the son's
life or upon the death intestate of the grantor-father. The court
pointed out that after the successive life estates, the remainder
would go to the heirs of the sons, some of whom could be born more
than twenty-one years and ten months after the death of persons
living at the time the deed was executed. Had this disposition and
limitation been made by will, the remainder would have been valid
under the rule, because then all of the children of the testator would
have been lives in being, the testator's death ending future patern-
ity. The rights were fixed by the deed, a pre-1960 legal transaction,
hence "wait and see" could not be applied. By another analysis, as
to the disposition of the land, the court noted that the remainder
in the son's heirs in the land was equally bad under the rule. The
same result would be reached by giving the last validly created
estate the fee.

VI. RESTRAINTS ON ALIENATION

As stated in the preamble to this compendium, the Kentucky
courts permit a landowner broad power to put restraints on the
alienation of land purportedly conveyed or devised in fee simple.
The majority of courts will not enforce any restraints on alienation
or permit alienation to be suspended at all on grounds of public
policy. It was long felt by common law judges in England that it best

235. 388 S.W.2d 117 (Ky. 1965).
serves the cause of public interest to permit untrammelled ex-
change, trade and commerce in a land interest. The common law
courts always found ways to break the stranglehold of land owner-
ship in particular families, first the feudal lords, and later the
landed gentry. Since *Quia Emptores*,\(^236\) passed by Parliament in
1290, the law has striven toward a development of absolute freedom
in the power of alienation. By this early English statute, tenure
between a grantor and a grantee of a fee was broken, and without
tenure, the grantee did not "hold" his estate under his immediate
grantor. Where tenure does still exist, as in the creation of leasehold
estates, reasonable restraints on the power of the lessee to assign or
sublet are enforced today in all American courts.

The history of common law cases dealing with land property
rights shows a constant battle between the courts and the landown-
ers over the issue of free alienability of land. *Quia Emptores* was an
important victory for the law. The development of the old fee simple
conditional, as designed, was a victory for the feudal lords. This
estate was conceived as an everlasting estate in the ancestor and the
heirs of his body in perpetuity. Along came the common law courts
which held that upon the birth of a live child capable of inheriting
the land, the fee simple conditional holder in possession could con-
voy away a fee simple absolute. It was a victory for the judges
advocating free powers of alienation. The feudal lords countered
with a statute by Parliament called *De Donis*,\(^237\) creating the fee tail,
which could not be broken by the birth of a child capable of inheriting
the estate lands. The victory was short-lived. The common law
courts in England blinked at a way to dock the tail by permitting a
collusive suit known as a fine and recovery, which permitted the
tenant in tail in possession to disentail the estate by a fictitious suit,
the transferee ending up with a fee simple absolute. Conveyancing
lawyers in England countered with an ingenious device that did lock
in estates in perpetuity in one family until 1830 by a family settle-
ment, taking advantage of the law that only a tenant in tail in
possession could disentail. By the shuffling of papers and new con-
vveyances, the former tenant in tail had his estate converted simply
to a life estate with the agreement by the next male heir in line to
accept a life estate in remainder, rather than his former remainder
in tail. The adoption of the *rule in Shelley's case*, abrogated in

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\(^{236}\) 18 Edw. I (Westminster III) c. I (1290).

\(^{237}\) 13 Edw. I (Westminster II) c. I (1285).
Kentucky and in all but a handful of American states, was simply a construction that aided in the free alienability of land.\textsuperscript{238}

The abhorrence of restraints on or suspension of alienability continues even in the modern law. It appears inconsistent that an owner can convey or devise a fee simple estate and then put limitations on the power of the grantee or devisee to transfer his interest. One of the attributes of a fee simple estate is that it can be transferred by deed or will. It is considered improper to permit a landowner to give an absolute with his right hand and then take away with his left. Consequently, in a majority of American jurisdictions, any suspension of the power of alienation, absent tenure, is void and unenforceable but not so in Kentucky.\textsuperscript{239}

The apparent reason for the more liberal rule in Kentucky is that the early court decisions conceived and construed the rule against perpetuities as one dealing with the suspension of alienation and not primarily as a rule that prohibits the creation of future interests that may vest too remotely. The opinions of the judges of the court of appeals contain language such as a "reasonable restraint on alienation" or "an enforceable restraint," and that recognizing and enforcing such "reasonable" restraints on the power of alienation of a transferee of a fee simple is not inconsistent with a fee.

Typical of the reasoning in Kentucky on restraints is that found in the early case of \textit{Stewart v. Brady}.\textsuperscript{240} There was a gift of a fee simple estate in land to the transferor's daughter with a provision that the land was not to be disposed of "by deed of gift or sale" until the daughter became thirty-five years of age. The court sustained the validity of the gift of the fee simple to the daughter, stating that this was a reasonable and enforceable restraint and the limitation on use was not inconsistent with a gift of the fee simple estate.\textsuperscript{241} In accord with \textit{Stewart} is the case of \textit{Francis v. Big Sandy Co.},\textsuperscript{242} where the court pronounced as valid and reasonable a restraint contained in a deed provision. The owner's son was granted a fee simple estate that, for twenty years from the date of the conveyance, he was not to sell to anyone other than the grantor-father's bodily heirs. The court noted that both the grantor-father and the son could together grant a fee simple estate to anyone without a breach of public pol-

\textsuperscript{238} See \textsc{I American Law of Property} § 4.40 (A. Casner ed. 1952).
\textsuperscript{239} See \textsc{VI American Law of Property} §§ 26.15-26.17 (A. Casner ed. 1952).
\textsuperscript{240} 66 Ky. (3 Bush) 623 (1868).
\textsuperscript{241} Id. at 625.
\textsuperscript{242} 171 Ky. 209, 188 S.W. 345 (1916).
icy. The son sought to avoid the restriction on alienation but failed.

Despite a restraint or suspension of the alienation of a land interest, the courts will sustain the conveyance and the title in the transferee if the original grantor does not object. In *Price v. Virginia Iron, Coal & Coke Co.* a twenty year restriction on alienation was placed on the power to transfer by the owner of the land transferred. The grantee, prior to the twenty year period, found a buyer who would take the title. The court said that when the original grantor does not object within the period of restriction, the transfer of title is valid; and, after the period of twenty years elapses, the ultimate grantee's title is unassailable by anyone.244

In accord with *Price v. Virginia Iron, Coal & Coke Co.* is the case of *Kentland Coal & Coke Co. v. Keen.* A conveyance was made by a father to his son in fee simple with a provision that the land was not to be sold during the grantor's lifetime. In 1892, twelve years after this conveyance and while the father-grantor was still alive, the son conveyed the land in fee simple, and by mesne conveyances, the mineral rights were acquired by the appellant, Kentland Coal & Coke Co. After the death of the original grantor, the children and heirs of the son sought to obtain a cancellation of the deeds commencing with that of the original grantor on the ground he was not empowered to convey and that such deed was void. The court sustained the title in the appellants through the mesne conveyances on the ground that the deed from the son was not void, but voidable. Although the transaction could have been voided by the father-grantor, the lower court erred in cancelling the deeds, because the power to set aside the transaction ended with the death of the original grantor who imposed the restriction in his deed. The court said that there must be an entry to enforce during the lifetime of the grantor who imposed the restrictions.245 By failing to object or take any action to set aside the transaction during his lifetime, the title becomes indefeasibly vested in the ultimate grantees. The court overruled all precedents that labeled a deed in this situation void, as it is more proper to refer to such deed as merely voidable.

In the *Price v. Virginia Iron, Coal & Coke Co.* and *Kentland Coal

243. 171 Ky. 523, 188 S.W. 658 (1916).
244. A transfer in defiance of the restriction can be set aside, particularly where the ultimate grantee paid only $40.00 and a bottle of whiskey for the land and got the transferee subject to the restriction drunk. Call v. Shewmaker, 24 Ky. L. Rep. 686, 69 S.W. 749 (1902).
245. 168 Ky. 836, 183 S.W. 247 (1916).
246. Id. at 843-46, 183 S.W. at 250-51.
& Coke Company v. Keen cases, the grantor did nothing when the land was conveyed against the prohibition against alienation, but in Turner v. Lewis,247 the grantor did do something. The grantor had conveyed land to his son in fee, the deed containing a clause preventing alienation by the son during the lifetime of the grantor. Despite the ban on alienation, the son conveyed the land to his wife during the lifetime of the grantor. Immediately, the grantor repossessed the land, cultivated it, and otherwise exercised rights of ownership. Ultimately, the original grantor conveyed to another. The son’s wife claimed the land against the subsequent grantee of her husband’s father. The court held that the acts of repossess and reoccupancy of the land were sufficient manifestation of an election on the part of the grantor to terminate the estate conveyed to the son.

One can go too far in a provision against alienation even in Kentucky, when the judges of the court of appeals use the language of the English common law courts. In Henning v. Harrison248 the testator included in his will, which devised land to his daughters, a provision that the devised land was to “remain theirs respectively and their heirs as patrimonial estate and not be subject by them to be sold.”248.1 The court held that this provision was void since the restriction against alienation was intended by the testator not only to bind the daughters but also the “heirs.”

A twenty year limitation on alienation imposed on a devise of land to the testator’s daughter was upheld in Johnson v. Dumeyer.249 The limitation on alienation was diluted somewhat by permitting the devised land to be sold if “advantageous to do so for the purpose of re-investment.”250 This enabled the court to state that the restriction on alienation was reasonable.

Courts everywhere seem to take a more liberal view of restraints on alienation placed on an equitable interest, such as the beneficiary’s interest in a trust, perhaps for one reason that no restriction is placed ordinarily on the trustee’s power to sell trust property or exchange it. In the case of Kean’s Guardian v. Kean,251 the testator’s will devised land to the son and provided that the estate should be held in trust for the son until he should arrive at the age of twenty-

247. 189 Ky. 837, 226 S.W. 367 (1920)
248. 76 Ky (23 Bush) 723 (1878).
248.1 Id. at 726.
250. Id. at 2245, 66 S.W. at 1025.
eight years. In the meantime, his guardian, thereby appointed, was to "educate and maintain him from the income" of the land devised. No forfeiture was provided in the event the son attempted to alienate the property before the period fixed. When the will was executed the son was approximately two or three years old. This suit was brought upon the son's attaining the age of twenty-one to determine if the son was entitled to control or dispose of the property. The court, relying upon *Stewart v. Brady*, held that the son was not so entitled, and the restraint on alienation until the son was twenty-eight years old was valid and binding. The court noted that the restriction did not take away all of the power of alienation, but only until a certain time has elapsed.

The Kentucky precedents permit a restriction on alienation until the transferee attains a certain age, and find nothing inconsistent with or repugnant to the transfer of a fee. Thus, in *Wallace v. Smith*, a restraint on alienation until the devisee attained the age of thirty-five was found reasonable and valid. The devisee, at twenty-five, had sought a declaration that he was empowered to sell, as he was offered a good price for the land.

To determine whether a particular restraint is reasonable, it is proper to consider the life expectancy of a life tenant. In *Lawson v. Lightfoot*, the testator devised land to his wife for life, with remainder to his daughters, but provided a restraint on alienation of the land during the life of the wife. It appeared that during the life of the widow, she and the daughters attempted to sell the land, but the prospective purchaser refused to accept the deed on the ground that the vendors had no power to sell. The court held that such provision was reasonable and valid when it was shown that the wife "was beyond middle age." The court said in dictum that had the proposed grantee taken a warranty deed, it would have been binding on the grantors. This case shows how restrictions such as this interfere with the free trade and commerce of land interests. The dead should not be able to control the living in this way. The case finds little to support it, and it is difficult to justify. The direction that this case was not to be officially reported was for good reason.

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252. 66 Ky. (3 Bush) 623 (1868).
253. 113 Ky. 263, 68 S.W. 131 (1902).
255. 27 Ky. L. Rep. 217, 84 S.W. 739 (1905).
A hybrid decision in Morton's Guardian v. Morton\textsuperscript{256} found the court sustaining the restriction during a life estate but declaring the restriction void as to the remainder person. The testator's will created life estates in his two cousins, A and B, with remainder in the survivor with gift-over to others. They will also contained the direction, "the family home must never be mortgaged or sold." Instead of being struck down as nonsensical surplusage, the court held the provision against sale valid during the lives of A and B and the survivor thereof, but bad as against the remainder people. The court solemnly reasoned that the interdiction against sale by A and B was "reasonable."

Sometimes the Kentucky courts will avoid the problem of sustaining restrictions on alienation repugnant to a fee simple by construing the gift, not as a fee simple, but as a life estate. In Robsion v. Gray,\textsuperscript{257} the testator devised land to his son John, and if John should die leaving a widow, there would be no dower for the widow. John was never to sell the land "to any person whatever," and the testator expressed his wish that the land descend to the heirs of John, remain in the family "and never be sold." The court ruled that John took only a life estate, construing "heirs" as the heirs at John's death. The court said that the restriction was valid and binding on John for his life but became invalid and unenforceable on the remainder persons. Despite the provision, John did sell the land in 1885, and he died in 1904 when his heirs were the appellees. The appellants claimed the land through mesne conveyances originating in John's deed. The court held that John's heirs, the appellees, were entitled, but were not entitled to the rents since the death of their father.

Three years later in 1909, the court refused to enforce restrictions against alienation for the life of the devisee by the son who was devised a fee. In Harkness v. Lisle,\textsuperscript{258} the testator died leaving a will which gave certain tracts of land to his son "and his children". A provision in the will provided that the land was not to be sold during the lifetime of the son. The court declared the attempted restriction on alienation during the lifetime of the son invalid as repugnant to a fee simple estate. "A testator cannot devise a fee, and then destroy it entirely," the court said. The court construed the intention of the

\textsuperscript{256} 120 Ky. 251, 85 S.W. 1188 (1905).
\textsuperscript{257} 29 Ky. L. Rep. 1296, 97 S.W. 347 (1906).
\textsuperscript{258} 132 Ky. 767, 117 S.W. 264 (1909).
testator as devising a fee, construing children as "heirs." A life estate-remainder to heirs construction could not be made out here for the reason that in other parts of the will the testator showed that he knew how to create a valid life estate.

Can a grantor whose deed reserves a life estate provide against the alienation of his grantee's interest during the life of the grantor? The Kentucky Court of Appeals in Frazier v. Combs,259 said "yes." The court declared such a restraint valid as it was imposed to prevent the grantee-son from conveying his interest until he reached a more mature age, presumably at the death of his father. Despite the restriction, the son conveyed his interest, during the life of his father-grantor, to his wife, and then died. The wife, believing that she held the land interest free of any restriction, conveyed the land in separate lots to purchasers. When the grantor died, the children of the son sought to recover the land from the grantees of the son's wife on the ground that the son had no power to convey during the lifetime of his father, and his doing so deprived them of a share in the remainder at their father's death. The transferees from the mother, relying on the title from the grantor's son, demurred. The lower court sustained the demurrer, but the court of appeals reversed saying that the defendant-purchasers must plead.

Where the grantor's deed bans an alienation from the date of the conveyance (1889) until 1950, in Kentucky this is too long, and it is an unreasonable and unenforceable restraint on alienation. The Kentucky rule against perpetuities limits alienation restriction to a permissible period of the rule.260 At the time Saulsberry was decided, there was no judicial "wait and see" doctrine in applying the rule. This case interprets the Kentucky rule against perpetuities as forbidding the suspension of alienation for a period in excess of the period comprising life or lives in being plus twenty-one years and ten months at the creation of the estate. In dictum, the court pointed out that as matters turned out, the restriction for the lives of the grantees would have been valid.

A provision in the deed restricting the alienation of land during the lives of the grantor and his wife, was upheld as valid in Polley v. Adkins.261 In this case the father-grantor conveyed by deed in 1874 land to his sons, subject to the grantor's wife's holding and control-

259. 140 Ky. 77, 130 S.W. 812 (1910).
261. 145 Ky. 370, 140 S.W. 551 (1911).
The deed further provided that the lands conveyed were not to be “sold or conveyed away to any person” during the lives of the grantor and his wife, but permitted the sons to sell to each other their interest. Where one of the sons acquired the interests of the other two, it was held that such son had good title and could enforce specifically a contract to purchase, since after the death of the grantor and his wife, the provision against alienation did not apply.

The next year the court struck down as unreasonable and unenforceable a provision in a mother’s deed of land to her daughter in fee which permitted the daughter to devise the land by will, but forbade any encumbrance or conveyance during the daughter’s life. The court noted that the deed language unquestionably conveyed to the daughter a fee simple estate. There was no reservation of a reversion nor the creation of any remainder. The court held that the daughter could convey away a fee during her lifetime, and the attempted restriction against alienation during her life was invalid and unreasonable.

However, in Thurmond v. Thurmond, the court upheld as valid a provision that if the daughter sold the land, the purchaser must see to the application of the money to purchase other land. The testatrix had devised land to her daughter for life, with remainder to the daughter’s children. The will gave the daughter and her children a power of sale with the aforementioned proviso. The court said that any restraint on the alienation of the land was on the daughter, and since she held only a life estate, the restraint was enforceable only during her lifetime. Since the daughter was not devised a fee simple estate, the restriction is not inconsistent with her estate.

Another instance where the testator went too far in imposing restraints on alienation is illustrated in the case of Carpenter v. Allen. The testator died in 1913 leaving a will which devised a tract of land to his son and provided that no beneficiaries of his will should ever sell or dispose of any lands devised to any person other than a beneficiary. If such beneficiaries did, the estates of those who did not comply would be divided among the beneficiaries who did comply. The son contracted to sell his tract to the defendant, who refused to accept a deed on the ground that the title was defective.

263. 190 Ky. 582, 228 S.W. 29 (1921).
264. 198 Ky. 252, 248 S.W. 523 (1923).
due to the restriction. The court held that the contract was enforceable. By limiting sale to the other devisees only, the testator had made the restriction overbroad. The court noted that the son was devised a fee and the interdiction against alienation was repugnant to the fee. Similarly, the court struck down in a later case as overbroad a provision limiting sale solely to the heirs of the grantor, the clause being void.

A case construing the Kentucky rule against perpetuities as forbidding the remote vesting of future estates, rather than permitting a suspension of alienation, is that of *Camack v. Allen.* There the prohibition against alienation was limited to the life of the devisees, but the court, applying the former Kentucky statute on the rule against perpetuities, said that the devisees took an absolute unfettered estate in fee simple. This result seems inconsistent with the Kentucky cases upholding as lawful and reasonable a restraint on alienation during the life of the grantor.

Yet in 1924, there appear indications that the court of appeals looked upon the Kentucky rule against perpetuities as one limiting or permitting restraints on alienation. In *Cahill v. Pelzer* the testator's will gave the wife a life estate, then remainders in the children for their lives, with an ultimate remainder to their offspring. The will further provided that the children shall have no power to sell "unless in case one of my heirs should die, there and then that property and the benefits derived from the same to be divided over the remaining heirs." The court held this was not an unreasonable restraint on alienation, since it was limited to the lives in being at the time of the creation of the estates. The case is consistent with other Kentucky precedents, because the children were devised life estates only. No argument could be made of the restraints being inconsistent with a devise of such an estate.

A provision in the testator's will that the land devised shall not be sold for thirty years from the date of decedent's death was declared void and unenforceable as possibly postponing the right of alienation for more than twenty-one years and ten months under the former Kentucky rule against perpetuities statute in *Perry v.*

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265. Chappell v. Frick Co., 166 Ky. 311, 179 S.W. 203 (1915). The court noted in *Chappell* that the restriction against alienation was against the whole world, except to a handful of ten to twelve people, heirs of the grantor.

266. 199 Ky. 268, 250 S.W. 963 (1923).


268. 204 Ky. 644, 265 S.W. 32 (1924).
Metcalf.269 A fortiori, a perpetual ban on alienation is bad.270 Likewise, a limitation on sale only to members of the family named 
"Courts," is overbroad, unreasonable and void. In Courts v. Courts' 
Guardian271 the court thought that this limitation on alienation was 
intended to "run with the land" and bind all, and was substantially 
"a denial of the right to sell the land at all."

VII. Statutes
A review of the statutory materials in property and future interest 
areas reflects that Kentucky has, by statute, as have most other 
states, abrogated the common law in expected areas. For example, 
by statute an estate tail at common law has been converted to a fee 
simple.272 The Rule in Shelley's case has been abrogated by stat-
ute.273 The common law rule of the destructibility of contingent 
remainders has been abandoned.274 The modern view disfavoring 
the common law concurrent estate, known as a joint estate, is car-
ried out by the Kentucky statutory scheme for the preferred con-
struction of a tenancy in common, as between husband and wife, 
unless a right of survivorship is expressly provided.275 The survivor-
ship feature of the common law joint tenancy was dropped by sec-
tion 381.120. This section, along with section 381.050, has been con-
strained as abolishing the common law estate enjoyed at common law 
by husband and wife known as the tenancy by entirety.276

A fee simple can be created in a deed without the magic formula 
required at common law—"and his heirs."277 Also, the dire construc-

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269. 216 Ky. 755, 288 S.W. 694 (1926).
270. Ernst v. Shinkle, 95 Ky. 608, 26 S.W. 813 (1894).
271. 230 Ky. 141, 18 S.W.2d 957 (1929).
272. KY. REV. STAT. § 381.070 (1972).
273. KY. REV. STAT. § 381.090 (1972).
274. KY. REV. STAT. § 381.100 (1972).
275. KY. REV. STAT. § 381.050 (1972).
277. KY. REV. STAT. § 381.120 (1972) provides:
Joint tenants may be compelled to make partition, and when a joint tenant dies, his 
part of the joint estate, real or personal, shall descend to his heirs, or pass by devise, 
or go to his personal representative, subject to debts, curtesy, dower or distribution.

KY. REV. STAT. § 381.050 (1972) provides:
If real estate is conveyed or devised to husband and wife, unless a right by survivorship 
is expressly provided for, there shall be no mutual right to the entirety by survivorship 
between them, but they shall take as tenants in common, and the respective moieties 
shall be subject to the respective rights of the husband or wife as fixed in KRS chapter 
392, with all other incidents to such tenancy. (2143).
277. KY. REV. STAT. § 381.060(1) (1972) provides:
Unless a different purpose appears by express words or necessary inference, every
tion problem which arises in “dying without issue,” raising the issue of “when,” is resolved by section 381.080. The Kentucky legislature thus has adopted the definite failure of issue construction.

As earlier indicated, Kentucky reverted to the common law rule against perpetuities in 1960, modified by adopting the “wait and see” reform.

In some states the old common law estate known as the fee simple determinable with the possibility of reverter has fallen on evil days. These old estates that so clogged titles were reformed in Kentucky. Actually, the reason for the continued existence of this estate has disappeared since land is no longer donated for exclusive use for school or religious purposes as was done in the early developing years of the United States.

Also, following the trend elsewhere, is the statute that limits enforcement of a right of entry for condition broken to thirty years from its creation.

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278. Ky. Rev. Stat. § 381.080 (1972) provides:
Unless a different purpose is plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying “without heirs” or “without children” or “issue”, or other words of like import, shall be construed a limitation to take effect when such person dies, unless the object on which the contingency is made to depend is then living, or, if a child of his body, such child is born within ten months next thereafter. (emphasis added)

No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. It is the purpose of this section to enact the common law rule against perpetuities, except as modified by KRS 381.215 to 381.223.

280. Ky. Rev. Stat. § 381.216 (1972) provides:
In determining whether an interest would violate the rule against perpetuities, the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest.

281. Ky. Rev. Stat. § 381.218 (1972) provides:
The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry.

282. Ky. Rev. Stat. § 381.219 (1972) provides:
A fee simple subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating such fee subject to a right of entry. If such contin-
Another statute required the holders of old rights at common law in a fee simple determinable or a fee subject to a right of entry for condition, to have preserved their rights by the filing of a declaration of intention to preserve prior to July 1, 1965, with the county clerk where the land is located. In 1967, the court of appeals in Atkinson v. Kish held that this statute applied to a situation to bar recovery on a right of entry created prior to July 1, 1960, since the claim went unrecorded prior to July 1, 1965. In Atkinson, by testator's will (1917) the alienability of the lands (a 500 acre farm-land) devised was restrained until twenty-one years and ten months after the death of the last survivor of four named life tenants, one of whom was the plaintiff, Fannie Atkinson, still living forty-six years after the death of the testator. The will devised the land to the widow for life, and then to the testator's four children, Robert, Washington, Milton and Fannie, for their lives with a remainder over to their issue, who were to take the share of any deceased parent if he or she died before the death of the widow. The will restrained the power to sell, lease or encumber the land. Two sons, Washington and Milton, died without issue before the widow of the testator. The widow died in 1927. Robert and Fannie then agreed to partition the land, with Fannie getting the upper portion and Robert the lower portion. Arrangements for formal conveyances were never carried out. Both Robert and Fannie continued to live on their respective portions. When Robert died in 1935, his children and his widow continued to reside on that portion. In 1957, Robert's children sued for a declaration of ownership as to their father's portion of the land. In the present suit, Fannie sought to upset the arrangement made with Robert in 1927 on the ground that the two lots were not equal. As the last survivor of her father's will, she claimed a tenancy for life as to all the property (both portions) with a remainder in her issue. The court declined the claim and re-

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283. Ky. Rev. Stat. § 381.221 (1972) provides:
(1) Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty years after the effective date of the instrument creating it, unless before July 1, 1965, a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is to be located . . . .

284. 420 S.W.2d 104 (Ky. 1967).
manded the case for a partition by the lower court. In effect, Fannie had waited too long to assert her rights and was cut down by the operation of the “right of entry” statute, which provided that any right of entry created prior to July 1, 1960 was unenforceable thirty years after its creation unless a declaration of intention to preserve provided by the statute was filed before July 1, 1965.

Note that in 1962, the Kentucky Legislature passed a law relating to condominium property ownership known as the “Horizontal Property Law.”

**Statutes Limiting Action**

The basic statute of limitation relating to the recovery of real property is stated:

An action for the recovery of real property may be brought only within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims.

As elsewhere, the Kentucky statutory limitation on the time in which a cause of action can be successfully brought is in a state of repose. “The statute of limitation is intended to close the door of the courts to the bringing of lawsuits on stale claims. It is intended to be used as a blanket to smother any faint respiration of moribund claims of plaintiffs in regular causes of action or those of defendants asserted by counterclaim.”

Certainly, there is a public policy to be served by fixing land rights and removing old, stale claims that could be clogs on the title.

The usual provision for disability of plaintiffs seeking to assert a right against land is found in Kentucky:

If, at the time the right of any person to bring an action for the recovery of real property first accrued, he was an infant or of unsound mind, he or the person claiming through him may, though the period of fifteen (15) years has expired, bring the action within three (3) years after the time the disability has been removed.

Another statute to be considered and read in the light of the above statute’s limiting action is the unusual and peculiar statute in Kentucky which makes void an attempted conveyance of a land interest held adversely. The application of this statute has rendered al-

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most nugatory the doctrine of estoppel by deed in Kentucky under
the theory that if the deed of conveyance is void, no warranty con-
tained therein can be enforced. The purpose of this statute was to
prohibit sales of doubtful interests in land to strangers to the title
and is for the protection of the adverse holder. Another purpose
conceived by the court was to discourage litigation by prohibiting
the sale of land in the adverse possession of another thereby encour-
aging strife.

The court of appeals recently was called upon to redefine the
application of this "champerty" statute in an adverse possession
situation. In *Vaughan v. Holderer*, the appellant owned lots in
Louisville, identified as lots 5 and 6, which had been acquired by
deed in 1968 or 1969. The appellee owned lots 8, 9 and 10, all facing
Warwick Avenue, Louisville, Ky. The dispute is over lot no. 7, a
vacant lot, once owned by a man named McCann, which went by
descent to his son, Fred McCann, who conveyed lot no. 7 to the
appellant. For many years, the father/grantor of the appellee,
Charles Oschsner, cut the grass and cared for lot no. 7, and had
planted gardens there. The evidence showed that at one time Osch-
sner had put up a fence between lot 7 and lot 6, but had never
entirely fenced in lot 7. Oschsner never claimed to own the land, but
he did pay some taxes on the lot and stated that he had been given
permission to use the lot "by relatives of the owner, and thereafter
Oschsner conveyed lots 8, 9 and 10 to his daughter, and thereafter
the daughter (appellee) continued to weed lot 7 and cut the grass,
etc. The record shows that she never claimed "to own it" until
sometime in 1971. In that year, appellant started making use of lot
7 by parking his truck and some equipment on it. The appellee
objected to such use and built a fence between lot 7 and 6, which
appellant proceeded to remove. Appellee then filed this suit to clear

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(1) Any sale or conveyance, including those made under execution of any land, or the
pretended right or title thereto, of which any other person has adverse possession at
the time of the sale or conveyance, is void; but this section does not render void any
device of land in adverse possession. (2) A judgment creditor, after a return on the
execution of no property found, may file a petition in equity to subject any real estate
to which the defendant has legal or equitable title even if the property is in the adverse
possession of another. The person in possession shall be made a defendant in such
action.

290. *See Construction of Limitation - Power to Convey an Expectancy, supra* at 83.
292. Elkhorn Coal Corp. v. Jacks Creek Coal Co., 240 Ky. 769, 43 S.W.2d 13 (1931).
294. 531 S.W.2d 520 (Ky. 1976).
the title. The lower court gave summary judgment to the appellee on the basis of affidavits and depositions, ruling that the deed to the appellant was "champertous" and void under the Kentucky statute. The lower court set aside the deed and enjoined the appellant from interfering with the appellee's use and occupation of the disputed property. The Court of Appeals reversed on the ground that it was error to render a summary judgment on the facts and evidence before the lower court. The court ruled that the deed from McCann to appellant was not champertous, even if McCann had knowledge of the appellee's claim, unless, in addition to her claim of ownership, the appellee also held the lot by adverse possession of a character that would ripen into title. The court of appeals said that there was no showing that the appellee had ever occupied and possessed lot no. 7 in an open and hostile manner against the claim of all other persons. Evidence of the cutting of the grass and payment of taxes does not constitute adverse possession that will ripen into title.

It is doubtful whether the Kentucky legislature by its passage of the old statute, now a part of the Revised statutes, ever intended the lengths to which the Kentucky courts have taken the statute by its construction. It was the purpose of the statute to prevent a deed of conveyance by one who had little or no claim to the land. But it has been construed, as we have seen, as operative even as against the record title holder. This interpretation would seem to require every Kentucky landowner, before conveying such land, to inspect the entire premises to determine if it, or any part, is being adversely claimed by a third person. No other state has a comparable statute. If indeed there was a brisk trade in the past by fraudulent land speculators in Kentucky, that day has long passed. The statute should be repealed.

A person in possession of land may purchase the adverse outstanding claim or title. It appears unfair to permit the adverse possessor to pass on his rights to the land by deed or contract, and to deny the title holder the right to do so as his deed could be determined to be void.

At one time, the Kentucky statute of limitations provided that coverture gave a disability to a married woman, but this exception was repealed in 1934. In Louisville Cooperage v. Rudd, the court

298. 276 Ky. 721, 124 S.W.2d 1063 (1939).
barred the right and claim of a potential heir, a contingent remainder person, twenty-four years after the sale of timber rights by the life tenant. The court pointed out that Kentucky statute permits immediate suits for an accounting for the selling of timber from common land without the consent of a tenant or co-partner. The remainderman also has an immediate remedy against a tenant for life to recover compensation and punitive damages for waste. Taking the view that a remainderman must sue immediately when the cause of action accrues, the court of appeals rejects the majority view, espoused by Simes and other writers, that a contingent remainder's only remedy is a suit to enjoin with no damages, since the contingency may never come to pass, pointing out that such a delayed remedy perhaps generations after the injury was done would be an empty legal right to enforce against a tort-feasor.

Where the holder of a life estate conveys away a fee simple estate, the right of the remainder person to recover the land is barred if he waits until the death of the life tenant. In Brittenum a grandfather, in 1889, conveyed by deed land to the plaintiff's mother for life with a remainder to the heirs of the life tenant's husband, Joshua. Prior to this conveyance, the grandfather-grantor had mortgaged the property which was foreclosed in 1897. Joshua was made a party to the foreclosure suit but the wife-life tenant of the heirs of Joshua were not. The purchasers of the land enjoyed possession for 43 years, until in 1940, the wife, Mary, finally died. Plaintiffs claimed that their right to recover did not arise until the death of the life tenant, but the court rejected this argument, for title here was held adversely to both the life tenant and the remainderman. The plaintiff's claim was barred by the 15 year statute of limitations. The lesson of the case is plain. The longevity of a life tenant may lull remaindermen and other future interest holders into a false condition of security. Here the future interest-holders slumbered while the clock ticked away their rights.

The Brittenum rule will not be applied in a situation where the life tenant is the purchaser at the foreclosure sale, since the holding by the life tenant-purchaser is not considered "adverse" to the remainder people. The court in Wheeler v. Kazee pointed out that

301. Brittenum v. Cunningham, 310 Ky. 131, 220 S.W.2d 100 (1949).
303. 253 S.W.2d 378 (Ky. 1952).
there is a special relation existing between the life tenant and those who hold a future interest in the land in dispute. In *Wheeler*, the remainder persons prevailed, but they were lucky. The life tenancy was created in 1898, but the life tenant finally died in 1950, 52 years later.

Kentucky law recognizes separate ownership of the mineral rights and the surface rights to the same land. So, it necessarily follows that where there has been a severance, a person who claims the surface rights through adverse possession cannot hold the mineral rights by adverse possession simply by occupancy of the land.304

CONCLUSION

The Kentucky property cases involving the rights of future interest-holders run the gamut of situations found in the traditional law books. Kentucky property law is interesting law. Except for the obvious aberrations from the tried and true common law principles, as outlined in this discourse, the Kentucky law of property serves the people of the Commonwealth well.

"Louisville Firefighters walked off their jobs shortly before 8:00 A.M. today, saying the City was using delaying tactics in its negotiations with their Union.

Shortly after 10:00 A.M., the City obtained a restraining order intended to force them back to work, but at noon, the strike continued."

The story appearing in The Louisville Times is not unlike stories appearing in newspapers of other major cities concerning strikes in the public sector. This article will examine the statutory and decisional law in Kentucky concerning public sector labor relations as
well as the practice and future of public sector labor relations in Kentucky as perceived by city and county officials.\(^2\)

I. STATUTORY PUBLIC LABOR LAWS

A. Collective Bargaining for Firemen

Kentucky has no statute of general application dealing with public sector labor relations. There do exist, however, isolated pockets of legislation which touch public sector labor relations and prescribe certain rights and duties. A complete chapter of statutes exists concerning municipal firefighters.\(^3\) Chapter 345 of the Kentucky Revised Statutes, entitled "Collective Bargaining for Firemen," enacted in 1972, created a comprehensive set of labor laws for firefighters, but it was limited to cities containing a population of at least 300,000.\(^4\) The only city in Kentucky meeting the threshold population is Louisville; therefore, its provisions have minimal state-wide application.\(^5\)

B. Collective Bargaining for Police

There also exists enabling legislation for collective bargaining with county police.\(^6\) Kentucky Revised Statutes section 78.470 provides that in counties containing a population of more than 300,000, a meritized county police force may organize for the purpose of collective bargaining.\(^7\) The only county in Kentucky meeting this

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2. A public sector bargaining survey was conducted by the author. A questionnaire was mailed to 120 county judges and 110 city officials of first, second, third, and fourth class cities. Nineteen county judges answered the survey for a 16% state-wide response and thirty-one city officials answered for a 28% state-wide response. The public sector survey is at appendix A.


In any county in the commonwealth of Kentucky, which has a population of 300,000 or more, and which has adopted the merit system, the county employees in the classified service as police may organize, form, join or participate in organizations in order to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to bargain collectively through representatives of their own free choice. Such employees shall also have the right to refrain from any or all such activities. Strikes by said members of any such collective bargaining unit shall be prohibited at any time.
population threshold is Jefferson County, and, therefore, this statute too has minimal state-wide application. Kentucky Revised Statutes section 78.480 enumerates the proper subjects of bargaining between county government and county police and enables fiscal courts to enter into contracts with a county police bargaining unit.6

Aside from the specific statutes identified pertaining to firefighters7 and county police, there is no other public sector labor law enacted by the General Assembly of the Commonwealth of Kentucky. Therefore, the lex fori in this area must be determined from analyzing the decisions rendered by the courts of Kentucky.

II. PROHIBITION AGAINST PUBLIC SECTOR STRIKES

A. Unrevised Statutory Prohibition

Prior to the establishment of the Kentucky Revised Statutes, Carroll's Kentucky Statutes were in effect.8 Baldwin's February, 1941 Supplement to Carroll's Kentucky Statutes provided for the rights of employees to organize, strike, picket, etc. Article III, section 1599C-28, stated:

Peaceful and amicable conciliation, mediation and arbitration of disputes between employees should be, and hereby is declared to be the public policy of the Commonwealth; and the right of employees to organize and bargain collectively concerning the terms and conditions of employment hereby is recognized and declared. Employees

In any county in the commonwealth of Kentucky, which has a population of 300,000 or more, and which has adopted the merit system for its police force, the fiscal court may contract with representatives of the police employed by said county with respect to wages, hours, terms and conditions of employment, including execution of a written contract incorporating any agreement reached between the fiscal court and representatives of the police. The fiscal court shall not be required to bargain over matters of inherent managerial policy.

9. The constitutionality of Ky. Rev. Stat. §§ 345.010-.130 was challenged in the pleadings of Louisville Prof. Fire Fighters Assoc. v. City of Louisville, No. 216305 (Jefferson Cir. Ct., June 7, 1976). Although the constitutional questions were not specifically addressed by Judge Mudd in his decision, the court did state that the statutes were enforceable and that they did not preempt local ordinance.

10. Prior to the 1942 adoption of the Kentucky Revised Statutes by the General Assembly, the most recent Carroll's Kentucky Statutes, along with the Baldwin Supplement where appropriate, were routinely "adopted as the law of the Commonwealth of Kentucky." See, e.g., 1940 Ky. Acts 736, ch. 190; 1938 Ky. Acts 148, ch. 9; 1928 Ky. Acts 529, ch. 154. However, these enactments were not to have effect as positive law. Rather, the published statutes were considered a compilation, as prima facie evidence of the law in judicial proceedings, and all previous editions of the statutes were receivable as evidence of the statute laws in force at the time of their respective publication. See Fidelity & Columbia Trust Co. v. Meek, 294 Ky. 122, 125, 171 S.W.2d 41, 43 (1943).
are entitled to associate collectively for self-organization and to designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment, free from restraint, or coercion of the employers or their agents, to effectively promote their own rights and general welfare. Employees, collectively and individually, have the right to strike and to engage in peaceful picketing, the right to assemble collectively for peaceful purposes; and it hereby is declared to be the public policy of the Commonwealth to encourage collective bargaining in employer-employee relations.\textsuperscript{11}

Article V, section 1599C-39 of Baldwin's February, 1941 Supplement to Carroll's Statutes contains exemptions to Article III, Section 1599C-28:

There is exempted and excluded from all of the provisions of this act the following: (a) All employers and employees subject to the provisions of the Federal Railway Labor Act, the Federal Safety Appliance Act, the Federal Railroad Mediation Act, the Interstate Commerce Commission and the Public Service Commission of the Commonwealth of Kentucky; (b) Farming, household and domestic work, hospitals, charitable institutions and employees of the United States, the state and any and all political subdivisions or agencies thereof.\textsuperscript{12}

In Article V, public employees of both the state and all political subdivisions thereof were exempted from provisions of the state law allowing employee organization and concerted work action. It was clear, therefore, that public employees did not have the right to strike as granted by state law to non-public employees.

B. Revised Statutes Omission

In 1942, the Statutes of Kentucky were completely revised into the Kentucky Revised Statutes.\textsuperscript{13} In the Revised Statutes, Carroll's

\begin{footnotesize}
\textsuperscript{11} 1940 Ky. Acts 414, ch. 105, art. III § 1.
\textsuperscript{12} 1940 Ky. Acts 414, ch. 105, art. V.
\textsuperscript{13} Unlike the adoption of the Carroll's Kentucky Statutes as a compilation, the enactment of the Kentucky Revised Statutes in 1942 was intended to be a revision of the statute law, a redrafting and simplication of the entire body of statute law. After reviewing the effect given Carroll's Kentucky Statutes and the history of the Kentucky Revised Statutes, the court in \textit{Fidelity & Columbia Trust Co. v. Meek}, 294 Ky. 122, 171 S.W.2d 41 (1943) held that "the Revised Statutes of Kentucky, together with the other acts enacted at the 1942 sessions of the General Assembly, constitute the statutory law of the Commonwealth." The court went on to state a rule of construction that, notwithstanding the fact that the Revised Statutes were intended to speak for themselves, the General Assembly also meant for a court to refer to the Acts of the General Assembly from which the sections were derived in order to resolve a latent or patent ambiguity. \textit{Id.} at 134, 171 S.W.2d at 47. \textit{See also Ky. Rev. Stat.} § 446.130 (1975) (permits reference to acts of General Assembly to resolve ambiguity); \textit{Ky. Rev. Stat.} § 7.138(2) (1971) (certified edition of Ky. Rev. Stat. to constitute prima facie evidence of the law in all courts and proceedings).
\end{footnotesize}
Section 1599C-39, Article V was compiled into sections 336.050 and 337.010, dealing with the duties of the Commissioner of Labor and the subject of wages and hours respectively. The current statutory law dealing with employees' right to strike and engage in collective bargaining is found in section 336.130.

When comparing the new Kentucky Revised Statutes to the old Carroll's Kentucky Statutes, it is apparent that the original statute pertaining to employer and employee relations clearly and expressly denied public employees the right to engage in concerted activities including the right to strike. The new Kentucky Revised Statutes, however, omitted any reference to the exclusion of public employees from the rights granted to non-public employees as, the right to organize, bargain collectively and strike. The question was raised whether the omission of the public employee exclusion in Chapter 336 was meant to allow public employees the right to bargain collectively and engage in concerted work activities, or whether the omission in Chapter 336 was merely inadvertent on the part of the revisers and, therefore, the public policy against public strikes remained inviolate.

C. Judicial Interpretation

The first case concerning the right of public sector employees to engage in concerted activities, including the right to strike, involved a dispute between the Jefferson County Teachers Association and

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15. (1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.
(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion.
(3) Except in instances where violence, personal injury, or damage to property have occurred and such occurrence is supported by an affidavit setting forth the facts and circumstances surrounding such incidents, the employees and their agents shall not be restrained or enjoined from exercising the rights granted them in subsection (1) of this section without a hearing first being held, unless the employees or their agents are engaged in a strike in violation of a “no strike” clause in their labor contract.
(4) Submission of a false affidavit concerning violence, personal injury, or damage to property shall constitute a violation of KRS 523.030. In the absence of any such affidavit alleging violence, personal injury, or damage injunctions shall be issued only by a circuit judge or other justice or judge acting as a circuit judge pursuant to law.

the Jefferson County Board of Education. In 1970 the teachers in Jefferson County refused to report to work whereupon the Board of Education obtained a temporary injunction against their continued refusal to work. The teachers obeyed the temporary injunction and the Board of Education obtained a permanent injunction against the teachers enjoining them from "participating in a concerted work stoppage or strike in the public schools of Jefferson County." The County Teachers Association appealed the permanent injunction contending, *inter alia*, that the injunction violated their statutory and constitutional rights. One theory used by the Teachers Association was that the General Assembly of Kentucky recognized the right of public employees to strike in the provisions of Kentucky Revised Statutes Chapter 336. The teachers contended that Chapter 336 applied to all employees, including public sector employees, and, therefore, their right to strike was granted by the Kentucky General Assembly. The court had the task of determining the meaning of "employe" as used in section 336.130. In order to do so, the court reviewed the statutory history of the section, noting that in the original statute there was an express prohibition against public striking by employees. The court, faced with the omission of such language from the new revised statutes held: "The apparently inadvertent omission of this exclusion in Chapter 336 when the statutes were revised cannot be held to have changed the legislative policy and the law. Therefore appellants cannot properly claim the legislature has granted them such right, and their principle contention must fall.

The Court of Appeals of Kentucky affirmed the holding of the circuit court thereby permanently enjoining the Jefferson County Teachers Association from engaging in any concerted work activities including strikes.

D. *No Right to Strike*

The court in the *Jefferson County Teachers Association* case

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17. Id. at 628.
19. Id. See note 15 supra for text of statute.
21. Id. at 631.
therefore, specifically found that there did not exist a statutory right which would allow public employees to engage in concerted activities including the right to strike. The court of appeals also noted that under the common law "it is recognized that public employees do not have the right to strike or to engage in concerted work stoppage."\(^2\)

With a clear expression by Kentucky's highest court that there did not exist any fundamental right by public employees to engage in concerted activities, public employers were free to discipline public employees for engaging in illegal, public sector concerted activities. In a case arising out of the same factual circumstances as that presented in the Jefferson County Teachers Association case, the Sixth Circuit United States Court of Appeals had occasion to reinforce the rights of public employers in Kentucky.\(^24\) In the case of Bates v. Dause\(^25\) the court of appeals upheld the public policy of Kentucky prohibiting public employee strikes and further stated that there existed no federal constitutional basis for public employee strikes. The court of appeals in this case made it clear that in both state and federal courts, public employee concerted activities and public employee strikes were not protected activities. The Sixth Circuit did, however, open one door to the federal courts, by stating that a public employee discharged for engaging in or participating in public employee concerted activities may maintain an action by stating that a first amendment right was infringed.\(^26\)

The most recent holding concerning the right of public employees to strike was announced by the Supreme Court of Kentucky in Board of Trustees of the University of Kentucky v. Public Employees Council #51, American Federation of State, County and Municipal Employees, AFL-CIO.\(^27\) There, the supreme court, in affirming a declaratory judgment of the Circuit Court of Fayette County, restated the reasoning of the Jefferson County Teachers Association\(^28\) case concerning the omission of public employees from the provisions of Section 336.130\(^29\) and reaffirmed the prohibition

\(^{23}\) Id. at 628.
\(^{24}\) Bates v. Dause, 502 F.2d 865 (6th Cir. 1974).
\(^{25}\) 502 F.2d 865 (6th Cir. 1974).
\(^{26}\) Id. at 866-67.
\(^{27}\) 571 S.W.2d 616 (Ky. 1978).
\(^{28}\) Jefferson County Teachers Ass'n v. Jefferson County Bd. of Educ., 463 S.W.2d 627 (Ky. 1970).
against public sector strikes. In the *Board of Trustees* case, the University of Kentucky filed an action for declaratory judgment in order to address seven points concerning public sector labor relations. One issue concerned the right of nonacademic employees at the University of Kentucky to strike or engage in other concerted activities for the purposes of obtaining collective bargaining. The supreme court held:

Under the common law, it is well settled that public employees do not have the right to strike or to engage in concerted work stoppages. The right to strike on the part of public employees is not protected by either the Federal or the Kentucky Constitution, nor has the legislature granted such rights to public employees.

III. THE RIGHT OF PUBLIC EMPLOYEES TO ENGAGE IN COLLECTIVE BARGAINING

The courts of Kentucky have uniformly held that there is neither a statutory nor a common law right for public employees to engage in concerted work activities for collective bargaining purposes. However, while denouncing the rights of public employees to engage in public strikes, the courts of Kentucky have upheld the principle of public employee collective bargaining. This anomaly cannot be easily explained except to state that the courts of Kentucky are generally protective of the rights of public employees.

A. Teachers and Collective Bargaining

Questions concerning the rights of public employees to engage in collective bargaining first arose in the field of teaching. A teachers' association requested an opinion of the Kentucky Attorney General as to whether it could legally enter into a collective bargaining contract. The Kentucky Attorney General stated that while there is no obligation to engage in collective bargaining with teachers, a local board of education "may engage in collective bargaining provided they do not do so under threat of strike." The Attorney General stated the law of collective bargaining in Kentucky when he advised:

[I]t is well settled that the board may listen or not as it wishes, accept or reject the proposals which teachers present, and take any

30. *Board of Trustees v. Public Employees Council*, 571 S.W.2d 616, 619 (Ky. 1978).
31. *Id.* at 617-18.
32. *Id.* at 619.
33. See section II *supra* for discussion of authorities.
35. *Id.*
action which it considers necessary and proper to the general welfare of the schools . . . A board of education must remain forever free to decide unilaterally what is good and best for the children and for the school system in general.

The position as announced by the Attorney General was one of freedom to collectively bargain, but not a duty to do so. Consequently, the state of the law in the opinion of the Attorney General was simply that public employees, vis-a-vis teachers, had no right to strike in order to force a public employer to engage in collective bargaining. However, if public employees, without using the threat of strike, successfully convinced a public employer to engage in collective bargaining, then the state would not interfere with that relationship. Obviously, the court in the Jefferson County Teachers Association case did nothing to interfere with the basic contractual rights between the county teachers and the board of education, vis-a-vis their collective bargaining agreement.

B. No Inherent Rights

In another case concerning the Jefferson County Board of Education, the Kentucky Court of Appeals considered the legal status of public union representation when the public employer was dealing with its employees. In International Brotherhood of Firemen and Oilers v. Board of Education the court refused to find that public union representatives had a right to represent its union members in a grievance hearing. In that case, the school board had refused to hear grievances of its employees when its employees required the presence of third party representation. The court held:

No statutory provision or school board regulation requires or permits third party representation in the presentation of grievances. The relief sought by appellants is properly a legislative function.

The court of appeals, therefore, while indirectly recognizing the legal status of public sector unions, echoed the opinion of the Attorney General by holding that without some unilateral regulation of the public employer there could be no rights inherent in a public sector union itself. The employees in the International Brotherhood of Firemen and Oilers case were asserting a right of representation

36. Id.
38. 393 S.W.2d 793 (Ky. 1965).
39. Id. at 794-95.
40. Id. at 795.
by virtue of the fact that the board of education had recognized a
public sector union. However, the court of appeals would not extend
any rights to public sector union membership unless those rights
were specifically given to public sector union employees either by
contract, agreement, or regulation by the public sector employer.

Even though it was apparent that boards of education were collec-
tively bargaining with teachers and non-teaching personnel and en-
tering into agreements with these groups, it was still unclear
whether public employers had the legal right to recognize and subse-
quently contract with public employee unions.

C. Authority to Recognize, Bargain and Contract

In 1968, the City of Louisville enacted Ordinance No. 156, Series
1968\(^{41}\) which permitted collective bargaining by city employees and
established procedures and methods for recognition of public em-
ployee unions and implementation of collective bargaining agree-
ments. In 1969, the City of Louisville through its board of aldermen
approved collective bargaining agreements between the city and two
public employee unions.\(^{42}\)

The question was presented to the Jefferson County Circuit Court
whether the City of Louisville, acting through its board of aldermen,
could legally enact an ordinance providing for collective bargaining
between the city and designated collective bargaining representa-
tives of appropriate groups of city employees.\(^{43}\) Judge Sternberg
(later of the Kentucky Supreme Court) considered the powers pos-
sessed by municipal corporation, looking to Kentucky Revised Stat-
utes Chapter 83 which conferred home rule upon the City of Louis-
ville.\(^{44}\) Judge Sternberg noted that this case was one of first impres-
sion in the Commonwealth of Kentucky, recognizing, however, cases
in other jurisdictions which generally found that public employers
did have the right but not the obligation to engage in collective
bargaining.\(^{45}\) The court stated:

The delegation of authority from the Legislature of the Common-
wealth of Kentucky to the City of Louisville does not specifically
provide authority for such collective bargaining agreements, yet there

\(^{41}\) Louisville, Ky. Ordinance No. 156, Series 1968 (July 9, 1968).
\(^{44}\) 1893 Ky. Acts 1265, ch. 244, §§ 1, 20 & 21; 1954 Ky. Acts 77, ch. 35 §§ 1-5, repealed
1972 Ky. Acts 1018, ch. 243 § 35. For current statutes pertaining to home rule powers of cities
is no statute forbidding or prohibiting such a contractual arrangement, nor is the public policy of the state adverse to such a collective bargaining agreement. It appears to the Court that the Legislature meant to and did confer home rule upon the City of Louisville except where specifically denied by statute.46

The court recited several innovative acts of the legislature and discussed the evolutionary movement in the law recognizing the principle of personal rights. Judge Sternberg concluded by stating that government employees should no longer be reticent concerning their working conditions and, therefore, the City of Louisville could legally enact a collective bargaining ordinance and contract with appropriate groups of city employees.47 Once the court found that the City of Louisville had the power to provide for collective bargaining and to designate collective bargaining representatives, it followed that the ordinances enacted between the City of Louisville and employee unions were binding and enforceable.48 While the court in Louisville Professional Firefighters specifically held that the City of Louisville had the legal authority to recognize employee unions and to subsequently contract with them by ordinance, the holding merely stated that legal authority existed so as to allow collective bargaining, but was not mandatory so as to force collective bargaining. Consequently, with the Louisville Professional Firefighters case, a Kentucky state court has held that there indeed did exist authority on which public employers in first class cities could, if they elected to do so, collectively bargain with their employees, notwithstanding the absence of direct statutory authority.49

Public employers like the City of Louisville did not have to establish an ordinance setting forth collective bargaining and ratification of contracts and, furthermore, public sector unions could not force a public employer to do so. In the case of Lexington-Fayette Urban County Government v. International Ass'n of Firefighters, Local 526,50 the firefighters union sought to enjoin the Lexington-Fayette Urban County Government from failing to recognize the public sector union and refusing to negotiate with it. The court noted that while there existed an ordinance for public sector unions to seek recognition, no evidence was presented to the court to show that the government had been so requested. The court stated:

46. Id. at 2004.
47. Id. at 2005.
48. Id.
49. Id. at 2004.
As we have previously stated, collective bargaining for the firefighters may or may not be beneficial to the community. What is clear is the principle that the decision to recognize or not to recognize the defendant as the bargaining agent of the firefighters is not the function of this Court. It is not a judicial decision. The decision to recognize or not recognize the defendant as the bargaining representative of all firefighters is a legislative and executive decision for the duly elected and appointed officers of the plaintiff Urban County Government.31

The *Lexington-Fayette Urban County Government* case did not, however, state from where the authority to bargain and recognize was derived as did the *Louisville Professional Fire Fighters* case. It could be argued that *Louisville Professional Fire Fighters* could have limited application since the holding referred to the City of Louisville’s Home Rule powers.42 Other public employers, for instance, when faced with petitions for collective bargaining and recognition, could assert as a defense the inability to bargain or recognize due to the absence of a specific delegation of authority from the General Assembly. *Lexington-Fayette Urban County Government*, while not specifically on the issue of authority to bargain and recognize, does imply that the urban county government did, in fact, have such authority if it elected to exercise it.53 However, since the public union did not formally petition for recognition pursuant to the terms of the collective bargaining ordinance, the court was not faced with the decision of whether the ordinance itself was a valid exercise of municipal legislation.54

In 1972, the Attorney General of the Commonwealth of Kentucky was still of the opinion that while public employees could join labor unions, the State and its agencies were prohibited from entering into any labor contracts.55 A question arose as to whether the State Fair Board could recognize an exclusive bargaining agent and enter into collective bargaining agreements with it. The Attorney General opined that employees of the State Fair Board were public employees of the Commonwealth and as such had no statutory right to organize and designate collective bargaining representatives.56 The Attorney General concluded by stating, “A fortiori, any contract

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51. *Id.* at 2309.
54. *Id.* at 2309.
56. *Id.*
which might be made between the Fair Board and a Union would be ultra vires." 57 This opinion of the Attorney General stated that not only could the State Fair Board not enter into a collective bargaining agreement with a public sector union representative but it could not even recognize such a representative. The reason for the strict interpretation by the Attorney General was probably due to the fact that state employees were the subject matter of the opinion and not municipal or board of education employees.

Despite the opinion of the Attorney General, collective bargaining between public employers and employees was occurring in the Commonwealth of Kentucky, and pressure by public employee groups was mounting for a public employee labor relations bill. 58

In 1975, the Governor of Kentucky requested an opinion of the Attorney General with respect to whether he could extend collective bargaining rights to teachers through executive order. 59 The Attorney General restated his general opinion that "in Kentucky the school teacher has no right to engage in collective bargaining, in its usual sense, and has no right to strike." 60 The Attorney General concluded his opinion by stating that the Governor could not extend negotiation rights of any kind to Kentucky teachers through the process of executive order. 61

IV. The Kentucky Supreme Court's Commentary on Public Sector Labor Law

A. Employees Organizing at the University of Kentucky

The Board of Trustees of the University of Kentucky is the body charged with operating the University. Employees of the University are public employees. The board was faced with a campaign by Council No. 51, American Federation of State, County and Municipal Employees, AFL-CIO, which resulted in a "substantial" num-

57. Id.
58. In 1972 House Bill 364 was introduced providing for public sector collective bargaining but did not pass the Kentucky General Assembly. In 1974 H.B. 30 and H.B. 639 were introduced providing for public sector collective bargaining for state employees and teachers respectively, but did not pass. In 1976 H.B. 300 and S.B. 200 were introduced providing for collective bargaining for state employees and teachers respectively but did not pass. Also House Joint Resolution 4, providing that public collective bargaining be voted on by referendum, was introduced but did not pass. In 1978 H.B. 7, S.B. 88, and S.B. 193 were introduced providing for collective bargaining for state employees, teachers and firefighters respectively but did not pass.
60. Id.
61. Id.
ber of authorization cards designating the union as a bargaining representative of all non academic employees.\textsuperscript{62} The board, faced with recognizing a public employee union, filed a declaratory judgment action concerning numerous questions in the area of public sector labor relations. The Kentucky Supreme Court, speaking through Justice Stephenson, seized upon this opportunity to formulate a restatement of the law of public sector labor relations in Kentucky.\textsuperscript{63}

The supreme court categorically stated that there existed no right on the part of public employees to strike.\textsuperscript{64} Furthermore, the court, in analyzing the statutes of Kentucky, held that “the Board of Trustees has no duty to recognize, negotiate or bargain with a union, other authorized bargaining agent, or with individual employees.”\textsuperscript{65} The court did announce a fundamental right concerning employee associations which had only been assumed to have existed but which was never explicitly stated heretofore. The court held that the right of employees to join a labor organization and to organize emanates from the rights of freedom of expression and association guaranteed by the Constitution of Kentucky and the United States Constitution, and the Board may not, without showing a paramount public interest, lawfully prohibit its nonacademic employees from membership in a union.\textsuperscript{66}

The court also found that since the Board of Trustees of the University of Kentucky was given authority by state law to perform personnel functions such as hiring, promotion, discipline, etc., there exists implied authority to perform other personnel functions pertaining to wages, hours and working conditions:

Thus, the Board has the authority to meet with representatives of a group of nonacademic employees, including a union representative, to discuss wages, hours and working conditions for those nonacademic employees authorizing such representation.\textsuperscript{67}

The court also discussed the power of the public employer to enter into collective bargaining agreements. In order for the court to find

\begin{footnotes}
\begin{enumerate}
\item Board of Trustees v. Public Employees Council, 571 S.W.2d 616 (Ky. 1978).
\item Although the union, et al., failed to properly present these issues on appeal, we feel that these issues represent the fundamental background of the other issues on appeal and should be addressed briefly.
\item Id. at 619.
\item Id. at 619-20.
\item Id. at 620.
\item Id.
\item Id. at 620-21.
\end{enumerate}
\end{footnotes}
that the Board of Trustees of the University of Kentucky had the power to bargain with a public union, it first had to locate the source of the board’s authority. The court found the source by examining the enabling legislation which created the public employer itself.68 State law created the board of trustees and prescribed that the board would be the governing body of the University.69 The state legislature, after creating the political entity known as the board of trustees, then delegated to it certain exclusive powers.70 The court reasoned that since the General Assembly of Kentucky created a governmental entity and granted it specific powers to provide for, inter alia, salaries, promotions, and appointments, the entity had the right and power to collectively bargain over matters within its exclusive jurisdiction. In other words, the court was saying that since the board of trustees had the power to act upon salaries and other working conditions on an individual basis, then a priori the board had the power to act upon the same matters on a collective basis.

In the case of Norwalk Teachers’ Association v. Board of Education of the City of Norwalk,72 the Supreme Court of Connecticut faced the identical issue concerning the permissibility of collective bargaining between public employers and employees when state legislation was silent on the matter. The Connecticut court came to the same conclusion as that of the Supreme Court of Kentucky, stating:

It would seem to make no difference theoretically whether the negotiations are with a committee of the whole association or with individual or small related groups, so long as any agreement made with the committee is confined to members of the association.73

Therefore, once the court was satisfied that certain powers to act

68. Id.
70. Ky. Rev. Stat. § 164.225 (1972) provides:
   Anything in any statutes of the commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries and compensation payable out of the state treasury or otherwise, promotions and official relations of all employees of the University of Kentucky, as provided in KRS 164.220, and, subject to any restrictions imposed by general law, the retirement ages and benefits of such employees, shall be under the exclusive jurisdiction of the board of trustees of the University of Kentucky, which shall be an independent agency and instrumentality of the commonwealth.
71. Board of Trustees v. Public Employees Council, 571 S.W.2d at 621.
72. 138 Conn. 269, 83 A.2d 482 (1951).
73. Id. at 274, 83 A.2d at 486.
were conferred upon the public employer by state law, then it was a simple matter to allow for collective bargaining since individual bargaining is a necessary function for the administration of the public employer. Ostensibly, this threshold process of locating original authority would hold true regardless of whether the public employer was a city with the power to pass general ordinances, or a board of education with the power to only issue rules, regulations, and resolutions. The general theory would be operative in Kentucky since the concern of the Kentucky Supreme Court is with the state authority to act and not the process or mechanism of such action.

Once the question of authority to bargain was resolved, the Kentucky Supreme Court addressed the issue of exclusivity in bargaining. As it happened, the latter issue turned more troublesome and, unfortunately, the court’s answer raised even more questions on the matter. The court, while finding the power of the Board to contractually commit itself with an employee group, limited such power as to forbid exclusive bargaining. The court explained that the board does not have the power to contractually commit itself to one group of employees when such would have a delimiting effect on its contracting power with other groups of employees. The supreme court explicitly found that the board “does not have the authority to enter into an agreement recognizing a union designated as bargaining agent by a majority of the nonacademic employees as the exclusive representative of all employees.” The court drew a line of distinction between private and public labor organizations when it found the principle of exclusivity not part of the public policy of the Commonwealth of Kentucky. Therefore, while the board had the right to bargain with employee groups, it did not have the right to grant exclusive representation to any one group.

The reasoning for prohibiting exclusive representation is not clear. The court understood the concept of exclusive representation to mean that once a majority of employees designates an employee representative as a bargaining agent, then all public employees in the group, regardless of whether they be members or nonmembers, would be represented by those designated by the majority. Once the status of exclusive representation is granted, it prevents the public employer from bargaining with other representatives who may be designated by minority groups of the public employees. The supreme court found that the board of trustees could not legally recog-

74. Board of Trustees v. Public Employees Council, 571 S.W.2d at 621.
75. Id.
nize one bargaining representative as the exclusive representative of all employees. The court discussed differences between private and public sector bargaining as it related to the issue of exclusivity and stated that exclusivity could not be part of the board's relationships with its employees. The reasoning of the court in forbidding exclusive recognition has at least two possible explanations. First, the court may have relied completely upon the enabling legislation setting forth the jurisdiction of the board of trustees. Kentucky Revised Statute section 164.225 provides that the board of trustees would have exclusive jurisdiction concerning certain personnel matters. Since the statute explicitly mandates that the board is vested with exclusive authority, it follows that the board could not contractually interfere with the exclusive grant of legislative power to it. In other words, if the board would recognize an exclusive bargaining agent, then it would be abdicating its legislative responsibility in retaining the exclusive power within itself. Obviously, if the board of trustees would recognize an employee group as the exclusive representative of all employees it would then be prevented from dealing with other employee groups in contravention of state statute. The statute granting exclusive jurisdiction to the board of trustees is a grant of sovereign power which cannot be delegated.

It is interesting to ask the question whether the holding in the Board of Trustees case is limited only to the University of Kentucky, since it rests upon statutory construction of enabling legislation. The supreme court may have premised its decision as to the prohibition of exclusive representation squarely upon the wording of Kentucky Revised Statute section 164.225, since it confers exclusive jurisdiction upon the board of trustees. If this explanation is accurate, it would raise questions of whether other public employers would have the ability to grant exclusive representation on employee groups.

The second explanation of the supreme court's prohibition on exclusive bargaining may be more fundamental, vis-a-vis, the absence of state legislation. The court recognized that it was merely rendering a decision based upon existing state laws of the Commonwealth of Kentucky. The principles of public sector bargaining and recognition were perceived as discretionary powers residing within the public employer. The court also noted that other principles of collective bargaining could not be addressed, since public sector

76. See note 70 supra for text of statute.
bargaining was at issue rather than private sector bargaining. The court stated:

Appellees argue that the principle of exclusivity is not prohibited by statute and is a necessary concomitant to any effective bargaining relationship. This principle may have validity as it applies to bargaining relationships in private industry, but has no application to the public employees of the University. 77

It is possible, therefore, that the court relied upon the concept of inherent sovereignty in refusing to permit exclusive bargaining. Since the court found the authority to collectively bargain derived from the authority to individually bargain, it follows that the public employer could do nothing to interfere with its ability to bargain on an individual basis as well as bargain on a collective basis. This issue was addressed by the Iowa Supreme Court in the case of Board of Regents v. Packing House, Food & Allied Workers, Local 1258. 78

In that case, the Iowa Supreme Court, very much like the Kentucky Supreme Court, stated:

The Board of Regents has the power and authority to meet with representatives of an employees' union to discuss wages, working conditions and grievances if it so desires. It can do so without becoming obligated to meet with the representatives of any other group of employees. The agreed terms could be adopted by the Regents in a proper legislative manner. Such action does not involve an improper delegation of legislative powers to private persons as there is no compulsion to sign an agreement and the final decision remains in the Board of Regents.

On the other hand, if the legislature desires to give public employees the advantages of collective bargaining in the full sense as it is used in private industry, it should do so by specific legislation to that effect. We cannot imply authority under these general powers to agree to exclusive representation, depriving other employees of the right to be represented by a group of their choosing or an individual the right to represent himself. 79

The Supreme Court of Iowa found that without state enabling legislation, the public employer could not grant exclusive representation with any one employee bargaining group. The language in Board of Regents is very similar to that used by the Supreme Court of Kentucky in the Board of Trustees 80 case. The logic used in these two

77. Board of Trustees v. Public Employees Council, 571 S.W.2d at 621.
78. 175 N.W.2d 110 (Iowa 1970).
79. Id. at 113.
80. Board of Trustees v. Public Employees Council, 571 S.W.2d 621 (Ky. 1978).
cases is similar and, for that reason, it is possible that the Supreme Court of Kentucky would extend its prohibition against exclusive representation to other public employers as well.

Another case in Kentucky has dealt with the issue of exclusive representation for public employees. In the case of Chittenden v. Board of Education the Fayette Circuit Court, in a declaratory judgment action, ruled upon the question of whether a board of education could grant exclusive representation to an employee group. The court had the benefit of a previous Fayette Circuit Court case which had not yet been ruled upon by the Kentucky Supreme Court, Board of Trustees of the University of Kentucky v. Public Employees' Council No. 51. The Fayette Circuit Court in Chittenden referred to the Board of Trustees case prior to its appeal to the Kentucky Supreme Court and concluded by stating, "it is obvious that the Board of Education has the power to confer with representatives, power to meet with single groups, if it chooses to do so, but, the Board may not bind itself to any exclusive relationship." Therefore, the Fayette Circuit Court found that, "so it may be said too, in Kentucky, the Board of Education may contract with a group and bind itself only as to members of the group."

Chittenden goes beyond the holding in Board of Trustees in that the prohibition of exclusive representation was not based upon statutory interpretation. The Fayette Circuit Court based its decision disallowing exclusive representation on the distinction between public and private bargaining, noting that without some form of state legislation concerning the issues of exclusive representation, there could be none implied under the existing laws of Kentucky. The court ordered that:

No representative may represent any group of teachers as exclusive representatives; that is, no representative of any group of teachers may bargain for teachers other than members of the group it represents.

B. First Restatement of Public Sector Labor Law

The Board of Trustees case presents an accurate and concise explanation of public sector labor relations in Kentucky. The

82. 571 S.W.2d 621 (Ky. 1978).
84. Id.
85. Id. at 23.
86. Board of Trustees v. Public Employees Council, 571 S.W.2d 621 (Ky. 1978).
"restatement of public sector labor law," as announced by Justice Stephenson, can be summarized as follows:87

(1) Public employees do not have the right to strike or engage in other concerted work activities against any public employer of the Commonwealth of Kentucky.

(2) Public employees have the right to join a labor organization and organize themselves for collective bargaining purposes and these rights emanate from the Kentucky Constitution and the First Amendment. Furthermore, these rights cannot be qualified except upon a showing of legitimate state interest.

(3) A public employer with general personnel powers has the inherent power to meet and confer with employee representatives, to discuss wages, hours, and other working conditions.

(4) A public employer has the power to recognize a duly authorized employee representative and to negotiate with bargaining representatives concerning wages, hours, and working conditions.

(5) A public employer has the legal authority to execute collective bargaining agreements with employee representatives regarding wages, hours, and working conditions as long as collective bargaining agreements do not conflict with state law concerning the activities of the public employer.

(6) Public employers have no legally enforceable duty to meet and confer, recognize, negotiate, or bargain with any group of employees or any duly authorized representative concerning any matter including wages, hours, and working conditions.

(7) A public employer has the authority to recognize, negotiate, and bargain with an employee representative and to decline to recognize, negotiate, and bargain with other similar employee representatives.

(8) A public employer does not have the power to grant exclusive representation to one employee representative group, nor may a public employer contractually agree to grant exclusive representation to one group thereby prohibiting representation of other employee representative groups, when the public employer has been given exclusive jurisdiction over all subject matters by state law.

87. The position of the Kentucky Supreme Court on nonexclusive bargaining is further supported in Norwalk Teachers Ass'n v. Board of Education, 138 Conn. 269, 83 A.2d 482 (1951) and in Philadelphia Teachers Ass'n v. Labrum, 415 Pa. 212, 203 A.2d 34 (1964).

V. RESPONSE TO AN ILLEGAL STRIKE

It is the law in the Commonwealth of Kentucky that no public employee has the right to strike. When a public employee organization does engage in strike activity, it raises the question of what responsive action should be taken by the public employer.

The most common response is for the public employer to petition the circuit court for a temporary restraining order against the public employee organization and its members. The action should be brought against the organization and its officers, in both their individual and representative capacities, and the action should be against the defendants as a class. The motion for temporary restraining order should be made pursuant to the Kentucky Rules of Civil Procedure, Rule 65.03 which requires a verified complaint or an affidavit that the public employer's rights are being violated or will be violated, and, in addition, that the public employer will suffer immediate and irreparable harm prior to the time a notice and hearing can be held on the matter.

The decision to obtain injunctive relief by the public employer should be decided only after considering the nature of the strike. Once the temporary restraining order is obtained, the public employer's courses of action are severely limited and immediate confrontation between the public employer and its employees may result. It may be the case, however, that the public employer has no choice but to seek immediate injunctive relief. When the striking organization is police or fire personnel, then the public employer has little choice but to seek an immediate halt of the illegal activity from the court. However, it is very possible that even though the strike is illegal, the striking employees do not occupy a position which renders essential services to the public employer, and the strike does not critically affect the functions of the public employer. Although the strike is illegal, the public employer may choose to do nothing but to suspend all benefits and payments while the strike is continuing and wait for the strike to end without interference by the public employer.

If it is decided that injunctive relief is necessary, then other issues must be addressed. When a temporary restraining order is obtained, the public employer must decide what to do if the restraining order

89. See Ky. R. Civ. P. 65.03.
90. See Ky. R. Civ. P. 23.
is not obeyed. The public employer, once resolving to obtain the temporary restraining order, should be prepared to proceed with contempt proceedings if the restraining order is disobeyed by striking employees. If the public employer has any reservations about initiating contempt procedures then the temporary restraining order itself should not be obtained. The public employer, in obtaining the temporary restraining order from the court, stated under oath that its rights were or would be violated and that immediate and irreparable harm would occur. It would be an abuse of judicial process to petition for a temporary restraining order and then not be prepared to take measures to enforce the order. Additionally, if a temporary restraining order is obtained and no subsequent action is taken to enforce its compliance the employee organization will quickly learn that the public employer's position contains more puff than promise.

The leading case in Kentucky dealing with contempt proceedings against public employee organizations is the case of *International Association of Firefighters, Local 526 v. Lexington-Fayette Urban County Government.* The union had engaged in an unlawful strike against the Lexington-Fayette County Urban Government, whereupon the public employer obtained a temporary restraining order prohibiting "any work stoppage or strike by the named defendants, all other members of the fire department, and all other persons acting in concert with them." Subsequent to the issuing of the restraining order, the union engaged in an organized strike in violation of the court's order. The public employer moved the court for a contempt proceeding, and the trial court held the local union in contempt of court for violating the temporary restraining order. Individual members of the union "were fined and given jail sentences which were suspended." The local union, however, was fined $10,000.00 for violating the temporary restraining order and the imposition of the fine was appealed to the Supreme Court of Kentucky.

The union argued that the imposition of the $10,000.00 fine was the result of a criminal contempt proceeding which, under *Miller v. Vettiner,* constitutionally entitled the union to a trial by jury. In

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91. See Ky. R. Cw. P. 65.03.
92. 555 S.W.2d 258 (Ky. 1977).
93. Id. at 259.
94. Id.
95. 481 S.W.2d 32 (Ky. 1972).
the *Miller* case the court of appeals (now supreme court) held that when a trial court rules on the existence or non-existence of contempt, civil or criminal, the court may make a determination of fact as to the existence of contempt without a jury, but may not impose a fine greater than $500.00 nor incarcerate for more than six months. 96 The *Miller* court made it very clear that the limits imposed applied only in cases where the contempt was not committed in the presence of the court or where the contempt has not been conclusively established. 97 The court in *International Association of Firefighters* concluded that since the union members admitted their participation in the strike which violated the terms of the restraining order, there was no factual issue to be decided by the court; therefore, the limitation on punishment without jury trial was inapposite. 98

The reasoning of the court in *Miller v. Vettiner*99 which distinguishes between punishments and fines of amounts greater than $500.00 and six month jail terms was first discussed by the United States Supreme Court in *Bloom v. Illinois*. 100 However, subsequent to the *Bloom* decision the Supreme Court of the United States was faced in *Muniz v. Hoffman*101 with a situation where a labor union was fined $10,000.00 for violating an injunction. The Supreme Court distinguished the differences between petty and serious punishment as described in the *Bloom* decision in those circumstances where a large corporation or labor union was involved in the contempt proceedings rather than an individual. The Court in the *Muniz* case held that even though a fine of over $500.00 would constitute serious punishment for an individual, it would not necessarily constitute serious punishment for a large corporation or labor union. 102 Consequently the Court upheld the fine of $10,000.00 imposed by the court with a jury.

The Supreme Court of Kentucky in the *International Association of Firefighters* case adopted the rationale of the Supreme Court in the *Muniz* case and redefined its holding in the case of *Miller v. Vettiner*. The supreme court stated that "[t]he determining factor

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96. *Id.* at 35.
97. *Id.*
98. *International Ass'n of Firefighters, Local 526, AFL-CIO v. Lexington-Fayette Urban County Gov't*, 555 S.W.2d at 260.
99. 481 S.W.2d 32 (Ky. 1972).
100. 391 U.S. 194 (1968).
102. *Id.* at 476-77.
will be whether the fine is 'petty' or 'serious' and that will be determined within the context of the risk and possible deprivation faced by a possible contemnor."

The supreme court decided that even though a fine of $10,000.00 was made against the public sector union, the fine was “petty” since the union had membership of over three hundred members, and thus a jury trial was not required.

**Emerging Remedies for Illegal Strikes**

As reported in the *International Association of Firefighters* opinion, the courts may impose a substantial fine against the union contemnor. Additionally, individual fines or jail sentences may be imposed by the court. However, there may be other remedies available to the public employer.

In the case of *Missouri v. Kansas City Firefighters* the state of Missouri sued the Kansas City firefighters’ local union for $128,787.72, for expenses incurred by the state in providing the National Guard, and for $25,000.00 in exemplary damages. Missouri statutes did not contain a public sector labor law, and state law expressly prohibited public employee strikes. The court found that since the city was helpless in the strike situation, and the Governor responded to the city’s request for help by mobilizing the National Guard, the state was not an intermeddler and was, therefore, entitled to reimbursement from the union. In addition, the circuit court held that since the union engaged in a public sector strike despite state law to the contrary, exemplary damages were permissible since it “would serve as a deterrent to these firefighters and other public employees who might consider willfully violating Missouri law.”

There are two other remedies which have been discussed by at least one court concerning unlawful strike activity by a public sector union. In *Pasadena Unified School District v. Pasadena Federation of Teachers* the teachers union called for and organized a one day work stoppage against the board of education. The board sued in

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103. *International Ass’n of Firefighters, Local 526, AFL-CIO v. Lexington-Fayette Urban County Gov’t*, 555 S.W.2d at 260.
104. *Id.*
105. 94 L.R.R.M. 2675 (Mo. Cir. Ct. 1976).
106. *Id.* at 2678.
107. *Id.* at 2682.
108. *Id.* at 2678.
tort for damages pursuant to two causes of action. The first cause of action related to the loss of instruction and the cost due to the one day job action. The second theory relied upon in the suit concerned the union's inducement of the breach of individual employment contracts. Tortious interference with contract lies when individual employees have contractual relationships with the public employer. However, if the public employer is not a board of education, it is unlikely that individual employment contracts will exist between the public employer and its employees. Consequently, recovery by public employers without employment contracts will have to rest upon the direct recovery for damages sustained directly by the public employer by the unlawful public employee strike. In the Pasadena case the court held: "Moreover, liability can be imposed on defendants upon a theory wholly independent of tortious inducement to breach the teachers' contract with plaintiff. The conduct of an unlawful strike is itself a tort for which damages may be recovered." The theory relied upon in this cause of action is one analogous to that of an intentional tort. The conduct taken by the public employees' union was performed in knowing defiance of state law. If the public employer can show that the union organization actively participated and encouraged unlawful activity, then there is a basis for recovery for the commission of the intentional tort.

In another case where public employees engaged in an unlawful strike, the court entertained a theory of common law nuisance as an alternative remedy against the actions of the public employees. In the case of Caso v. District Council No. 37, American Federation of State, County and Municipal Employees, the Appellate Division of the Supreme Court of New York held that a cause of action exists for a common law action in nuisance against striking public employees. The public sector union argued that since New York provided an exclusive remedy for public sector strikes, the court was without power to fashion any other remedy. However, the court held:

Nor is there any wisdom in a decision which puts the "right" of a public union to engage in illegal activities entirely beyond the court's ability to find suitable redress, particularly in the compelling circumstances of the instant case, where the union activities endangered the

110. Id. at 104 & 111, 140 Cal. Rptr. at 43 & 48.
111. Id. at 112, 140 Cal. Rptr. at 48.
112. Id. at 113, 140 Cal. Rptr. at 49.
114. Id. at 178.
lives and health of millions of persons and cause possibly irreparable damage to the environment.\textsuperscript{115}

This was a case where, due to a strike by sanitation workers, raw sewage was dumped into the waters, and such raw sewage found its way to a neighboring jurisdiction. The neighboring jurisdiction brought suit against the public employees on the theory of common law nuisance for damage to its property and resources, and the court held that the action was recognizable.

It should be noted, however, that not all jurisdictions which have entertained the questions of remedies against public employee strikes have determined that the court may fashion its own remedy.\textsuperscript{116}

It is obvious that with the developing public sector labor law in Kentucky, the question of the appropriate remedy for unlawful public sector strikes will come before the courts. As long as the state legislature refuses to act in this matter, it will be up to the courts of Kentucky to fashion remedies which are responsible to protecting the public.

VI. PUBLIC SECTOR BARGAINING SURVEY

A. Survey Questions

A survey was conducted between September, 1977, and January 1, 1978, concerning public sector union activities throughout the Commonwealth of Kentucky.\textsuperscript{117} Letters were addressed to 120 county judges and 110 city officials, from all the first, second, third, and fourth class cities. Sixteen percent of all the counties responded to the survey while twenty-eight percent of the cities responded. A total of fifty responses was received, with nineteen from the counties and thirty-one from the cities. The responses represent a cross section of the entire Commonwealth of Kentucky. Responses were received from both urban and rural counties, large cities, and small cities in both the eastern and the western parts of the state.

The first thirty-four questions elicited a “yes” or “no” answer and concerned specific labor relations questions. The next five questions requested a narrative answer, and a summary of the answers has been made for the purposes of this article. Where the total number of responses was less than fifty, the reason is due to either no response or an undecided response.

\textsuperscript{115} Id. at 177.


\textsuperscript{117} See note 2 supra.
B. Results of Survey

A comparison of some of the responses is very enlightening. One question asked whether there had ever been an illegal strike by public employees, and twelve responses indicate that an illegal strike had occurred at some time.\textsuperscript{118} Based upon the number of total counties and cities surveyed, and given that twelve jurisdictions indicated that an illegal strike had occurred, five percent of the jurisdictions in the Commonwealth of Kentucky have experienced illegal strikes by public employees. The five percent figure is also significant in that it excludes all strikes by teaching groups.

Fifteen jurisdictions, or seven percent of the population sampled, responded that they had been requested to recognize an employee organization.\textsuperscript{119} The survey indicates that on a local level, public sector bargaining is occurring, and public officials recognize that public sector unionism is a growing phenomenon. One question asked whether public sector unionism is thought to be gaining in Kentucky, and forty-four of the jurisdictions responded affirmatively.\textsuperscript{120}

A series of questions concerned whether public officials had an understanding of public sector labor law. Most of the responses indicated that they understood that the Labor-Management Relations Act\textsuperscript{121} did not apply to their jurisdictions.\textsuperscript{122} Most officials also realized that it was illegal for public employees to strike.\textsuperscript{123} An interesting question which drew an almost even response was whether the public official felt that a state collective bargaining law for public employees was inevitable.\textsuperscript{124} Twenty-two of the responses indicated that they thought it was inevitable, while twenty-seven thought it was not.

Concerning the general rights of public employees, most public officials felt that public employees should not have the right to unionize.\textsuperscript{125} Forty-seven of the fifty responses indicated that public employees should not have the right to strike.\textsuperscript{126} It is also interesting to note that thirty-two of the jurisdictions felt that compulsory

\textsuperscript{118} Public Sector Bargaining Survey, Appendix, Question 11.
\textsuperscript{119} Id. at Question 1.
\textsuperscript{120} Id. at Question 32.
\textsuperscript{121} 29 U.S.C. § 141 et. seq. (1976).
\textsuperscript{122} Public Sector Bargaining Survey, Appendix, Question 12.
\textsuperscript{123} Id. at Question 13.
\textsuperscript{124} Id. at Question 18.
\textsuperscript{125} Id. at Question 25.
\textsuperscript{126} Id. at Question 26.
binding arbitration is not necessary to prevent illegal public strikes.\footnote{127}

The responses to the survey indicate a general lack of understanding of public sector labor law in Kentucky. One question asked whether the public official knew the difference between a meet and confer ordinance and a collective bargaining ordinance, and the responses implied that thirty did not understand the difference.\footnote{128} Additionally, twenty-eight of the responses indicated that they did not know the difference between grievance arbitration and interest arbitration.\footnote{129} The survey also shows that public officials are cognizant of public sector labor problems and that many have preconceived notions about what the future will be in the area of public sector bargaining. It would seem that while a vast majority do not believe in public employee strikes or in compulsory binding arbitration, there is a feeling that public sector unionism is a growing phenomenon in Kentucky and should be better understood.

VII. Conclusion

Public sector labor law in Kentucky is of increasing interest to government officials, public employers, and taxpayers. However, Kentucky's public sector labor law has been judicially manufactured rather than legislatively enacted. Public sector collective bargaining exists in Kentucky, and without state legislation Kentucky courts will continue to develop the law in this field.

The question of whether a public employer can grant exclusive recognition to a public employee representative is one which will continue to present itself to the courts. A public employee union is not unlike a private sector union when it comes to the issue of exclusive representation. The reason for this is simple. A union must deal from a position of power. Power is derived from the ability to speak with one voice and bargain as a cohesive single entity. The ruling by the Supreme Court of Kentucky which prohibits the granting of exclusive representation severely limits the power position of public employee unions. A public employer will be able to question the ability of the public employee union to adequately represent all employees of a certain group since the union cannot speak as the authoritative spokesperson of all employees.

The public employer will be able to negotiate with different

\footnotesize{127. Id. at Question 27.}
\footnotesize{128. Id. at Question 33.}
\footnotesize{129. Id. at Question 34.}
groups of public employees representing the same general class of employees. Additionally, the public employer can deal directly with individual employees who choose not to be represented by any public employee group. It is, of course, possible that the supreme court recognized this situation and intentionally prohibited exclusive recognition in an effort to diminish the growing power of public sector unions.

The prohibition against granting an exclusive representation does not only adversely affect public unions, but may also adversely affect public employers. Public employers will have to negotiate with different groups of public employees if they elect to collectively bargain at all. Obviously, the public employer may have a greater reluctance to begin employee recognition since it will then be obligated to deal with competing employee groups. It must be remembered that while there is no duty imposed upon the public employer to grant recognition and bargain with public unions, once it chooses to do so, it then must bargain in a non-exclusive fashion. This non-exclusive bargaining will definitely set apart public sector bargaining in Kentucky from public sector bargaining in other states and from private sector bargaining in general. Non-exclusive bargaining may also have a beneficial effect by reducing confrontations between public employees and their employers, since public employee groups and individuals may have competing interests.

It is possible that the supreme court’s reliance on the word “exclusive” in the statute which created the Board of Trustees of the University of Kentucky was one of form more than substance. Every public agency established by state law receives the necessary grant of authority from the General Assembly to allow it to operate in an orderly and efficient fashion. Every board of education throughout the Commonwealth of Kentucky receives the necessary power to deal with its personnel functions. Every fiscal court is given the necessary authority to enact ordinances and pass resolutions for the purposes of employing people and providing for promotions and other personnel matters. Cities throughout the Commonwealth possess necessary powers to enable them to employ police chiefs and other officials so as to allow those cities to perform the duties for which they were created.

The state laws providing for the creation of political entities do not necessarily provide that the entity has exclusive jurisdiction to

130. See notes 62-77 supra and accompanying text.
deal with matters such as salaries, promotions, retirement, suspensions, and other working conditions. However, if the authority for such matters does not rest with the governmental entity, the question of where else the authority resides must be raised. This being the case, it may be said that every political entity created by the General Assembly to perform an act of general government, be it providing for education or maintaining sewer systems, has the ability to recognize and negotiate with public sector unions. At the same time, however, none of the political entities has been delegated the authority by the General Assembly to grant exclusive recognition to a particular employee group. The two possible exceptions are the City of Louisville and Jefferson County, since there exists specific public sector labor legislation concerning these two jurisdictions.

It is not the obligation of the courts of Kentucky to legislate in the area of public sector labor relations. However, the courts have provided that each public employer may individually provide for its own separate legislative device in solving its public sector labor problems. The public employer may refuse to recognize and collectively bargain altogether, with no questions asked. If, however, the public employer does elect to recognize and collectively bargain, it must do so on a non-exclusive basis. The public employer may very properly provide for a mechanism to allow for meaningful collective bargaining without violating the prohibition against exclusive representation. The public employer may, for instance, agree with a public employee group to provide for a system of minority representation. As long as the public employer does not contractually limit its abilities to negotiate on a non-exclusive basis, the public employer may establish whatever procedure it deems advisable to effectively negotiate with its employees.
## Public Sector Bargaining Survey

1. Have you ever been requested to recognize an employee organization? .......................... YES 15  NO 35
2. Have you ever recognized an employee organization? .................................................. YES 8  NO 41
3. Is there an ordinance, resolution or order setting forth a procedure for recognition?  .... YES 5  NO 45
4. Do you negotiate with the Fraternal Order of Police? ............................................... YES 5  NO 45
5. Do you negotiate with firefighters? ............... YES 7  NO 42
6. Have you ever received authorization cards from a union purporting to represent your employees? ................................................................. YES 10  NO 40
7. Do you have a labor relations specialist or labor attorney? ....................................... YES 5  NO 45
8. Do you bargain with groups representing public employees? ...................................... YES 7  NO 43
9. Have you ever resorted to the courts to obtain an injunction against public employees? ................................................................. YES 2  NO 48
10. Do you subscribe to any labor management reporting services? .................................... YES 8  NO 42
11. Has there ever been an illegal strike in your city or county of your public employees? ................................................................. YES 12  NO 37
12. Do you understand that the National Labor Relations Act does not apply to public employees? ................................................................. YES 42  NO 8
13. Do you know that it is illegal for public employees to strike? ...................................... YES 43  NO 7
14. Do you have a plan of action in the event of a public employee strike? ............................ YES 16  NO 33
15. If you have an impasse procedure, does it provide for factfinding or advisory arbitration? ........................................................................................................... YES 6  NO 34
16. Do you believe you may legally discharge or discipline an employee for organizing public employees? ................................................................. YES 16  NO 32
17. Have you used a mediator in a dispute with public employees? .................. YES 3 NO 46
18. Do you feel a state collective bargaining law for public employees is inevitable? ... YES 22 NO 27
19. Do you understand the difference between supervisory employees and nonsupervisory employees in regard to union recognition? .................. YES 42 NO 7
20. Do you understand the difference between mandatory and nonmandatory items of bargaining? .................. YES 32 NO 16
21. Do you enter into a written contract with any group of public employees? .......... YES 6 NO 44
22. Do you enter into a Memorandum of Understanding with any group of public employees? .................. YES 4 NO 46
23. Do you have a management program directed at avoiding public sector unionism? YES 9 NO 41
24. Do you feel that good management techniques can avoid the need for public employees to unionize? .................. YES 47 NO 3
25. In general, do you feel that public employees should have the right to unionize? YES 17 NO 31
26. Do you feel that public employees should have the right to strike? .................. YES 3 NO 47
27. Do you feel that compulsory binding arbitration is necessary to prevent strikes? ... YES 15 NO 32
28. Do you arbitrate grievances? .................. YES 27 NO 22
29. Do you have an election procedure whereby public employees can elect their representatives? .................. YES 7 NO 43
30. Have you ever requested outside assistance in dealing with public employee unionism? YES 5 NO 45
31. Have you ever been requested to supply salary data on your employees by another city or county? .................. YES 30 NO 20
32. Do you feel that public sector unionism is gaining in Kentucky? .................. YES 44 NO 5
33. Do you know what the difference is between a Meet and Confer ordinance and a collective bargaining ordinance? .................. YES 20 NO 30
34. Do you know the difference between grievance arbitration and interest arbitration? YES 22  NO 28
35. List the names of employee organizations recognized. Municipal workers, police, firemen, city civil service.
36. List those organizations who have sought recognition. Police, firemen, municipal workers, public works, road dept., teamsters, pipefitters, MSSD.
37. Who bargains on behalf of the city or county? County Judge, Mayor, City Engineer, City Manager, Board of Commissioners, City or County Attorney, Personnel Manager.
38. Explain the most common method used by your public employees in obtaining recognition.
Present grievance before County Judge, meetings with employees and supervisors, authorization cards, secret election, news media, meeting with Mayor and Commissioners, petition.
39. Explain what groups in your opinion would be most likely to organize and request recognition in the near future? Road Department, Sanitation Department, police, firemen, CETA, City Hall staff, MSSD.
COMMENTS

EQUINE SYNDICATIONS: ARE THEY SECURITIES?

I. INTRODUCTION

The 1977 Triple Crown winner and Horse of the Year, Seattle Slew, was syndicated in 1978 for $12,000,000 with each of the forty shares valued at $300,000.1 A Secretariat yearling colt, named Canadian Bound, was purchased for $1,500,000 at the 1976 Keeneland summer sale.2 This tremendous value in the thoroughbred racehorse has prompted the need for syndications which have become commonplace throughout the horse industry.3

Through syndications, horse owners are able to spread expenses as well as the risk and give more people the opportunity to own a more valuable horse, which they would not be able to do otherwise. Problems have arisen from this growth in the syndication of horses. One such problem is the subject of this article. Are equine syndications "securities" and therefore subject to the registration provisions of the Securities Act of 1933? It will be the purpose of this article to present the current status of the relevant provisions of federal and state securities laws and how they relate to syndications or the sale of fractional interests in horses. Guidelines will be offered to assist attorneys and their clients in forming equine syndications.4

II. CREATING AN EQUINE SYNDICATION

There are two basic types of equine syndications: racing and breeding. A racing syndication is a contractual arrangement whereby one or more horses are managed by a trainer to be entered in races for the purpose of gaining income by winning purses. On the other hand, a breeding or stallion syndication is a contractual arrangement whereby the participant obtains the right to breed a mare to the stallion.5

4. For analysis of other legal problems involved in the syndication of horses, including securities, see Note, Equine Syndications: A Legal Overview, 62 Ky. L.J. 1038 (1974) [hereinafter cited as Equine].
Some syndications are a combination of both. While the horse is racing, the owner of an interest receives a percentage of the winnings and, when the horse is retired to stud, is entitled to breed a mare to the stallion.

The most common type of syndication is the stallion or breeding syndication. Usually the original owner forms the syndication while retaining some of the fractional interests. The syndication usually consists of thirty-two to forty fractional interests or shares. Each share entitles the owner to breed a mare to the particular stallion each year during the lifetime of the stallion. This is commonly called a season. The owner may sell his season for a particular year or exchange it for a season in another stallion. The owner of a fractional interest earns income through the racing or sale of the progeny produced by the owner's mare.6

III. THE FEDERAL SECURITIES LAWS

The Securities Act of 1933 [Act] prohibits the offer and sale of unregistered securities.7 Violations of the registration provisions may result in criminal as well as civil sanctions.8 Furthermore, compliance with such provisions is extremely costly and burdensome. On the other hand, certain transactions and securities may be exempt from the registration provisions because the public's need for protection is too remote. However, even though a security or a transaction may be exempt from the registration provisions, the anti-fraud provisions of the Act may still apply.

What is a security? To answer this question one must look first to the Securities Act. Though this Act has been in force for more than forty years, the question is far from resolved. Section 2(1) of the Act provides:

(1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, tempo-

This definition includes an investment contract, which although not defined in the Act, has been construed liberally to include many unusual forms of money-raising schemes, thereby causing them to be subject to the securities laws. These schemes are frequently based on the sale or lease of real or personal property with the agreement providing that the seller will retain possession and control of the property while earning a profit for the investors. 10 ‘[I]n searching for the meaning and scope of the word ‘security’ in the Act, form should be disregarded for substance and the emphasis should be on economic reality.” 11

The term “investment contract” has been used under the state securities laws commonly referred to as Blue Sky laws, to attempt to protect the investing public from unscrupulous promoters of speculative and even fraudulent schemes. In applying the Blue Sky laws, courts have interpreted an investment contract to mean a contract or scheme for the “placing of capital or laying out of money in a way intended to secure income or profit from its employment . . . .” 12

In SEC v. C. M. Joiner Leasing Corp. 13 the Supreme Court imposed an economic realities test for determining what constitutes an investment contract under federal securities laws. “The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.” 14

The test was later expanded in SEC v. W. J. Howey Co., 15 which involved two corporations under common control and management. One corporation owned large tracts of citrus acreage, while the other engaged in servicing the citrus groves. The corporation owning the citrus acreage planted about 500 acres annually, of which one-half was offered to the public. Each prospective customer was offered a

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14. Id. at 352-53.
15. 328 U.S. 293 (1946).
package which contained both a land sales contract and a service contract with the corporation engaged in servicing the citrus groves. The land was purchased in narrow strips in which ownership could only be determined by a plat book record. The promoter corporation had complete possession of the land. The investors had no right to specific fruit, only an allocation of the net profits.

The Supreme Court held that the transaction involved was an investment contract, and therefore subject to the federal securities laws. In arriving at its decision, the Supreme Court formulated the following test:

[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

In the application of the test to the facts, the Court concluded that the investors provided the capital and in return expected to receive a share in the profits. On the other hand the promoter corporation solely managed, controlled, and operated the enterprise.

If the Howey test is applied literally, any participation by the investor would take the transaction out of the definition of an investment contract. However, according to some courts, the word “solely” in the test should not be construed strictly; the question should be “whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.”

This interpretation of the significance of the word “solely” was applied in SEC v. Koscot Interplanetary Co., which involved multi-level distributorships known as pyramid plans. Under the scheme investors paid cash to be a distributor of cosmetics, but also received the right to recruit other investors as distributors and to receive a portion of the investment of such recruits. This recruit-

16. Id. at 295.
17. Id. at 295-96.
18. Id. at 300.
19. Id. at 298-99.
20. Id. at 300.
22. Id.
23. 497 F.2d 473 (5th Cir. 1974).
ment role was essentially limited to bringing prospective recruits to meetings at which the promoters conducted a high pressure sales campaign. At such meetings the prospective recruits were told to expect huge profits from their investment. The promoters retained immediate control over the essential managerial conduct of the enterprise.24

The trial court found the operation to be an intentional fraud on the investors. The trial court stated:

[I]t is plain that the defendants' program is a get-rich-quick scheme in the worst sense. Poor, unwary persons have been induced by high-pressure sales tactics to part with their money, and very few have harvested the large returns they were led to believe were common for those participating in the program. Gross, intentional fraud may well be involved.25

The court concluded that the scheme consisted primarily of selling distributorships rather than cosmetics, and that the promoter had substantial control over the operations. There was investor participation, but according to the court, it was the efforts of the promoter that determined the success or failure of the plan.26 Therefore, it was an investment contract under the now expanded Howey test.

Though the promoter in Koscot had substantial control, it appears that the investors' activities were essential to the plan. It was the personal contact by the distributors that brought prospective investors to the recruitment meetings. They gave the meetings and the enterprise an affluent and ostentatious appearance. In essence the investors could not receive any financial benefit by merely relying on the efforts of the promoter. Their continuing efforts were essential to the success or failure of the plan;27 therefore, the enterprise should not have been found to be an investment contract within the Howey test.

Looking at the decision from a policy standpoint, the court wanted to halt the Koscot plan, which it found to be an intentional fraud. In achieving its objective, the court unfortunately used the securities laws as its vehicle, expanding the scope of the definition of "investment contract" to the point lawyers and their clients were left with little guidance as to what types of commercial arrange-

24. Id. at 475-76.
26. 497 F.2d at 484-85.
27. Id.
ments may be found to be securities.28

Whether this approach is entitled to significant value as a precedent may be questioned, in view of the Supreme Court’s specific reservation on the issue in United Housing Foundation, Inc. v. Forman.29 Something of the Supreme Court’s attitude in the area may be inferred from its recent decision in International Brotherhood of Teamsters v. Daniel,30 in which it was held that a compulsory non-contributory pension plan was not a security. Daniel appears to signal a desire by the Supreme Court to impede this vast and limitless expansion of the securities laws.

IV. THE HOWEY TEST AND EQUINE SYNDICATIONS

The application of the Howey test to equine syndication hinges on the amount of participation by the investor and the amount of control over the syndicate by the promoter or syndicate manager.

Traditionally the syndicate manager has been possessed with nearly absolute control over the syndication. Not only was the syndicate manager responsible for nearly every aspect of the horse’s life, but also the handling of the business aspects of the enterprise.32 The syndicate manager had control over any excess seasons, as well as the power to veto the shareholder’s selection of the broodmare to be bred to the particular stallion.33

If the syndications are to continue outside the purview of the securities laws, it would be advisable for the syndicate manager to relinquish much of his power and control.

The federal securities laws have been applied to arrangements involving the breeding of other animals such as beavers,34 foxes35 and

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31. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. SEC v. W. J. Howey Co., 328 U.S. 293, 298-99.
32. Equine, supra note 4, at 1052.
33. Id. at 1053. Most syndicate agreements require each mare nominated to be bred to the stallion to be in sound breeding condition and free from infection and disease. This is determined by the syndicate manager upon the advice of a veterinarian. If the mare of a syndicate member is rejected, it is only for the protection of the stallion and in the best interest of the syndicate. Sturgill, New Considerations for Old Stallion Syndicate Agreements, THE BLOOD-HOSS 5251, 5254-55 (Nov. 6, 1978) (provides an outline of recommended provisions for stallion syndication agreements in compliance with IRS and SEC regulations).
34. Kemmer v. Weaver, 445 F.2d 76 (7th Cir. 1971); Continental Marketing Corp. v. SEC,
chinchillas. However, these cases are distinguishable from equine syndications, since sellers, in the arrangement involving the breeding of other animals, had control over every aspect of the enterprise including the breeding, caring, management, and sale of the animals or fur from such animals. The investors merely received the proceeds less expenses. In many of these arrangements the investors had no title to a particular animal. On the other hand, the owner of a share in a stallion or breeding syndication has complete ownership and control over the progeny. Furthermore, there is no distribution of proceeds in a stallion syndication. The owner of the share gains income from the sale or earnings of the progeny.

Perhaps for this reason, there have been no court decisions involving the application of the federal securities laws to equine syndications. However, the SEC has issued several no-action letters on the subject.

In 1973, the SEC ruled that an agreement "to furnish broodmares and suitable breeding and other services to prospective investors for the production of thoroughbred offspring" was a security. In another such letter issued in January 1977, the SEC ruled that a proposed syndication of breeding rights to an unborn foal may involve a security.

It was July 1977 before the SEC gave any clear indication as to whether or not stallion syndications would involve the sale of a security. In a no-action letter, the SEC ruled that the SEC would not recommend enforcement action for non-compliance with the registration provisions of the Act, if the fractional interests in a stallion are sold to breeders as proposed by the facts in the letter. The material facts involved in the syndication are as follows:

1. Shares are sold to breeders who want the right to breed to the stallion involved;
2. Each breeder who purchases a share has complete dominion and title over the progeny produced by his mare;

387 F.2d 466 (10th Cir. 1967), cert. denied, 391 U.S. 905 (1968).
37. Kemmer v. Weaver, 445 F.2d 76 (7th Cir. 1971); Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), cert. denied, 391 U.S. 905 (1968); See 1 L. Loss, SECURTIES REGULATIONS 489-90 (2d ed. 1961).
40. [1977-78 Transfer Binder] Fed. SEC. L. REP. (CCH) ¶ 81,311 (Those who sold the interest were not required to register as Broker-Dealers under 15(a)(1) of the Act).
3. There is no understanding in connection with the purchase for any pooling of income or for sharing any gain or risk of loss;
4. Any shares not purchased are retained by the original owner;
5. Maintenance costs of the stallion are paid pro rata by each owner in relation to the number of nominations he is entitled to use in a normal season;
6. The custodian of the stallion receives as compensation: (a) the right to use an agreed-upon number of nominations in each breeding season after each owner has received his nominations; and (b) a per diem reimbursement for boarding the stallion;
7. Excess nominations, if any, are given to participating owners by lot. In other words, there is no pooling of excess nominations;
8. Each owner has an insurable interest in the stallion;
9. Owners may sell their shares in the stallion only after extending a right of first refusal to other participating owners;
10. Owners may sell any nominations they do not use to another user-breeder who need not be a member of the syndicate;
11. The shares and related breeding rights may not be sold with any emphasis on profit potential arising out of the efforts of others.  

It should be emphasized that the no-action letter only expresses the SEC’s intention not to initiate an enforcement action for non-compliance with the registration provisions of the Securities Act in this particular fact situation. Furthermore, no-action letters do not purport to express any legal conclusions on the questions involved. However, the provisions of the syndicate agreement which was the subject of the no-action letter should be regarded as the minimum standard in the creation of any syndicate agreement.

The recommended provisions in the no-action letter arguably negate the element of expectation of profits as required by the Howey test. There is neither an expectation of profits nor a pooling of profits from the stallion syndication itself. The breeder acquires only a right to breed a mare to the particular stallion. This interest purchased by the breeders is a commodity to be used in their own businesses. Each breeder-owner has complete ownership of the progeny produced by the breeder-owner’s mare, which he alone prepares for sale or racing.

The idea that the breeder is purchasing a “commodity”44 finds

42. 1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,311.
43. Id.; Sturgill, New Considerations for Old Stallion Syndicate Agreements, THE BLOOD-HORSE 5250 (Nov. 6, 1978) [hereinafter cited as Stallion Syndicate].
44. 1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,311; Stallion Syndicate,
support in *United Housing Foundation, Inc. v. Forman*,\(^45\) which stated that "when a purchaser is motivated by a desire to use or consume the item purchased—'to occupy the land or to develop it themselves', as the *Howey* court put it . . .—the securities laws do not apply."\(^46\) In *Forman* the plan involved shares purchased in a nonprofit housing cooperative, which entitled the purchasers to lease an apartment.\(^47\) In holding that the shares were not a security, the Supreme Court found that the inducement for buying the shares was the housing unit.\(^48\) The purchasers were interested in a place to live and not an investment or a profit.

The owner must not purchase the interest in the stallion for investment purposes, but *only* for breeding purposes. Occasionally, various trade journals contain advertisements suggesting that a purchase of a share in a particular stallion will reap substantial profits.\(^49\) This is extremely dangerous; the purchase of such an interest arguably is not merely an acquisition of a right to breed a mare to the stallion, but is seeking a profit on his investment, and thereby jeopardizing the entire arrangement.

Another perilous factor is involved when a person purchases one or more shares in a stallion with the intention of reselling the shares at a future date for a profit. Frequently, the owner of the interest never intends to breed a mare to the stallion, but only desires to sell the seasons.\(^50\) This again may be evidence of investing with an expectation of profit, rather than purchasing a commodity.

In addition to the provisions set forth in the 1977 no-action letter, syndicate agreements should, and sometimes do, provide the co-

\(^{supra}\) note 43 at 5251.

\(^{45}\) 421 U.S. 837 (1975); see SEC Securities Act Release No. 33-3347, 38 Fed. Reg. 1735 (1973) (application of federal securities laws to offer and sale of condominium units coupled with an agreement to perform rental or other services for the purchaser).


\(^{47}\) 421 U.S. at 841-843.

\(^{48}\) Id. at 853.


\(^{50}\) Frequently, an owner of a share in a stallion syndication elects not to use his season for a particular year. When this occurs it is a common practice to pool and to sell such seasons. The proceeds may be divided among the syndicate members or used to defray the expenses of the syndication. However, this practice must not be used as an incentive or enticement in the selection or recruitment of prospective syndicate members. Prudence would also suggest that this practice be limited to a very small number of such seasons. The reasoning behind such a position is that the owner purchases the interest for breeding purposes only, and not for investment purposes, *i.e.*, expectation of profit.
owners with the power to remove the syndicate manager, and move the stallion to another location to perform his stud duties. This is usually accomplished by a majority vote or some other agreed upon percentage of the syndicate members.51

By placing these provisions in the syndicate agreement, one is in a position to argue the absence of the “solely from the efforts of others” requirement of the Howey test. The syndicate manager is primarily a custodian or agent of the co-owners,52 rather than holding a position of total control over the syndicate.

If a syndicate agreement does not contain the foregoing, the arrangement runs an unnecessary chance of being considered a security in the event an action is brought by the SEC or a disgruntled buyer. In view of the great risk involved in the racing and breeding of horses, it is not difficult to foresee the possibility of an owner becoming displeased with the operation of the syndicate. Therefore, it becomes imperative that adequate safeguards be taken.

Advisedly, syndicate members should be limited to persons who are knowledgeable and experienced in the horse industry.53 This serves at least two valuable purposes. First, such persons are fully aware of the risks involved, and are therefore not as likely as outsiders to become disgruntled if the horse is unsuccessful. Second, if at some future time horse syndications are found to be securities, the syndication may be able to establish its applicability to the private offering exemption54 from the registration provisions of the Act.

53. See Lawrence, So You Want to Get Into the Horse Business, reprinted in T. DAVIS, HORSE OWNERS AND BREEDERS TAX MANUAL § 1.09 (1978) (discussion of investment risks in the horse industry).
54. 15 U.S.C. § 77d(2)(1976) provides for an exemption from the registration provisions of the Act for transactions by an issuer not involving any public offering. Rule 146 provides objective standards to be used in the use of the private offering exemption. These conditions relate to limitations on the manner of offering, the nature of the offerees, access to or furnishing of information about the issuer, limitations on the number of purchasers, and limitations on the subsequent disposition of securities acquired pursuant to the rule. SEC Release No. 5486, 39 Fed. Reg. 15, 266-68 (codified at 17 C.F.R. § 230.146 (1978)). See also Dogwood Farm, Inc. (unpublished no-action letter, Sept. 1, 1975).

An exemption is available to “any security which is a part of an issue offered and sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such territory.” 15 U.S.C. § 77c(11) (1976). For objective standards of the intrastate exemption see Rule 147, SEC Securities Act Release No. 33-5450, 39 Fed. Reg. 2353 (1974) (codified at 17 C.F.R. § 230.147 (1978)).
interest in the horses and the earnings, the plaintiffs expressly retained the sole right to control the care and activities of the horses.\textsuperscript{61}

In accordance with the agreement, the horses were sent to California to be trained for racing. The defendant continued to pay the expenses of the horses until December 1, 1973.\textsuperscript{62} As so often happens, the horses were unable to race due to injuries. Meanwhile, the defendant had also purchased an interest in the horse involved in the original agreement with the attorney.\textsuperscript{63}

The Court in \textit{Marshall} held that the \textit{Howey} test for an investment contract had been met since the defendant had invested money into a common enterprise and expected profits to be derived solely from the efforts of others, therefore coming within the purview of the state securities law.\textsuperscript{64} Moreover, the transaction was not exempt from the registration requirements as being an isolated sale or an initial sale.\textsuperscript{65}

In dissent Justice Howell stated:

It is going to be a shock to a rancher who sells a fractional interest in a horse or a registered bull to his neighbors to learn that his sale is considered in the same category as the sale of a worthless corporate stock or security and subject to the Blue Sky Laws.\textsuperscript{66}

The majority opinion states that this was “by no means uncommon to many in this day of constantly proliferating laws.”\textsuperscript{67}

Justice Howell was correct. The horse industry was shocked by the \textit{Marshall} decision. Never before had a disgruntled buyer utilized the federal or state securities laws to rescind a racing arrangement or breeding syndication.\textsuperscript{68} The decision in \textit{Marshall} placed most sales of fractional interests in horses, particularly where there is little or no investor control, in the precarious position of being considered a security.

In the other state appellate court decision involving the sale of a

\textsuperscript{61.} \textit{Id.} The plaintiffs had also discussed the possibility with two other people, but they did not enter into an agreement. \textit{Id.} at 758-59.

\textsuperscript{62.} \textit{Id.}

\textsuperscript{63.} \textit{Id.} at 758.


\textsuperscript{65.} \textit{Marshall v. Harris}, 276 Or. 447, 555 P.2d at 762-65.

\textsuperscript{66.} \textit{Id.} at 765 (Howell J., dissenting).

\textsuperscript{67.} \textit{Id.} at 759.

\textsuperscript{68.} Hollingsworth, \textit{supra} note 54.
V. Recent State Court Decisions

The state securities laws, commonly referred to as Blue Sky laws, are essential considerations when forming horse syndications. In two recent state appellate court decisions, the Blue Sky laws were at issue in the sale of a fractional interest in a horse. Both transactions involved a racing arrangement and not a breeding or stallion syndication.

In *Marshall v. Harris*, the Oregon Supreme Court reversing the lower court, held that the sale of a fractional interest in a racehorse was an investment contract within the meaning of the Oregon Blue Sky laws. In *Marshall*, the plaintiffs had sold the defendant an interest in two racehorses and their earnings, while in return the defendant agreed to pay the expenses involved in training and racing horses. When the plaintiffs sued to recover money due under the contract, the defendant claimed that the contract constituted a security, and that the plaintiffs had sold the security in violation of the registration requirement of the Oregon Blue Sky laws. Based on this contention, the defendant counterclaimed to recover the money paid to the plaintiffs under the contract.

The facts in *Marshall* indicate that nearly four months prior to entering into the contract with the defendant, the plaintiffs' attorney and three friends entered into an oral agreement with the plaintiffs. Under the oral agreement, the attorney and his friends were to receive one-half of the winnings of one of the plaintiffs' racehorses in return for paying expenses.

In June 1973, the plaintiffs entered into a similar agreement with the defendant. Although the defendant agreed to pay the expenses for two racehorses until the end of 1974, in return for one-third...
fractional interest in a horse, *Brown v. Rairigh,* the Florida District Court of Appeals held that the transaction did not constitute an investment contract within the meaning of the *Howey* test due to the lack of a common enterprise.0

According to the facts in *Brown*, the defendant, a public relations executive, and the plaintiff, a wealthy businessman, were friends. The defendant was also in the business of breeding and racing harness horses. As a result of their friendship, the plaintiff became interested in the horse industry. Eventually, the plaintiff bought a ten percent interest in five horses owned by the defendant, as well as a ten percent interest in the earnings. The plaintiff was to pay ten percent of the expenses.

The agreement also provided the plaintiff with an option to purchase another twenty-five percent interest in horses at the original price. Most importantly, the plaintiff could resell his interest to the defendant by a certain date. The price was to be determined by the market value at the time of the sale.

Unsurprisingly, the horses did not win. Due to his lack of success, the plaintiff became disgruntled and filed an action to recover his money, claiming that the defendant had sold him an unregistered security in violation of the Florida Blue Sky Laws.

The Florida court applied the three-prong test in *Howey* for an investment contract: (1) An investment of money (2) in a common enterprise (3) with the expectation of profit to be derived solely from the efforts of the promotor or a third party.

Applying the *Howey* test, the court easily found the first element, an investment of money, and also the third, an expectation of profits to be derived solely from the efforts of others. However, there was no "common enterprise," because there was only one investor, which, in the court's opinion, distinguished it from *Marshall v. Harris* where there were five investors.

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70. Id.
71. Id. at 591.
72. Id.
73. Id.
74. Id. at 591-92.
75. 328 U.S. at 298-99 (1945).
76. Brown v. Rairigh, 363 So.2d at 592.
77. Id.
78. 276 Or. 447, 555 P.2d 756.
79. Brown v. Rairigh, 363 So.2d at 593.
Arriving at their decision, the court discussed three theories of interpretation of the phrase “common enterprise.” The first theory requires more than one investor and also a joint participation or a dependency among the investors. The courts in applying this theory have considered as important factors the pooling of the funds of joint investors, the actual commingling of assets for a common purpose.\(^{80}\) This interaction between investors is not necessary under the second theory as long as “the fortunes of all of them are inextricably tied to the effectiveness of the promoter in securing multiple recruits . . . .”\(^{81}\) The “emphasis [is] on the uniformity of impact of the promoter’s efforts.”\(^{82}\)

As to the third theory, the court in Brown referred to Huberman v. Denny’s Restaurants, Inc.\(^{83}\) for the proposition that a common enterprise may exist even where there is only a one-to-one relationship between the promoter and the investor. The basis of this view is that both parties have an interest in the success of the enterprise.\(^{84}\) In rejecting the theory in the California case, the court in Brown stated:

(1) To us, this Huberman case goes too far because it reduces the word “common” to mere surplusage and the word “enterprise” is all that is left. Obviously even one single promoter and one investor are inevitably involved in a mutual project, or enterprise, hopefully for profit, unless the promoter plans to abscond with the funds. Moreover, every applicable situation is going to involve at least one investor and one promoter. Therefore, if this single union is all that is required to constitute a “common enterprise,” then the definition set forth in the Howey test is meaningless. We choose to believe it must have some meaning and thus we adopt the view that not only should there be more than one investor, but there should be some form of interaction between the investors, or, in the alternative, if there is no such

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82. SEC v. Koscot Interplanetary, Inc., 497 F.2d at 479.

83. 337 F.Supp. 1249 (N.D. Cal. 1972); see Mr. Steak Inc. v. River City Steak, Inc., 460 F.2d 666 (10th Cir. 1972).

interaction between investors then the success of the enterprise should be dependent upon obtaining a number of investors. 85

To support their decision the court relied on Howey as appearing to imply that multiple investors are essential to have a common enterprise. 86

The decision in Brown, which was based “upon the relatively simple premise that there was only one investor,” 87 is an extremely unfortunate, if not erroneous, piece of legal reasoning. The number of investors should not be a factor in the determination of whether or not a security exists. Technically a security may exist where there are no investors. The Securities Act and the Florida Blue Sky Laws forbid securities to be sold or offered to be sold without first complying with the registration provisions. 88

The Howey test neither defines the phrase “common enterprise,” nor refers to any consideration of the number of investors. This restrictive approach (by the Brown court and other courts) 89 is obviously a device by which the Howey test may be circumvented. However, the securities laws are to be construed not technically and restrictively, but flexibly to effectuate their remedial purposes. 90

In rejecting the strict and literal approach to the common enterprise requirement, District Court Judge Stuart in Marshall v. Lamson Bros. & Co. 91 stated:

At the very least, it is equally as plausible to conclude that the element of “common enterprise” is satisfied when a single investor commits his funds to a promoter in hope of making a profit as to conclude that the investor protection afforded by the ’33 and ’34 Acts and the complex regulatory scheme developed thereunder is available only to those hapless capitalists who are not alone in their misfortune. 92

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86. “A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments.” Brown v. Rairigh, 363 So.2d at 593 (citing SEC v. W. H. Howey Co., 328 U.S. 293 (1946)).
87. Brown v. Rairigh, 363 So.2d at 593.
The buffoonery in Brown culminates with the court’s statement that “[w]e do not mean to preclude the possibility that we might have arrived at the same result if the appellee’s wife and/or brother had similarly purchased additional fractional interests.” What does being a member of the family have to do with the issue of whether or not a security exists? By including the relationship of the parties as well as the number of investors as additional factors in the application of the Howey test, the court has apparently confused the requirements of the Howey test with those of the private offering exemption.

In essence the decision in Brown was based on public policy under the cover of the court’s erroneous application of the Howey test and the securities law. In Brown, the parties were friends. The defendant was not in the business of selling or promoting fractional interests in horses. In fact the plaintiff himself may have suggested the arrangement. There was neither any evidence nor allegation of any bad faith or fraud. Furthermore, the plaintiff failed to take advantage of his resale privilege which provided him with an opportunity to recoup his money.

The public policy basis in Brown is further indicated by the discussion of estoppel. In dicta the court stated that the Florida Blue Sky Laws are “voidable,” rather than void; therefore, an investor may be estopped by his conduct from claiming that he purchased a security which was in violation of the Blue Sky Laws.

The decision in Brown provides little, if any, guidance to lawyers and their clients in the sale of fractional interests in a horse. Reliance on Brown in an effort to negate the “common enterprise” requirement of Howey is extremely risky. The most central and important problem to be dealt with is the amount of investor’s control over his investment.

VI. Conclusion

The SEC, together with the IRS, constantly hover over the horse industry. Failure to realize and understand the meaning and relevance of the securities laws could have disastrous consequences. After
all, knowledge of the violation of the securities laws is not a necessary element.\textsuperscript{97}

The manner in which equine syndications have been formed and maintained has been influenced by the customary practices of the equine industry, developed through years of experience from working with horses. The horse industry is a unique and closely knit industry which has generally been controlled from within. Now, horse syndications must also be structured in light of the securities laws.

If the 1977 no-action letter\textsuperscript{98} issued by the SEC is followed, there is no expectation of profits in a breeding or stallion syndication. The owner of the interest merely acquires a right to breed a mare to the stallion each year. Income is derived solely through the sale or racing of the progeny produced by the owner's mare. In essence a stallion syndication is not likely to be considered a security.

On the other hand, racing syndications present more serious problems for the horse industry. Racing syndications are extremely vulnerable to the application of the securities laws in light of the lack of investor control as well as the pooling of income. For protection, racing syndications, in the event they are found to be securities, should be formed to come under an exemption from the registration provisions, such as a private offering.\textsuperscript{99}

Extreme care is imperative when attempting to comply with an exemption. Compliance is difficult, because the conditions are usually both numerous and rigid. The exemption will be strictly construed against one claiming it.\textsuperscript{100}

It appears from both \textit{Brown} and \textit{Marshall} that whether or not the sale of a fractional interest in a horse is a security under the Blue Sky laws depends on the facts of the particular case. Moreover, these two state decisions have created the alarming possibility that almost any sale of a fractional interest in a racehorse may be found to constitute a security under the applicable Blue Sky laws as well as the federal securities laws. This seemingly unlimited scope of the securities laws was expressed by the Florida court when it stated that "[a] statute . . . might prevent two brothers from purchasing

\begin{itemize}
\item \textsuperscript{97} Marshall v. Harris, 276 Or. 447, 555 P.2d 756, 760.
\item \textsuperscript{98} [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) \# 81,311.
\item \textsuperscript{99} For exemptions to the registration provisions of the Kentucky Blue Sky Laws, see Ky. Rev. Stat. §§ 292.400-.410 (Supp. 1978).
\item \textsuperscript{100} SEC v. Los Angeles Trust Deed & Mortgage Exchange, 186 F.Supp. 830 (S.D. Cal.), modified, 285 F.2d 162 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961).
\end{itemize}
a share in their sister’s business, without going through the frighten-
ingly complicated and expensive business of registration.”

If equine syndications are to remain outside the purview of the securities laws, it is imperative that certain safeguards be taken in the formulation of any horse syndication. However, despite these precautions, there can be no guarantee against a court’s holding at some future time that a horse syndication constitutes a security.

William A. Sanders, Jr.

INTRODUCTION

Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA) contains a sweeping preemption of state laws "insofar as they may now or hereafter relate to any employee benefit plan. . . ." An employee benefit plan is any plan which is established or maintained by an employer or employee organization to provide medical care or benefits in the event of sickness, accident, disability, death, unemployment or retirement. Exempted from the operation of the preemption provisions are state laws regulating insurance, banking, or securities, and "generally applicable" state criminal laws. Congress enacted the preemption provision purport-
edly "[i]n order to avoid 'the possibility of endless litigation over the validity of state action that might impinge on federal regulation . . . and potentially conflicting state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the federal regulatory scheme.'"

Despite its avowed purpose, the preemption provision has stirred a considerable amount of litigation in three major areas of state regulation: community property, insurance and equal employment.

The conflict between ERISA and community property laws is engendered by section 206 of ERISA which provides that a participant's pension benefit cannot be assigned or alienated. When a nonemployee spouse is awarded a community interest in pension benefits, the question arises whether the award constitutes an alienation or assignment within the meaning of 206(d)(1).

Greater controversy has surrounded the interaction between section 514(b)(2)(A) which exempts state insurance laws from the operation of the general preemption provision, and section 514(b)(2)(B) which prohibits states from "deeming" an employee benefit plan or a trust established under the plan "an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies [or] insurance contracts . . . ."

Herbert B. Anderson, the Chairman of the National Association of Insurance Commissioners, contends that these provisions, together with ERISA's broad definition of employee benefit plan, have provided a "smoke screen" for persons who want to conduct insurance operations not authorized under state insurance laws.


7. "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1976).


10. ERISA Preemption Task Force, Report to the House Education and Labor Subcom-
Anderson cites two major problems: "the proliferation of self-insured, or uninsured multiple employer trusts (METs) and the nullification of state laws covering delivery modes, quality of services, and minimum benefits for health care." The uninsured METs convince employers to set up employee pension and benefit plans with them. These funds are then often mismanaged. The MET becomes insolvent, and thousands of employees are left with no benefits. Anderson estimates that 600,000 persons are enrolled in uninsured benefit plans of approximately thirty MET promoters. In the last eighteen months, at least five uninsured METs have become insolvent, leaving unpaid claims and enrollees without disability coverage.

ERISA regulation focuses on reporting, disclosure, funding, vesting, and fiduciary duties, but it does not deal with such areas as financial soundness of welfare plans, the manner in which potential enrollees are solicited, aspects regarding delivery of health care services, and the content of health care contracts. It is in the latter areas that a regulatory void has been created.

Another issue of particular concern is states' attempts to enact comprehensive health care legislation. Such legislation has been held invalid if it attempts to regulate "employee benefit plans" within the definition of section 3 of ERISA.

The third major area of concern has been with state equal employment laws, particularly those relating to sex discrimination, and more specifically, exclusion of pregnancy from disability and sick leave plans. While the ERISA preemption clause applies to any state laws which relate to employee benefit plans, it does not

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**MITTEE ON LABOR STANDARDS (June 1, 1978), reported in [1978] Pens. Rep. (BNA) A-16 (June 5, 1978).**

11. Id.
12. Id.
13. Id.
preempt any existing federal laws. Therefore, ERISA does not preempt Title VII of the Civil Rights Act of 1964 which provides for concurrent jurisdiction with state agencies to investigate employment discrimination claims. The courts have analogized that state regulations of equal employment opportunities are not preempted by ERISA even though employee benefit plans may be affected by such regulations.

This issue has become moot in light of a bill signed by President Carter which amends Title VII of the 1964 Civil Rights Act to prohibit employment discrimination because of pregnancy, childbirth, or related medical conditions and clearly indicates that fringe benefit programs must treat women affected by these conditions in a manner equal with other employees on the basis of their ability to work.

I. ALIENATION OF BENEFITS FOR SPOUSE AND CHILDREN

The majority of the decisions regarding the conflict between ERISA and divorce settlements relates to rights to pension plan benefits which become an issue in property settlements, and they support decisions of domestic relations courts. California, a community property state that considers pension benefits part of the community property of a marriage, has been the situs of most litigation regarding the alienation of pension benefits for the support of spouses and children. Stone v. Stone, a well-reasoned opinion by Judge Renfrew of the Northern District of California, provides a thorough analysis of the federal policy of noninterference with state domestic relations law. He states that "[i]ntervention in divorce proceedings by federal courts involves them in state domestic relations law, an area traditionally and wisely left to state courts."

The principal argument against a spouse’s right to pension benefits, even though a pension benefit may be considered community property by the state, is the ERISA section 206(d) prohibition

18. 29 U.S.C. § 1144(d) (1976) expressly provides that ERISA is not be to "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ."
24. Id. at 921.
against alienation or assignment of those benefits. It is argued that "an award of a community interest in pension benefits to a nonemployee spouse constitutes an assignment or alienation of benefits within the meaning of section 206(d)(1) of ERISA and that such an award, therefore, conflicts with that section's prohibition of such assignments and alienations." However, section 206(d) does not prohibit any and all assignments as indicated by the exception of 206(d)(2).

The court reasons that a conflict between state and federal statutes exists "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Courts attempt to interpret federal statutes consistently with state domestic relations policy, and Congress generally drafts statutes to avoid conflict with such policies.

The court goes on to state that the courts have made a statutory exception from a general rule for child support obligations for which Congress later created specific exemptions in the area of bankruptcy and benefits of federal employees. A federal court will not construe a federal statute to preempt a domestic relations law unless "positively required by direct enactment" or "unless that was the clear and manifest purpose of Congress." The issue under ERISA is whether Congress has manifested a clear and express purpose to preempt domestic relations laws.

The Stone court finds that "[s]ection 206(d)(1) does not explicitly prohibit the transfer of pension benefits under community property laws, and the plain meaning of the terms assignment or alienation does not include such a transfer. Nor does the legislative history of ERISA clarify this ambiguous language." The court states that:

25. Section 206(d) provides:
   (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
   (2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974 . . . .
27. Id. at 924 (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978)).
28. Id.
29. Id. at 924, 925.
Members of the families of employees are included in the class ERISA protects. It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce.33

The Stone court concludes that "[p]reemption by ERISA of state community property laws would expose nonemployee spouses to the kind from which ERISA is designed to protect the family unit and against which they cannot effectively protect themselves."34 Inasmuch as pension benefits constitute a major asset of many marriages, ERISA preemption of community property laws would cause a major change in the division of marital property, and Congress has not directly expressed an intent to do this.35 The prohibition against alienation in ERISA section 206(d)(1) does not conflict with the recognition of the community property interests of a nonemployee spouse in pension benefits of an employee benefit plan.36

Phillipson v. Board of Administration37 further delineated the reason for finding that community property rights are not an assignment or alienation prohibited by section 206(d)(1) by finding that a spouse’s claim to her share of the community property is an assertion of an ownership right and not a claim requiring transfer or assignment of property. The spouse claims “not as a creditor, but as an owner with a present, existing, and equal interest.”38 Such claim cannot be described as a levy of execution, garnishment, attachment, or assignment of property.

New Jersey reached a similar conclusion in Cody v. Riecker.39

Furthermore, the usual purpose of exemptions is to relieve the person exempted from the pressure of claims hostile to his dependent’s essential needs as well as his own personal ones, not to relieve him of familial obligations and destroy what may be the family’s last and only security, short of public relief.40

Cody concludes that to prohibit a spouse from asserting a claim against the pension benefits would be to permit a retiree to effec-

33. Id.
34. Id. at 931.
35. Id.
36. Id.
38. Id. at 44, 473 P.2d at 772, 89 Cal. Rptr. at 68.
tively relieve himself of familial obligations, as pension benefits often provide a retired wage-earner's sole source of income or may be the only asset left in the jurisdiction to attach for support of the nonemployee spouse. Congress did not intend such a dramatic encroachment on the enforceability of a retiree's family obligations, which arise by operation of law, in the enactment of ERISA, but only that the retirement funds should be exempt from levy where third parties outside the family are concerned.\footnote{41}

The United States Department of Labor has submitted an amicus curae brief to the Ninth Circuit Court of Appeals in the \textit{Stone} case,\footnote{42} encouraging the court to affirm the lower court decision on the basis of an implied exception to the anti-assignment provisions of ERISA for the enforcement of a state court decree attaching the benefits of a participant in pay status to satisfy a claim under a state's community property laws.\footnote{43}

Therefore, litigation thus far would appear to support the contention that Congress did not intend to preempt state domestic relations law, nor to prohibit non-employee spouses from a portion of the pension benefits which may be the largest part of property acquired during the marriage, based on the theory of ownership rights versus creditor rights, and that nonemployee spouses and children are within the class of persons ERISA is intended to protect by the restraint from assignment or alienation. To find that ERISA prohibits such an assignment and preempts domestic relations law insofar as it "relates to employee benefit plans" would be to leave the nonemployee spouse without remedy and without the protection ERISA was enacted to provide.

The Senate is presently considering the Proposed ERISA Improvements Act of 1979, Senate Bill S209, introduced by Senators Williams and Javits, which includes a provision to exempt from the preemption provision "any judgment, decree, or order pursuant to a state domestic relations law (whether of the common law or community property type)."\footnote{44} This proposed legislation follows the trend of the courts to exempt domestic relations laws from ERISA preemption.

\begin{footnotes}
\footnote{41}{454 F.Supp. 22, 25 (E.D.N.Y. 1978).}
\footnote{42}{Stone v. Stone, No. 78-2313 (9th Cir. 1979).}
\footnote{43}{[1979] PENS. REP. (BNA) R-7 (Jan. 8, 1979).}
\footnote{44}{[1979] PENS. REP. (BNA) R-35 (Jan. 29, 1979).}
\end{footnotes}
II. PREEMPTION OF STATE HEALTH INSURANCE PROVISIONS

Although section 514(b)(2)(A) of ERISA exempts from preemption "any law of any state which regulates insurance," a state may not deem an employee benefit plan or trust to be insurance for the purposes of regulating such plans under the insurance regulations of the state. Therefore, only insofar as a plan is funded by insurance is it subject to the insurance regulations of the state.

Several states have attempted to enact comprehensive health care legislation, but these provisions, insofar as they attempt to regulate self-insured plans, have been held to be preempted by ERISA. California's Knox-Keene Act (Health Care Service Plan Act of 1975) governed health care services of health care plans for California residents in such areas as funding, disclosure, sales practice, and quality of services. In addition, the Act required such plans to be licensed by the State Commissioner of Corporations. "In enacting Knox-Keene, the California legislature intended to promote the delivery of low cost, quality health care through financially sound plans to participants well informed of the benefits of various available plans." Although primarily concerned with plans and contracts which directly deliver health care services, the statute also seeks to regulate self-insured plans.

The fact that the state considers employee benefit plans to be a unique variety of insurance arrangement, and subjects them to specialized regulation under Knox-Keene rather than generalized regulation under the entire panoply of law addressed to traditional insurers, makes no difference under ERISA. In seeking to regulate plaintiff's plans pursuant to Knox-Keene under the theory that the statute applies to and that such plans constitute "insurance," defendant contravenes the clear intent of Section 514(a) and (b) of ERISA that employee benefit plans, so dubbed or under any other name, be free of state regulation.

The Hawaii Prepaid Health Care Act attempted a progressive

47. CAL. HEALTH & SAFETY CODE § 1340-1399.64 (West 1976).
49. Id.
50. Id. at 1300.
health care legislation which required that all workers in the state be covered by a comprehensive prepaid health care plan which included diagnosis and treatment of alcohol and drug abuse. The Act includes reporting requirements different from those in ERISA and provides that all employers who fail to comply with the Act would be barred from carrying on business in the state and would be subject to fines and other remedies.

The court in Standard Oil Co. v. Agsalud considered the question of whether or not the Hawaii Act could come under an exemption for disability insurance, but it concluded that disability insurance is intended to replace lost wages, whereas the Hawaii Act pertained to reimbursement of medical care. Therefore, the Hawaii Act would not be saved by section 4(b)(3) relating to disability insurance laws. The court stated that:

The purpose of the exemption clause in § 4(b)(3) was clearly not to accommodate all types of social insurance laws broadly analogous to worker's compensation, unemployment compensation, or disability insurance laws that require the adoption of employee benefit plans. The test is whether employee benefit plans providing that general type of benefit are usually maintained solely to comply with state social insurance laws or generally maintained for other or additional reasons. [T]he Hawaii Act regulates a type of employee benefit plan generally and historically maintained for other reasons, and it requires a combination of features duplicated in many voluntary plans. Congress intended to permit only traditional forms of state social insurance laws to continue to operate, and the Hawaii Act, the first state health insurance law in the country, is hardly a traditional state social insurance law.

The Standard Oil court concluded that the Hawaii Act was preempted by ERISA and that such an act was a threat to the uniformity of laws intended by ERISA. However, Judge Renfrew was troubled by the fact that Congress preempted state health insurance laws without any specific discussion for the need to do so. The efforts of states like Hawaii to ensure low-cost comprehensive health insurance to its citizens may be significantly impaired by ERISA preemption of state health insurance laws. Judge Renfrew

53. Id.
54. Id.
57. Id. at 711.
added that federal legislators should heed the admonition of Justice Brandeis that

[d]enial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.\footnote{58. Id. (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).}

However, when the regulation relates only to insurers or issuers of group health insurance policies, state regulation will be upheld. \textit{Wadsworth v. Whaland}\footnote{59. 562 F.2d 70 (1977), \textit{cert. denied}, 434 U.S. 1044 (1977).} considered preemption of ERISA by a New Hampshire state law which required issuers of group health insurance to provide coverage for the treatment of mental illness and emotional disorders.\footnote{60. N.H. Rev. Stat. Ann. \textsection 415:18-a(I) (1976).} The court found that the “deemer” clause did not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans. Therefore, it would appear that although self-insured plans can avoid stringent state regulation, plans covered by insurance will be subject to comprehensive state health care legislation.

In response to the \textit{Hewlett-Packard}\footnote{61. 571 F.2d 502 (9th Cir. 1978).} decision, the California State Legislature adopted a joint resolution\footnote{62. Calif. S.J. Res. No. 43 (1978).} to urge amendment of the ERISA preemption clause to provide for preemption only insofar as state laws conflict with ERISA. The resolution notes that the federal courts have held that California’s Knox-Keene Health Care Service Plan Act is totally preempted by ERISA with regard to self-funded employee welfare benefit plans which would otherwise be subject to the act. Yet ERISA does not address several areas covered by the Knox-Keene Act, including:

1. The financial soundness of self-funded health plans;
2. The manner in which potential enrollees are enrolled in self-funded health plans;
3. The quality of care and other aspects of delivery of services;
4. The liability of an enrollee to pay a contracting provider sums owed by, but not paid by, the plan; and
5. The contents of health plan contracts and the benefits to be provided.\footnote{63. [1978] \textit{Pens. Rep.} (BNA) A-18 (July 31, 1978).}
The resolution was referred to the U.S. Senate Committees on Human Resources and Finance on July 20, 1978, as well as to President Carter and the House of Representatives.

III. STATE EQUAL EMPLOYMENT REGULATIONS AS AFFECTED BY ERISA

Litigation in the area of discrimination under employee benefit plans has centered primarily on pregnancy under disability plans. Employers have contended that state laws prohibiting discrimination in employment are preempted by ERISA insofar as they relate to employee benefit plans. They have relied primarily on the decision in General Electric Co. v. Gilbert44 which held that the federal Civil Rights Act does not require that pregnancy benefits be paid as part of an employee health and welfare plan.

However, ERISA does not preempt federal law and, therefore, does not preempt state employment discrimination regulations which are an enhancement of Title VII of the Civil Rights Act of 1968.55 Whereas Title VII does not expressly require pregnancy benefits to be included in employee benefit plans, Title VII provides for state regulation in the area of civil rights which does not conflict with federal civil rights legislation and expressly preserves state laws which are designed to prohibit employment discrimination.66

The courts have reached conflicting decisions as to whether state statutes regarding employee discrimination were thus saved from preemption. Gast v. Oregon67 and Time Insurance Co. v. Department of Industry, Labor and Human Relations68 held such state laws were not preempted by ERISA, but Pervel Industries, Inc. v. Connecticut Commission on Human Rights and Opportunities69 reached the opposite conclusion.

The Gast court reasoned as follows:

Plaintiffs broadly interpret this term (supercede) to mean that Congress totally occupied the field of fringe benefits together with such things as apprenticeship and "other training programs." 29 U.S.C. § 1002(1). We decline to make such a broad interpretation in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been

64. 429 U.S. 125 (1976).
matters of vital state concern. Correct usage of the term “supersede” connotes supplanting one thing with another. Webster’s Third New International Dictionary, 2295-2296 (1971). Here Congress has only in small part supplanted state regulation. The substantive nature of health and welfare benefits provided by employers and employee organizations has not been addressed by Congress. We will not presume Congressional intent to preempt unless Congress “has mistakably so ordained.”

However, controversy in this area has been resolved by the passage of an amendment to the Civil Rights Act of 1964 on pregnancy discrimination. The amendment makes discrimination in employment relating to pregnancy, childbirth, or related medical conditions per se violative of Title VII. Inasmuch as this is federal regulation, it is not preempted by ERISA, as the preemption clause applies only to state law and expressly preserves federal laws.

The Act requires disability relating to pregnancy to be treated in the same manner as any other disability. It does not require that an employer offer a disability benefit plan to his employees, but only that if he does provide such benefits, that pregnancy should receive identical treatment with any other type of disability. This applies only to the period when the woman is actually physically disabled by her pregnancy and does not require a longer period because of any problems that the baby may incur.

This amendment should provide guidance for courts in any area in which a benefit plan discriminates against a protected class of employees, and the courts should now find that ERISA does not preempt civil rights legislation which only peripherally concerns employee benefit plans, but has its major emphasis on preventing discrimination in employment.

CONCLUSION

Until ERISA is amended, as urged by Insurance Commissioners and some state legislatures, to provide for preemption of ERISA only in those areas which will conflict with state law, preemption issues will be resolved on a case by case basis. There is no clear pattern as to how courts will hold in a particular situation. However, the trend appears to be that domestic relations law will be upheld

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70. No. CA-9686 (9th Cir., Dec. 2, 1978).
as not preempted by ERISA but that state regulation of self-insured plans is specifically preempted. The proliferation of the METs operating outside of state insurance regulation, in particular, requires Congress to take another look at the preemption issue.

Congress is presently considering some of the areas of preemption where litigation has been most prevalent. Senate Bill 209, ERISA Improvements Act of 1979, proposes to exempt from preemption the Hawaii Prepaid Health Care law and any substantially similar legislation which may be enacted by any other state. The bill also proposes a specific exemption of judgments or orders pursuant to state domestic relations law. Other provisions of the bill would attempt to improve regulation of such areas as financial soundness of plans, self-insured contract provisions and contents of employee benefit plans, and the quality of care and other aspects of delivery of services. Substantially similar legislation was proposed in 1978 but was not adopted. Specific legislation in these areas by Congress would substantially reduce litigation in the area of ERISA preemption of state laws and would help achieve the avowed purpose of the preemption clause to avoid endless litigation.

BARBARA M. BROWN

NOTES


In January, 1966, a Michigan court issued warrants for the arrest of Bernard Stroble on charges of murder and assault with intent to kill stemming from two separate incidents. New York authorities arrested Stroble in June, 1966 and charged him with manslaughter. He was subsequently tried, convicted, and imprisoned in the New York State Correctional Facility in Attica. While serving his New York sentence, Stroble was brought back to Michigan on June 27, 1968, pursuant to the Interstate Agreement on Detainer (I.A.D.).

He was convicted of assault in one of the cases on October 8, 1968. The murder trial was scheduled for October 23, 1968, but on October 11, Stroble filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, and the trial court granted a continuance pending determination of the habeas corpus action. The district court dismissed the petition on November 7, 1968, and the trial was then set for December 2, 1968. The trial, however, was later continued to December 16, because the judge to whom the case had been assigned was in the middle of another trial.

The trial finally began on December 16, 1968, 173 days after Stroble returned to Michigan, and Stroble was convicted of murder and sentenced to life imprisonment on December 20, 1968. On appeal, he contended that Michigan lacked jurisdiction to try him for murder.

3. Stroble v. Egeler, 408 F. Supp. at 632. Stroble was convicted of the (lesser included) offense of assault with intent to do bodily harm less than murder.
der inasmuch as the trial did not commence within 120 days after his arrival in Michigan as required by the I.A.D. The Michigan Court of Appeals affirmed the decision of the trial court and held that the pendency of the habeas corpus petition operated to stay the 120-day period, since he had "by his own act delayed the trial." I.A.D.'s requirement that continuances be for good cause had not been violated and Stroble's right to a speedy trial had not been abridged, because he was tried on the first charge within 120 days of his arrival in Michigan. The Michigan Supreme Court denied leave to appeal.

When Stroble was subsequently returned to Michigan to serve his sentences on the two Michigan charges, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. section 2254 claiming that Michigan's failure to try him on the murder charge within 120 days of his arrival in Michigan violated his rights under the provisions of the I.A.D. as adopted by Michigan. The district court agreed with the Michigan Court of Appeals and held that where petitioner was tried on one of the criminal charges pending against him within the 120-day period, his rights under the Agreement were not violated when his second trial did not start within the same 120-day period. Petitioner's second trial began within a reasonable period after the completion of the first trial.

9. Id. Article IV(c) of the I.A.D. provides that "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state..." 18 U.S.C. app. at 1396 (1976).
13. Stroble v. Egeler, 408 F. Supp. at 632. Stroble's second claim in his petition for a writ of habeas corpus contended that Michigan waived its right to imprison him on the murder conviction when Michigan authorities returned him to New York after he had begun serving the life sentence in Michigan through administrative mistake. This claim was denied by the district court in Stroble v. Egeler, 408 F. Supp. 630, 635-636 (E.D. Mich. 1976). The district court's denial of this claim was affirmed by the Sixth Circuit in Stroble v. Egeler, 547 F.2d 339, 340 (6th Cir. 1977). The merits of this claim are not relevant to this Note.
14. 408 F. Supp. at 635.
In the court’s view, the purpose of the I.A.D. was “to provide orderly and expeditious disposition of untried criminal charges.”

It found that since the continuances were valid, the purpose of the I.A.D. was served. The I.A.D. is silent as to the proper procedure to be followed when multiple charges are lodged in one jurisdiction against an out-of-state prisoner, so the court found it unnecessary to determine whether there had been any technical violations of the I.A.D. by Michigan which could have resulted in a waiver of its right to imprison Stroble. The district court did, however, rule that pendency of a habeas corpus petition did not stay the 120-day period specified in the act. The court found that tolling the 120-day period pending disposition of the habeas corpus petition “would tend to chill the use of the Great Writ and cannot be sanctioned. Prisoners must be free to use the writ without fear of repercussions.”

On appeal the Sixth Circuit found some merit in Stroble’s claim that his rights were violated because he was brought to trial after the 120-day period expired, but remanded the case because the record did not afford a proper basis for consideration of the issues involved. It directed the district court to determine whether the continuances were on the basis of good cause shown after notification and with appellant and counsel present. If there was failure to observe one or more of these provisions, the court should then determine whether prejudice to the appellant resulted therefrom, and if not, whether non-prejudicial violation of the Compact nonetheless mandates vitiation of the trial and sentence and dismissal of the indictment.

The district court found on remand the first continuance was for good cause, since the defendant was unable to stand trial due to his involvement in the highly-publicized assault trial which lasted more than a week and ended on October 8 and that the delay to December 2 provided a reasonable time to permit the publicity surrounding the defendant to subside. Similarly the trial judge’s involvement in another case was held to have constituted good cause for the continuance from December 2 to December 16. Although the district court could not determine whether petitioner’s counsel was present when the continuances were granted, it did find that the petitioner was not present. Furthermore, neither of the continuances was granted

15. Id.
16. Id. at 634.
18. Id. at 341.
in “open court.” Because the continuances were for good cause and, therefore, tolled the 120-day limitation period, and because the petitioner could not show that he was prejudiced as a result of the delay of the trial, the district judge denied the writ.\(^\text{19}\)

The Sixth Circuit vacated the district court’s judgment and remanded the case for entry of a writ of habeas corpus.\(^\text{20}\) The court found a clear violation of the I.A.D. due to the fact that the continuances had not been granted “on good cause shown in open court.”\(^\text{21}\) Furthermore the court found that the appellant had been neither physically nor mentally disabled so as to render him unable to stand trial, nor had he sought a postponement of the murder trial due to its close proximity to the assault trial. The court concluded that there was no indication that any judge ever considered any rationale now urged as justification for violation of the I.A.D.\(^\text{22}\) In addition, the court did not require Stroble to show prejudice in order to assert his rights under the I.A.D.

**MUST PREJUDICE BE SHOWN?**

The state contended in its argument to the Sixth Circuit that even if Stroble had been able to stand trial and the continuances had not been granted in open court with defendant or his counsel present, the writ should still not issue because the delay in bringing Stroble to trial had not been prejudicial.\(^\text{23}\) The view that a showing of prejudice is a condition precedent to the dismissal of an indictment violative of the I.A.D. was espoused by Circuit Judge Moore in his dissenting opinion in *United States v. Ford*.\(^\text{24}\) Finding that no showing of prejudice had been made, Judge Moore was unwilling to allow technical violations to operate to “thwart the jury’s determination of guilt . . . .”\(^\text{25}\) The Supreme Court, however, affirmed the majority’s decision in *Ford*, holding implicitly that where the I.A.D. has been violated, prejudice need not be shown to warrant dismissal of an indictment.\(^\text{26}\)

Nowhere in the Agreement or its legislative history is there any indication of intent that prejudice must result from a violation be-

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21. Id. at 839.
22. Id. at 838.
23. Id. at 834.
25. Id.
fore an indictment may be dismissed. On the other hand, Article V(c) of the I.A.D. makes dismissal of a case mandatory if trial is not begun within the period prescribed by the I.A.D.

[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

The first time Stroble appealed, the Sixth Circuit did not determine whether non-prejudicial violations of the Agreement required dismissals with prejudice, but it directed that question to the district court on remand. The district court found that the “agreement does not require a showing of prejudice before an indictment must be dismissed for violation of the time provision of the Agreement,” but denied the writ after concluding that the 120-day limitation had been tolled. The Sixth Circuit agreed with its conclusion that prejudice need not be shown to entitle a petitioner to the remedial benefits of the Agreement.

Recognizing the stringent enforcement sanctions of the I.A.D. regarding dismissal with prejudice, the Sixth Circuit relied on United States v. Mauro to conclude that Stroble was not precluded from asserting his rights under the I.A.D. due to his failure to show prejudice.

In Mauro, the Supreme Court strictly interpreted and applied the Agreement in accordance with its unequivocal language. With similar reasoning, the Sixth Circuit examined the I.A.D. and its history and found that “[t]he Agreement was written with meticulous

29. Stroble v. Egeler, 547 F.2d at 341.
30. Stroble v. Anderson, No. 5-71943, slip op. at 5-6.
31. Stroble v. Anderson, 587 F.2d 830. While not explicitly holding that prejudice is not a requirement before the remedial effects of the I.A.D. are imposed, such proposition is implicit in the Sixth Circuit’s decision reversing the district court, since petitioner never did show prejudice. See id. at 833 (quoting the district court’s finding that petitioner had shown no prejudice).
33. See note 31, supra, & accompanying text.
care. It even anticipated the possibility that its terms might have harsh effects if employed by state officials who were ignorant of its terms.” By virtue of the decisions in Mauro and Stroble, I.A.D. does not require the petitioner to show prejudice upon a violation of the Agreement in order to invoke its protective sanction.

**IS DISMISSAL MANDATORY?**

When Stroble’s first petition for a writ of habeas corpus was presented, the district court read Article V(c) to provide that “[w]hen the prisoner is not brought to trial within the 120 day period as extended, the court should enter an order dismissing such charge.” This language seems to allow the trial court to exercise discretion as to whether it should dismiss an indictment with prejudice. The Agreement, however, does not permit such discretion. The language of Article V(c) is clear and complete; it provides that where Article III or IV is violated “the appropriate court . . . shall enter an order dismissing the [charge] with prejudice, and any detainer based thereon shall cease to be of any force or effect.” The dismissal is mandatory and also consistent with the legislative history.

Faced with the question whether violation warrants reversal of the conviction below, the Second Circuit in Ford concluded that “the language actually enacted is mandatory on this court.” In Mauro, which the Supreme Court decided with Ford, the Court viewed Article IV(c) as a mandatory requirement that trial commence within 120 days. “Any other reading of this section would allow the Government to gain the advantage of lodging a detainer against a prisoner without assuming the responsibility that the Agreement intended to arise from such action.” When the Sixth Circuit examined that same clause, it found that “[t]he provision requiring the receiving state to try the prisoner sent by another state within 120 days, or return him or dismiss the indictment, was a major feature

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37. 18 U.S.C. app. at 1396-97 (emphasis added).
40. United States v. Ford, 550 F.2d at 744.
of the Agreement designed to make it enforceable." 42

Permitting discretionary dismissal rather than requiring mandatory dismissal would strip the Agreement of its intended force, allow the government to avoid its responsibility to comply with the act, and allow a defendant's rights to be whittled away.

"GOOD CAUSE SHOWN IN OPEN COURT"

On remand the district judge denied the writ for the second time, because the 120-day limitation had been tolled. 43 Article VI(a) provides that "the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." 44

Because Stroble's murder trial was to commence less than two weeks after his assault trial, the state contended that the publicity surrounding the first trial made Stroble unable to stand trial. However, it was not apparent in the record that the defendant was mentally or physically disabled, and the Michigan courts at no time made a determination that Stroble was "unable" to stand trial. 45 Furthermore, neither Stroble nor the prosecutor sought a postponement of the murder trial because of its proximity to the assault trial. 46 Recognizing these deficiencies in a state's argument, the Sixth Circuit concluded that had "the District Judge [engaged] in a finding of fact in holding appellant 'unable to stand trial,' we would conclude that the finding was unsupported by this record and was clearly erroneous." 47 If a state claims that the defendant's inability to stand trial caused its failure to try him within 120 days, the state has an affirmative duty to show the defendant was either mentally or physically disabled and that such determination was made by the court of competent jurisdiction.

Article IV(c) provides that "for good cause shown in open court the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuances." 48 The state contended that the continuance of December 2,

42. Stroble v. Anderson, 587 F.2d at 836.
43. Stroble v. Anderson, No. 5-71943, slip op. at 5-6.
45. Stroble v. Anderson, 587 F.2d at 838. Furthermore, "there [was] no indication that any judge ever considered any rationale now urged as justification for the violation of the I.A.D." Id.
46. Id. at 839.
47. Id. at 838.
1968 was for good cause, because the assigned judge was in the middle of another trial.\textsuperscript{49} The Second Circuit, faced with the same issue in \textit{Ford}, held that such continuances were not "necessary, reasonable or for good cause within the meaning of Article IV(c)."\textsuperscript{50}

The Sixth Circuit found that no better explanation for the continuances could be made other than routine docket management by court clerks.\textsuperscript{51} Continuances for purely clerical reasons or because the trial judge is occupied with another matter should never be held to be sufficient cause when weighed against a petitioner's federal rights under the I.A.D.\textsuperscript{52}

Article IV(c) requires that continuances be granted in open court.\textsuperscript{53} On remand the district court defined "open court" in relation to Article IV(c) as "a judge present in the courtroom conducting the proceedings in which the continuance is granted." The continuances in \textit{Stroble} were not granted in open court. The record showed entry of the continuances but no notations that they were granted by a judge on the bench (as required by court custom).\textsuperscript{54}

The state further contended that the customary practice of the trial court was to bring continuances before a judge for resolution only when a party objected, and that this procedure complied with the I.A.D. The Sixth Circuit refused to allow the explicit procedural requirements of the Agreement to be satisfied by such informal practices, however.\textsuperscript{55} The Second Circuit had reached the same result two years earlier in \textit{Ford}, finding the continuances in Ford's trial were not granted "in open court [with] the defendant or his counsel . . . present;" and, it, therefore, reversed his conviction.\textsuperscript{56} The \textit{Ford} court "emphasized . . . the importance of granting the defendant an opportunity to be heard before granting an extended criminal trial continuance,"\textsuperscript{57} which was the purpose of the phrase, "good cause shown in open court, the prisoner or his counsel being present . . . ."\textsuperscript{58} Without such a requirement, the right to a speedy

\textsuperscript{49} Stroble v. Anderson, 587 F.2d at 833.
\textsuperscript{50} United States v. Ford, 550 F.2d 732 (1977).
\textsuperscript{51} Stroble v. Anderson, 587 F.2d at 839.
\textsuperscript{52} "Congress' approval of the Interstate Agreement on Detainers rendered that agreement federal law for purposes of federal habeas corpus proceedings . . . ." Stroble v. Anderson, 587 F.2d at 840 (citing United States v. Mauro, 436 U.S. 340 (1978)).
\textsuperscript{54} Stroble v. Anderson, No. 5-71943, slip op. at 5.
\textsuperscript{55} Stroble v. Anderson, 587 F.2d at 839.
\textsuperscript{57} Id. at 743 (citing United States v. Didier, 542 F.2d 1182, 1189 (2d Cir. 1976)).
\textsuperscript{58} 18 U.S.C. app. at 1396 (1976).
trial under the Agreement would "be whittled away in the non-adversary context of ex parte communications between the government and the court." 59

CONCLUSION

The Interstate Agreement on Detainer was enacted "to encourage the expeditious and orderly disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, information or complaints." 60 The I.A.D. was also designed to prevent penalizing a prisoner by the filing of malicious detainers that were never intended to be followed up. 61 The Agreement was therefore remedial in nature 62 and directed at technical, procedural violation. However, the district court in Stroble attempted to use the liberal construction clause of Article IX to support the proposition that technical violations would not operate to release duly convicted prisoners from serving the balance of their sentences. 63 A liberal construction of the time limitations in favor of the state should not operate to deprive a prisoner of the rights intended to be protected by the I.A.D. The protective clauses of the I.A.D. "cannot appropriately be turned from a shield for the defendant into a sword for the prosecution." 64

Since a prisoner must comply with certain prerequisites or find himself without remedy in the courts, 65 the state should likewise bear its burden. Procedural violations are not mere technical defects. Depriving a prisoner of the right to a speedy trial or the right to be heard threatens the very core of our basic freedoms. Procedural requirements are designed to insure fairness and are no small part of our law. As Circuit Judge Edwards, writing for the court in the instant case stated, "[i]t is a requirement of the law of our land that it be enforced in accordance with the procedures contained

62. Id. at 740.
64. Stroble v. Anderson, 587 F.2d at 838.
therein . . . The history of American freedom is, in no small measure the history of procedure."  

HENRY D. ACCIANI

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Breathes there a motorist with soul so dead that mere mention of an automobile warranty will not ignite some spark of anger? Probably not. According to the chairman of the Federal Trade Commission, the automobile is the nation’s most difficulty-prone consumer product.1 Nearly one of every five complaints received by H.E.W.’s Office of Consumer Affairs concerns automobiles.2 Not surprisingly, new cars seem to spark much of that consumer ill-will. As a New Jersey court aptly stated,

For a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle losses are not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired . . . .3

Just how badly shaken is the consumer’s faith in new motor vehicles? A recent Federal Trade Commission study showed that thirty percent of new motor vehicles purchased had some problem fixable under warranty, and that about thirty percent of these problems took more than a month to resolve.4 Thus, in a year in which ten million new vehicles are sold, nearly one million buyers can expect to have problems serious enough to take more than a month to resolve.5 In simpler terms, one out of every ten vehicles becomes a lemon, at least in the eyes of the purchaser.

And warranties do not seem to help. The FTC survey indicated that twenty-five percent of motorists whose cars had problems repairable under the warranty provisions were dissatisfied with the results of the service they obtained under the warranty.6 The FTC concedes that many of them have good reason to be dissatisfied, or even irate.7 Although some purchasers have a temperament that even

2. Id.
4. See Pertschuk, supra note 1, at 146 (citing Arthur Young & Co., Consumer Survey on Warranties (unpublished survey prepared for the FTC)).
5. Pertschuk, supra note 1, at 146.
6. Id.
7. Consumers complained of the failure of manufacturers’ representatives to return tele-
a celestial repairman could not please, the FTC survey indicates that a substantial number of new vehicle buyers purchased internal combustion lemons and have not gotten much cooperation from either dealers or manufacturers.

Larry and Glenda Mayes had such a problem with the manufacturer of their vehicle. In February, 1976, the couple purchased a new, 1976, four-wheel drive Ford pickup truck from North City Ford, Inc. for $6,566.34. The new truck had a number of minor defects which were apparently repaired quickly under the terms of the warranty. But about five weeks after the purchase, more serious problems began. Mr. Mayes noticed an unusual noise and vibration in the truck. The dealer discovered that the truck had worn clutches. They were replaced, but the grinding noise and vibration persisted. Over the course of time, the truck was returned to the dealer on seven or eight more occasions. The dealer cooperatively replaced or repaired clutches, transmission gears, the steering mechanism, and other parts. The dealer consulted Ford's district office in Louisville, but Ford did not assist in the efforts to determine the cause of the noise and vibration. It could only suggest that the truck's drive shaft be wrapped with springs, then pumped full of liquid foam to deaden the noise. Ford offered no solution to the vibration problem.

At some point, a Ford engineer had a better idea: he suggested that the new truck might have a bent frame. Though the dealer lacked the equipment necessary to make that determination, the truck was taken to a commercial frame shop which concluded that the frame was not only twisted, but diamonded. A twisted and diamonded frame will cause excessive wear and tear to virtually all moving parts of a vehicle; the defect was major.⁸

Deciding that they had but one course of action left after five months of problems which even a cooperative dealer could not solve, Mr. and Mrs. Mayes revoked acceptance of the truck. They and the dealership requested that Ford either replace or repurchase the truck. Ford refused, citing its warranty provisions:

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⁸ See Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966), in which a defective frame was the apparent cause of another truck's problems. The frame was replaced twice before the purchaser finally filed suit. The court found that the entire truck was "one big defective part." Id. at 431.
LIMITED WARRANTY
1976 NEW CAR AND LIGHT TRUCK
Ford warrants for 1976 model cars and light trucks sold by Ford that
the Selling Dealer will repair or replace free any parts, except tires,
found under normal use in the U.S. or Canada to be defective in
factory materials or workmanship within the earliest of 12 months or
12,000 miles from either first use or retail delivery.

THERE IS NO OTHER EXPRESS WARRANTY ON THIS VEHI-
CLE.
AN IMPLIED WARRANTY OF MERCHANTABILITY OR FIT-
NESS IS LIMITED TO THE 12 MONTH/12,000 MILE DURATION
OF THIS WRITTEN WARRANTY.
NEITHER FORD NOR ANY OF ITS DEALERS SHALL HAVE
ANY RESPONSIBILITY FOR LOSS OF USE OF THE VEHICLE,
LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS OR
CONSEQUENTIAL DAMAGES.

Ford maintained that anything mechanical, even something as
drastic as a bent frame, could be fixed eventually and suggested the
truck be brought to its Louisville facilities so that it could confirm
the bent frame diagnosis and attempt to make "corrective repairs." By
then, Mr. and Mrs. Mayes no longer claimed ownership of the
truck and declined to grant their permission for the trip to Louis-
ville. Instead of remaining purchasers, they became plaintiffs, filing
suit under the Kentucky Consumer Protection Act. The dealer,
North City Ford, Inc., allowed the couple to keep actual possession
of the truck during the pendency of the litigation.

In a jury trial in Hopkins Circuit Court, the plaintiffs were
awarded judgement based upon the jury's finding that Ford's con-
duct constituted an unfair trade practice in violation of the Ken-
tucky Consumer Protection Act. The jury awarded the Mayes the
following amounts as damages:

(1) the difference in value between the
purchase price of the truck and its value on
the date acceptance was revoked $1,566.34

(2) the charges for official fees, usage
tax and license and registration fees contracted
for by the Mayes couple $ 436.14

11. The truck was used until it was demolished in an accident in July, 1977. There was no
evidence that the defective frame caused the accident.
(3) the finance charges contracted for by
the Mayes $2,081.50
(4) loss of the use of the truck resulting
from its defective condition $ 480.00
(5) time lost from work as a direct result
of the defective condition of the truck $ 317.00
(6) incidental expenses for tires, gasoline
and mileage $ 255.00
(7) punitive damages against Ford Motor
Company $25,000.00
(8) attorney's fees $5,000.00

Ford appealed, arguing that there was no evidence it had violated
the Consumer Protection Act and that even if it had, the court erred
in allowing the jury to return a verdict for punitive damages, conse-
quential damages, and attorney's fees.

Ford's defense throughout the litigation was that it had lived up
to the letter of its warranty. But the court of appeals noted that
Ford's "limited" warranty was different from other new car warran-
ties previously considered by appellate courts in the Common-
wealth. 12 It was evident to the court that the warranty was drafted
in light of the Magnuson-Moss Warranty Act:13

Ford's 1976 warranty was obviously drafted in light of the Magnuson-
Moss Warranty Act . . . . Because Ford did make a written warranty
to consumers with respect to its products, Ford was prohibited from
disclaiming or modifying any implied warranty other than to limit
the duration of the implied warranty . . . . We also note that Ford's
warranty is conspicuously designated as a "limited warranty"

12. In point of fact, Ford's warranty is not unusual. Of all domestic and foreign marketers
of new cars, only American Motors Corporation (AMC) offers a full warranty. Pertschuk,
supra note 1, at 149 n.11. However, because AMC enjoys only two percent of the market share,
ninety-eight percent of all new cars sold are covered only by limited warranties. Id.

action for breach of warranty. 15 U.S.C. § 2310(d) (1976). It even requires some warrantors
to replace or repurchase defective goods. 15 U.S.C. § 2304(a)(4) (1976). In theory, the reme-
dies provided by the Act seem effective, but "[u]nfortunately, in the case of automobiles, it
now seems that these remedies are neither solving the problems nor lessening their severity."
Pertschuk, supra note 1, at 148. The reason for the Magnuson-Moss Act's failure to solve the
problems of the new car buyer is that the right of action created by the Act for breach of
warranty applies only where the warranty breached is a full warranty. 15 U.S.C. §§
2303(a)(2), 2304 (1976). The chairman of the FTC recommends that the Act be amended to
close this loophole: "[C]onsumers [should] be allowed to sue under Magnuson-Moss to
make a company buy back a lemon, even under the limited warranty, and be entitled to keep
and use the car until the dispute is resolved." Pertschuk, supra note 1, at 149 (emphasis in
original).
thereby avoiding the necessity of meeting the federal minimum standards for warranties applicable to a "full warranty.""14

Mr. and Mrs. Mayes sought to invoke the provisions of the Kentucky Consumer Protection Act15 by way of the Uniform Commercial Code. Essentially, they argued that Ford's warranty policy denied them remedies afforded by the U.C.C.;16 Ford's continuing failure to recognize the U.C.C.'s statutory remedies was unconscionable; an unconscionable action is the same as an unfair business practice under the Act; therefore, Ford was in violation of the Act. Ford contended that its limited warranty constituted a lawful trade practice authorized by the U.C.C.; that its conduct toward the plaintiffs was authorized by the limited warranty and therefore not unconscionable; because Ford's conduct was not unconscionable, it was not an unfair business practice within the meaning of the Act; therefore, Ford had not violated the Act.

Although this was a case of first impression for the Kentucky appellate courts, the court was able to draw on a large body of U.C.C. law in resolving the claim in favor of the plaintiffs. Under the U.C.C. a seller has two means of limiting warranty liability: he may disclaim warranties17 or may limit the remedies available to a buyer for the breach of a warranty.18 Ford had not disclaimed or excluded any implied warranties. Indeed, it cannot, under Magnuson-Moss, but it did seek to limit the buyers' remedies for breach to repair or replacement of defective parts within twelve months or 12,000 miles of the date of purchase. The warranty further denied Ford's responsibility for loss of use, loss of time, incon-

(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
(2) For the purposes of this section, unfair shall be construed to mean unconscionable.
16. Under U.C.C. § 2-608(1)(a), a buyer may revoke acceptance of "a commercial unit whose non-conformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured . . . ." Ky. Rev. Stat. § 355.2-608(1)(a) (1972). If the buyer's revocation of acceptance is justifiable, "the buyer may cancel and . . . may in addition to recovering so much of the price as has been paid . . . recover damages for non-delivery . . . ." Ky. Rev. Stat. § 355.2-711(1)(b) (1972). The measure of damages for non-delivery is "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . . ." Ky. Rev. Stat. § 355.2-713(1) (1972).
venience, commercial loss, or consequential damages. Ford argued that the provisions of its warranty complied with the U.C.C. But the U.C.C. also provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose," all the remedies provided by Article two of the U.C.C. are available to the buyer. In Kentucky, a remedy fails of its "essential purpose" when the seller fails to correct a defect within a reasonable time.

The court expressly agreed with the analysis in Beal v. General Motors Corp. of a warranty limiting the buyer's remedy to repair or replacement of defective parts:

The purpose of an exclusive remedy of replacement or repair of defective parts, whose presence constitutes a breach of an express warranty, is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. . . . The limited, exclusive remedy fails of its purpose and is thus avoided under § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period.

Thus, the court found the Mayes were entitled to revoke their acceptance and pursue remedies outside the scope of the warranty when it became apparent that Ford was not going to be able to solve their problem within a "reasonable time."

Having decided that the terms of the Ford warranty unlawfully limited the relief available to a buyer under the U.C.C., the Mayes court was still required to determine whether Ford's practice of limiting the buyer's remedy to repair or replacement of defective parts violated the Kentucky Consumer Protection Act. To establish a

22. Id. at 426, quoted in Ford Motor Co. v. Mayes, 575 S.W.2d 480, 484 (Ky. Ct. App. 1978).
23. The Mayes court did not go quite as far as did a New Jersey court which considered the same Ford warranty in Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978). The court held that a new car buyer, forced to accept the warranty because he needed the vehicle, could avoid the limitation of remedies, because, when he bought the vehicle, he had acted under duress.
violation of the Act, the Mayes had to show that Ford’s conduct was unfair or unconscionable. 24 Although the warranty was not unconscionable on its face, the court concluded that it was unconscionable as applied to the plaintiffs:

Because the truck could not be repaired within a reasonable time, Ford acted “unconscionably” when it insisted that Mr. and Mrs. Mayes had no remedy other than to allow Ford and its dealers to continue indefinitely in their efforts to correct the problem. Ford followed a warranty policy which refused to recognize the rights of buyers under the Uniform Commercial Code when the only remedy afforded by its limited warranty fails of its purpose. This was an “unfair trade practice” which was unlawful under the Consumer Protection Act. 25

Distinguishing the case from one involving “an identifiable defect which Ford reasonably believed could be corrected satisfactorily within a reasonable period of time,” 26 the court concluded that there was no indication the Mayes would have “received what they bargained for, namely a new truck fit for the ordinary purpose for which trucks are used and free from defective parts.” 27 Thus, Ford’s continued insistence on the literal reading of the warranty was unconscionable, and, therefore, constituted an “unfair” business practice under the Consumer Protection Act.

Under the Act, successful plaintiffs are entitled to recover “actual damages.” 28 The Mayes contended that the finance charges should be included as the actual damages. They relied on Riggs Motor Co. v. Archer, 29 in which the buyer of an automobile which later proved to have been a stolen car was allowed to recover the finance charges he had paid to secure the purchase loan. Riggs was based upon the seller’s breach of warranty of title, and because the buyer had to relinquish possession of the car to the true owner, he had not received the benefit of his bargain. Riggs is easily distinguishable from the Mayes’ situation by the fact that the Mayes continued to enjoy possession of the vehicle even after they had revoked acceptance. Under Riggs, the Mayes would have been able to recover all finance charges which accrued after returning the truck to the dealer. But

26. Id. at 486.
27. Id. at 485.
29. 240 S.W.2d 75 (Ky. 1951).
because the dealer returned the truck to them after they had re-
voked acceptance, the court held that they could recover finance
charges attributable to the short period of time between their revo-
cation of acceptance and reacquisition.

The court affirmed the trial court's allowance of damages for loss
of use and held that Ford's exclusion of consequential damages was
of no effect. The Mayes had contended that once they proved that
the limited remedy of repair or replacement failed of its essential
purpose, then they had also established that the exclusion of conse-
quential damages was unconscionable under the U.C.C.30 The court
acknowledged the question, but answered it in terms of "public
policy," saying that the Consumer Protection Act expresses a legis-
lation intent to protect the consumer public,31 and that, as a matter
of policy, Ford could not limit the definition of "actual damages"
under the Act by relying upon the express provision of its warranty.

The Mayes court also upheld the trial court's award of $5,000 in
attorney fees. The Consumer Protection Act specifically allows re-
covery of "reasonable attorney's fees and cost."32 So the only real
question on appeal was whether the amount was reasonable. Ford
presented no evidence that it was not, and the court allowed the
award to stand, noting in passing that "[p]ersons such as Mr. and
Mrs. Mayes having legitimate claims under the Consumer Protec-
tion Act would be deterred from enforcing their rights if they were
required to absorb all costs of litigation."33

The court did, however, void the award of punitive damages. It
determined that the couple had to bear the burden of aggravation
they sustained during the two and one-half years following their
purchase of the truck. Under the Act, punitive damages may be

355.2-719(3) (1972) provides that "[c]onsequential damages may be limited or excluded
unless the limitation or exclusion is unconscionable . . . ."
31. Ford Motor Co. v. Mayes, 575 S.W.2d at 488. The legislative intent is expressed in
section 1 of the Kentucky Consumer Protection Act:
The general assembly finds that the public health, welfare and interest require a strong
and effective consumer protection program to protect the public interest and the
wellbeing [sic] of both the consumer public and the ethical sellers of goods and
services; toward this end, a consumers' advisory council and a division of consumer
protection of the department of law are hereby created for the purpose of aiding in the
development of preventative and remedial consumer protection programs and enforc-
ing consumer protection statutes.
33. Ford Motor Co. v. Mayes, 575 S.W.2d at 488.
awarded “where appropriate.” According to the court, the phrase “where appropriate” should not be construed literally because it merely “makes clear” that the Act does not limit a right to punitive damages where one previously existed. Such a right does not exist under the U.C.C. for breach of contract. Even under common law contract doctrine, the right to punitive damage was sharply limited. The court noted that although other courts have awarded punitive damages without finding a separate tort, Kentucky’s highest court has consistently disallowed punitive damages for breach of contract.

Arguably, it is time to reassess this rule in cases involving automobile warranties. As one commentator has aptly put it, the purchaser of a new automobile has “long suffered from being on the sticky end of a contract of adhesion.” Certainly the buyer is free to choose whichever make or model he desires, but the warranty provisions are unilaterally determined in most instances by the manufacturer and to some extent by the dealer. Unless the buyer accepts the warranty which is generally part of the sales contract, the dealer and the manufacturer will not sell. This disparity in bargaining power has long been recognized by the courts. It inevitably results in warranties whose terms favor the manufacturers who draft them. While the threat of punitive damages would certainly “foreclose a contracting party from breaching a contract he no longer desires to consummate,” in order to impose them in breach of warranty cases, the customary limitation of remedies must first be avoided. Otherwise, by strictly adhering to the terms of the warranty, including the limitation of remedies, a limited warrantor is able to effectively limit his liability without breaching his contract. The warrantor gets what he wants, a limitation of his own liability, but the dissatisfied buyer must go through the troublesome remedy

35. Ford Motor Co. v. Mayes, 575 S.W.2d at 487.
36. KY. REV. STAT. § 355.1-106(1) (1972):
The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this chapter or by other rule of law.
37. See generally 11 WILLISTON ON CONTRACTS § 1340 (3d ed. 1968).
38. Ford Motor Co. v. Mayes, 575 S.W.2d at 486 n.3.
of revocation and subsequent litigation. Actual damages are often small and have little real impact on limited warrantors who use their superior bargaining position to ride roughshod over the consumer.

Punitive damages might well be considered in such cases. Though not generally allowed in contract actions, they are awarded in tort actions for the purpose of “punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.” There must, of course, be more than tortious conduct; “there must be circumstances of aggravation and outrage, such as spite or ‘malice’ or a fraudulent or evil motive on the part of the defendant . . . or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.”

Although most courts hold that, absent personal injury or property damage, breach of warranty is not a tort, the New Jersey Supreme Court, which has been recognized in the vanguard of products liability thinkers, has held that it is. In Santor v. A & M Karagheusian, Inc., the plaintiff recovered damages for breach of warranty for defective carpeting. On appeal, the court held that the recovery was justified by the theory of strict liability in tort. The court noted that although strict liability had been applied mainly in personal injury cases, the manufacturer’s responsibility should be no different where the article sold is itself damaged.

Punitive damages were not an issue in Santor; in fact, the Santor court limited the recovery to the reduced value of the defective carpeting. But Santor’s holding that liability for defective goods can be predicated upon tort theory opens the door to the possibility that punitive damages could be recovered for breach of warranty, thus giving the consumer more leverage than he now has under the U.C.C.

If warrantors can draft warranties that operate unconscionably with economic impunity, it seems reasonable to assume that they will. Not many new vehicle buyers, stuck with a lemon, will go to the trouble of litigating their claims under the present law, and the manufacturers are aware of this. Unless and until Congress drafts some meaningful warranty legislation, it is the duty of the state courts to protect consumers. Certainly, making the individual con-

43. Id. (footnotes omitted).
44. 44 N.J. 52, 207 A.2d 305 (1965).
sumer “whole” by an award of actual damages is laudable, but it begs the larger policy question of how consumers as a class can be effectively protected. Magnuson-Moss attempts to do that in the area of full warranties by providing class-action remedies. A class action would certainly provide the economic incentive to improve the warranty situation. But Magnuson-Moss, as it now stands, offers no meaningful protection to the largest segment of aggrieved purchasers in the economy—buyers of new motor vehicles. They need extra help in squeezing the lemonmakers.

The Mayes court’s construction of the Consumer Protection Act should provide some of that help, at least to Kentucky consumers. In a sense, it fills some of the gaps in Magnuson-Moss by combating Code remedies with Consumer Protection Act remedies, thus making relief simpler and less costly for the average consumer to obtain. For example, the consumer who has a claim cognizable under the Act is more likely to be awarded attorney’s fees. However, the court’s interpretation of the Act, generous though it is, may still be insufficient to induce consumers to assert their rights. Mr. and Mrs. Mayes went through a protracted legal battle to prove their claim. How many other consumers will do likewise, especially in the case of goods with a smaller price tag than a new motor vehicle? Put another way, is it worth the time and trouble? Undoubtedly, many consumers will decide that it is not and will merely suffer in silence. The decision in Mayes promises to provide reasonably good “lemon-aid” to the Kentucky consumer. But it is clear that something stronger may still be necessary.

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46. The Consumer Protection Act expressly allows a court to award a successful plaintiff “reasonable attorney’s fees and costs.” Ky. Rev. Stat. § 367.220(3) (Supp. 1978). Under the U.C.C., generally, attorney’s fees are not recoverable as damages in an action for breach of contract unless expressly agreed to by the parties. See Ky. Rev. Stat. § 355.2-719(1)(a) (Supp. 1978) (provides that the contract “may provide for remedies in addition to . . . those provided for in [Article 2]”).
On February 22, 1972, Mrs. Lula Daugherty Roach and her husband were involved in an automobile accident near Richmond, Kentucky. Mrs. Roach received emergency medical treatment in Richmond and was then transferred to St. Joseph Hospital in Lexington, Kentucky, where she died on March 17, 1972. The official cause of death was listed as "bronchial pneumonia due to, or as a consequence of, generalized peritonitis and bacterial endocarditis." On the date of Mrs. Roach's death, her husband entered into a contract with Runner, an attorney. According to the terms of the contract, Runner was to "institute a claim for damages against any and all responsible parties as a result of injuries received upon the 22nd day of February, 1972." Runner proceeded to investigate the facts surrounding the automobile accident and filed suit in federal court against the driver of the other automobile involved in the accident. According to his testimony, Runner never suspected the possibility of a malpractice claim against the hospital or the doctor.

On March 15, 1973, Mr. Roach hired a second attorney to prosecute the medical malpractice claim, but no suit was filed. On July 28, 1973, Mr. Roach employed a third attorney, who filed suit on the medical malpractice claim on August 1, 1973. Summary judgment was granted for the defendants, because the suit had not been filed within the statute of limitations. There was some evidence that Mr.
Roach had contacted Runner in order to inquire as to the status of the malpractice claim, but Runner denied ever having had the conversation. It was not clear why the second attorney had not filed the suit within the time limit, as might have been done.

Runner was sued for legal malpractice based upon his failure to prosecute the medical malpractice claim. The jury found in Runner's favor. Additionally, it found that had the medical malpractice suit been timely filed, there would have been recovery in the amount of $146,123.75.5

This appeal contended that the issue of Runner's negligence should not have been submitted to the jury and that the jury was not instructed properly. Runner filed a cross-appeal arguing that if the trial court's verdict was reversed, the jury verdict on the amount of damages for the medical malpractice claim was based upon improperly admitted evidence. The court of appeals affirmed the trial court, making it unnecessary to decide Runner's cross appeal.

As pointed out by the court of appeals, an action against an attorney for malpractice involves a "suit within a suit." In other words, the plaintiff has "the burden of proof not only to show that defendant negligently breached his contract in permitting the statute of limitations to operate against plaintiff's claim but also to establish that he had a recoverable claim for malpractice against [the hospital and others]." 6

The elements which a plaintiff must prove against an attorney are: "(1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client." 7 The plaintiff need not prove that he has paid the attorney. 8

The attorney has the burden of proving that the client was contri-

butorily negligent in that he failed to act or to give information to the attorney. And where the plaintiff does not cooperate with his attorney, there is no liability on the part of the attorney.

Several authorities have set forth the standard of care for attorneys. The American Law Institute states that “[u]nless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.” This standard is stricter than the earlier one of gross negligence.

“Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.” As professionals, attorneys have been likened to doctors:

[If the injured person exercises ordinary care in selecting a doctor to treat his injuries, and follows the advice of the doctor, he is permitted recovery for the full extent of his injuries. . . .

[It is difficult] to discern any reasonable basis for a different rule as respects legal advice obtained in an effort to mitigate harm. . . .

. . . One basis for the rule is that the injured person is not skilled in medical science; he has done all that can be expected of him when he exercises ordinary care in selecting a competent physician.

Therefore, when a client is careful in selecting his attorney, the client, not being skilled in the law, should be able to rely upon the skill of the attorney in handling his case — as a patient would rely upon the skill of his doctor. However, a client may not recognize his attorney’s negligence, because the client does not observe most of the attorney’s actions. This implies that the attorney has a duty

to make disclosure of material facts to his client.\textsuperscript{17}

Malpractice by an attorney results from his failure to exercise the requisite degree of care and skill as discussed earlier. When this failure becomes the proximate cause of the client's damage, it gives rise to a tort action. But the attorney usually performs his duties pursuant to a contract; therefore, such failure also leads to a breach of contract. The result is that legal malpractice may involve both a tort and a breach of contract.\textsuperscript{18} However, an injury brought about by the negligent attorney is generally financial and not physical.\textsuperscript{19}

The court of appeals pointed out that while this was a case of first impression in Kentucky, \textit{Humboldt Building Association v. Ducker's Executrix}\textsuperscript{20} was helpful as to the law to be applied. In \textit{Humboldt}, an attorney was employed by the building association to search titles, prepare and secure mortgages, and perform related duties. He examined and approved the title to certain property upon which a loan was to be made. However, he failed to discover or obtain waivers for liens of materialmen and subcontractors. At the foreclosure proceedings, the property did not bring enough to cover both the liens and the loan made by the building association, resulting in loss to the association. The court discussed the attorney's liability:

\begin{quote}
[T]he attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment. . . . When one seeks and obtains admission to that profession dealing with so many important and involved affairs of men, and holds out his services to be engaged by those standing in need of such, he engages that he possesses to an ordinary extent the technical knowledge commonly possessed by those in the profession, and that he will give to the matters submitted to him such care and attention as is ordinarily given similar affairs by men of this profession. He does not agree, in the absence of special contract to that effect, that he will make no mistake of judgment. On the contrary, the law recognizes, in fixing this liability of the attorney, that human judgment is fallible. Courts, as well as lawyers, do disagree concerning the many matters about which each one may have a fairly fixed opinion. The law is a science, it is true, but an imperfect one, for the reason that it depends for exemplification and
\end{quote}

\begin{itemize}
\item \textsuperscript{17} Id. at 189, 491 P.2d at 429, 98 Cal. Rptr. at 845.
\item \textsuperscript{18} Id. at 181, 491 P.2d at 423, 98 Cal. Rptr. at 839.
\item \textsuperscript{19} Hillhouse v. McDowell, 219 Tenn. 362, 410 S.W.2d 162 (1966).
\item \textsuperscript{20} 111 Ky. 759, 64 S.W. 671 (1901).
\end{itemize}
enforcement upon the imperfect judgments and consciences of men. Therefore when the attorney has used ordinary care in acquainting himself with the facts, his misjudgment as to the law thereon will not generally render him liable.\(^{21}\)

In the present case, the court of appeals compared the attorney-client relationship to that of principal and agent. However, due to his status as an officer of the court, “the attorney is vested with powers superior to those of any ordinary agent” and owes “a higher duty than any ordinary agent owes his principal.”\(^{22}\) Also, the attorney-client relationship, being fiduciary in nature, places upon the attorney the “duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client’s interest.”\(^{23}\)

The degree of care and skill exercised in an attorney’s act, or failure to act, is judged by how far it departs from the quality customarily provided by members of the legal profession.\(^{24}\) As stated in Humboldt and Hansen v. Wightman,\(^{25}\) the question as to whether the attorney’s conduct meets this standard is for the trier of fact.

The appellant’s first theory was that Runner was retained to bring all possible legal actions arising from the injuries to Mrs. Roach. This would also include any medical malpractice action. As the court pointed out, there was disputed evidence on this issue, and whether Runner had a duty to bring such an action was for the jury to determine.\(^{26}\)

The second theory was that even if Runner was not employed specifically for the purpose of bringing such an action, he had a duty to examine medical records and inform his client that there could be some question as to the medical care Mrs. Roach received but that he did not handle medical malpractice claims.\(^{27}\)

The court cited Owen v. Neely\(^{28}\) which discussed the duty of an attorney to advise the client of possible legal claims or problems he may have. In Owen, the attorney made a title search and reported a clear and merchantable title. However, there were discrepancies between the survey and deed descriptions of the property. The

\(^{21}\) Id. at 763, 64 S.W. at 672-73.

\(^{22}\) Daugherty v. Runner, 581 S.W.2d at 16.

\(^{23}\) Id.

\(^{24}\) W. Prosser, supra note 14, at 162.


\(^{26}\) Daugherty v. Runner, 581 S.W.2d at 17-18.

\(^{27}\) Id. at 17.

\(^{28}\) 471 S.W.2d 705 (Ky. 1971):
court, pointing out that the client would not be expected to understand legal descriptions of property, held that the question of duty of the attorney to advise of and investigate this discrepancy would preclude summary judgment. Relying upon this authority, the court explained that to hold that Runner had no duties to his client in regard to the medical malpractice claim because it was not specifically provided for in the contract “would require the client, presumably a layman who is unskilled in the law, to recognize for himself all potential legal remedies.”

The court mentioned certain facts which it considered important. Runner’s testimony indicated that he was hired to pursue only the claim arising out of the automobile accident and that he did not handle medical malpractice claims. The hospital admission report stated that Mrs. Roach entered with “multiple contusions and abrasions, a fractured nose, fractured right shoulder and a compressed fracture of the spine.” This information, combined with the fact that Mrs. Roach died thirty days later, did not arouse Runner’s suspicions as to the hospital treatment. Furthermore, on June 9th, the medical records were still not complete, and there was no autopsy report. According to Runner, no one representing the deceased had ever mentioned the possibility of the medical malpractice claim until he was contacted by the second attorney a few days before the statute of limitations ran. Runner testified that he told the other attorney to proceed with the medical malpractice claim.

On the other hand, the appellant offered evidence that members of Mrs. Roach’s family had contacted Runner about the medical malpractice case. The Roach family had discussed the possibility of a medical malpractice action and had contacted two attorneys who declined to take the case. The family was aware of the statute of limitations. They had hired a second attorney to file the complaint, but he failed to do so. Finally, their third attorney filed the claim, which was, by that time, barred by the statute of limitations. Their evidence suggested that Runner’s failure to “inquire into the cause of death . . . and . . . to review the medical records was not consistent with good legal practice. . . .” The court of appeals upheld the jury’s verdict, holding that Runner was not negligent as a matter of law.

29. Daugherty v. Runner, 582 SW.2d at 17.
30. Id.
31. Id. at 18.
32. Id.
The court also considered the appellant's tendered instruction to the effect that the actions of the second attorney would not operate as an intervening cause to relieve Runner of liability. Support for this contention, it was argued, came from Wimsatt v. Haydon Oil Company. In Wimsatt, one of the issues was the liability of the attorneys who were employed to file suit against the Haydon Oil Company and the driver of its truck. The truck was involved in a collision with an automobile owned and operated by Thomas Carrico. Mrs. Carrico, a passenger in the car, died from injuries sustained in the accident. The attorneys pursued the wrongful death action but neglected to bring suit for the substantial injuries sustained by Mr. Carrico. The existence of these injuries was known to the attorneys, as it had been revealed during a deposition in connection with the wrongful death action. The attorneys were discharged, and a second attorney was engaged to file an amended complaint seeking compensation for Mr. Carrico's injuries. The trial court dismissed this amended complaint, because it was barred by the statute of limitations. Mr. Carrico then filed suit against the first attorneys, alleging that they had been negligent in failing to file Mr. Carrico's claim in time. The attorneys asserted as a defense that the trial court erred in striking the claim and that this could have been corrected by a timely appeal. Since no appeal was taken, the first attorneys argued that it was the negligence of the second attorneys which caused damage to Mr. Carrico. The court rejected that argument and pointed out that had the first attorneys instituted the claim originally, it would not have been dismissed by the trial court, and there would have been no need to appeal.

The court in the present case approved the decision of Wimsatt, but it rejected the contention that Wimsatt required the tendered instruction. Instead, it called attention to House v. Kellerman. House did not involve negligence on the part of an attorney; it dealt with an intervening cause as the subject of a jury instruction. Based

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33. Appellant's tendered instruction read:
You are further instructed that it is no defense to the Defendant, E. Michael Runner, Attorney at Law, that the Plaintiff employed, or attempted to employ, an Attorney who might have been able, by taking appropriate action, to avoid the damage to Plaintiff's decedent's estate, but failed to do so.

Id. at 19.

34. 414 S.W.2d 908 (Ky. 1967).

35. Id.

36. 519 S.W.2d 380 (Ky. 1974).
upon the language of *House* and the authority of *Wimsatt*, the court ruled that the trial court's denial of the jury instruction was proper.\(^{38}\)

The court concluded that the evidence sufficiently supported the jury's verdict for the attorney, but it also remarked that "we may have found differently had we sat as jurors in this case. . . ."\(^{39}\)

While certain concepts of attorney liability are rather recent,\(^{40}\) an attorney's liability to his client for certain action, or inaction, has been generally recognized for some time. In an early Kentucky case, *Eccles v. Stephenson*,\(^{41}\) the client sued his attorney for the mismanagement of a case which resulted in the client being nonsuited. The court noted that if he "undertake[s] to perform what he has thus promised to do, and by his negligence or want of skill an injury accrues to the person whose business he has undertaken to perform, he will be responsible for such injury."\(^{42}\)

There are several cases in which recovery has been allowed where the attorney allowed the statute of limitations to run on his client's cause of action.\(^{43}\) The present case is similar to these, since the damage to the client was apparently due to the loss of the malpractice action, barred by the statute of limitations. Therefore, it is necessary to analyze the factors which make the present case different from the others cited by comparing other situations involving multiple claims or defendants.

In *Sikora v. Steinberg*,\(^{44}\) the client sued her attorney for failing to sue the correct defendant. Her injuries were sustained when she was struck by an automobile operated by a volunteer fireman responding to an alarm. The attorney sued the fireman and the owner of the

\(^{37}\) "In short, only when an intervening force would constitute a superseding cause as a matter of law should it be singled out as the subject of an instruction, and then only if it is necessary to determine whether in fact it took place." *Id.* at 383.

\(^{38}\) The Court of Appeals notes that "the alleged negligence of the second attorney was not, as a matter of law, a superseding cause" to the plaintiff's damage. *Daughtery v. Runner*, 581 S.W.2d at 20.

\(^{39}\) *Id.* at 18.

\(^{40}\) See 6 N. Ky. L. Rev. 229 (1979).

\(^{41}\) 6 Ky. (3 Bibb) 517 (1814).

\(^{42}\) *Id.* at 517-18.


vehicle. Both were exonerated from liability: the fireman, because he was responding to an alarm; the owner of the vehicle, because the driver had been exonerated. The attorney also filed a notice of claim against the incorporated village, which may have been liable. However, no further action was taken on that claim which was eventually barred by time. The court held that the client had stated a cause of action against the attorney for malpractice.

One major difference between *Sikora* and the present case is that Runner never instituted a claim of any kind against the hospital. Also, it appears that Runner did bring suit against a potentially liable defendant who would not be exonerated in the same manner.

In *Reynolds v. Picciano*, the client sued her attorney for failing to institute a claim against one of the drivers in an automobile accident in which she had been injured. The attorney had sued the driver of the automobile in which the client was a passenger, but he failed to sue the driver of the other automobile before the statute of limitations had run. The court found that the client had stated a cause of action against the attorney for malpractice and breach of contract.

Comparing *Reynolds* to the present case, Runner did sue the driver of the automobile but neglected to bring the malpractice action against the hospital. However, it appears that Runner was unaware of the possibility of the hospital as a potential defendant. In *Reynolds*, on the other hand, the attorney certainly should have known of the existence of another possible defendant—the driver of the second automobile. Therefore, it could be argued that one factor which relieves Runner from liability is his lack of knowledge of the second possible defendant.

Where the attorney has failed to bring all causes of action or to sue all possible defendants, and the client knew of this, courts have relieved the attorney of liability. In *Case v. Ricketts*, the client sued her attorney for failing to join a potential defendant. The court stated that "it is sufficient to say that [the client] knew he was not named, that she was present during the entire trial and testified therein, and it is now too late to claim that the wrong parties were sued or additional parties should have been sued." Comparing

46. Case v. Ricketts, 41 A.2d 304 (D.C. 1945); Lord v. Hamilton, 34 Or. 443, 56 P. 525 (1899); Youngman v. Miller, 98 Pa. 196 (1881).
47. 41 A.2d 304 (D.C. 1945).
48. Id. at 305.
Case to the present situation, the clients knew of the potential malpractice action and the statute of limitations; however, there is little, if any, evidence that any mention of such possible claim was made to Runner.

The present case is consistent with Sikora, Reynolds, and Case in that Runner failed to prosecute the malpractice claim. He was apparently unaware of the hospital as a potential defendant, and his client, who evidently was aware of it, said nothing. Additionally, Runner could not be said to be totally inactive. He did bring suit against the operator of the other automobile. However, Maryland Casualty states that there is really no distinction between failure to do anything and making an inexcusable mistake.

What constitutes an "inexcusable mistake"—what is the attorney's duty to his client? An attorney's responsibility is not simply to file an action within the statutory period. When he [undertakes] to represent plaintiffs he [assumes] a much broader obligation. That obligation [encompasses] the taking of any steps reasonably necessary in the proper handling of the case. It [includes], of course, the duty of investigating the facts, formulating a litigation strategy and filing within a reasonable time any action necessary to effectuate recovery.

Runner reviewed the hospital records but not until he filed the wrongful death action. However, the records were incomplete for some length of time. The injuries sustained by Mrs. Roach were serious. Should the cause of death have put Runner on notice that there might have been malpractice? Should the client have been more specific in advising Runner of the potential claim?

The jury found that Runner was not negligent. But the line is fine, and Runner comes close. As mentioned earlier, the attorney is a professional. Like a doctor, he possesses knowledge superior to his client who depends upon him to handle the case. The client is not expected to know the law or to anticipate all possible causes of action. It is the attorney who must do this. "[T]he public expects, and has the right to demand, that their legal affairs will be approached with expertise and initiative, and anything short of that

49. Daugherty v. Runner, 581 S.W.2d at 18.
50. Maryland Casualty Co. v. Price, 231 F. 397, 403 (4th Cir. 1916).
is a violation of the trust and confidence reposed in a member of our profession."\textsuperscript{52}

\textbf{Georgana T. Slater}

\textsuperscript{52} Daugherty v. Runner, 581 S.W.2d at 20.
I. FACTS

Nine days after the Hardin Circuit Court entered a judgment setting aside the Radcliff City Council’s denial of a request for property rezoning, several local property owners moved to intervene as additional parties defendant for the purpose of appealing the case. These citizens were opposed to the rezoning, which would permit the construction of apartments in their neighborhood. They sought to intervene when they learned that the city would not take an appeal. The circuit court overruled the motion on the grounds that the interests of the local property owners “had been adequately protected by the defense made on behalf of the City of Radcliff and that the motion to intervene was not timely filed.”

The court of appeals unanimously reversed the trial court and ordered the intervention motion sustained. Writing for the court, Judge Park concluded that the interests of the local property owners were not adequately represented, simply because the city failed to appeal the adverse judgment. The court was swayed by the participation of one of the proposed intervenors in the zoning hearing before the city council. This citizen owned land within one hundred feet of the land sought to be rezoned and testified that the construction of apartments could worsen a flooding problem in the area. Since a circuit court cannot receive new evidence in a review of a zoning decision, that citizen had participated in the only evidentiary hearing in the case. In view of this early involvement, the court essentially decided that it would be unfair to deny the intervenor an opportunity to appeal. On discretionary review, the Kentucky Supreme Court reversed the court of appeals. Justice Jones, in the majority opinion, described the intervenors as “seeking a free ride on the train of the Radcliff City Council.” The failure to intervene while the circuit court action was still pending was held inexcusa-

3. City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971). “[J]udicial review is confined to a determination of whether the zoning action taken was arbitrary. A de novo trial in circuit court concerning what particular zone classification the property should receive is impermissible.” Id. at 178-79.
ble. Justice Reed, joined by Justices Clayton and Lukowsky, strongly dissented, warning that the decision would create "a trap for the unwary lawyer who attempts to practice in both the state and federal courts in Kentucky," since a federal court would have reached an opposite result. According to the dissent, the recent case of *United Airlines v. McDonald* had interpreted Federal Rule 24 to allow post-judgment intervention for the purpose of appealing a case such as *Pearman*.

II. BACKGROUND

Intervention is controlled by Rule 24, which closely follows the federal rule. For intervention of right under 24.01, first an applicant must either have a statutory right to intervene or must claim "an interest relating to the property or transaction which is the subject of the action." Second, the "disposition of the action may as a practical matter impair or impede his ability to protect that interest." An adjacent landowner whose property could decrease in value as a result of a zoning change clearly meets these two requirements. Third, the applicant's interest must not be "adequately represented by existing parties." This last requirement and the general prerequisite of timeliness are at the heart of the *Pearman* decision and

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5. Id. at 466 (Reed, J., dissenting).
7. Ky. R. Civ. P. 24 provides in pertinent part:

   **Rule 24.01. Intervention of right** - Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

   **Rule 24.02. Permissive intervention** - Upon timely application anyone may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.


8. See Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973), in which intervenors owned land up to three and one-half blocks from the subject property. The increased flow of traffic which could result from a zoning change was a chief objection of the intervenors.
have recently been given new meaning by the United States Supreme Court.9

Although Rule 24 does not define "timeliness," a trial court must consider all of the circumstances surrounding a particular case.10 The trial court's ruling on an intervention motion will be reversed only upon a finding of an abuse of discretion.11 The traditional analysis for determining timeliness, whether before or after judgment, involves consideration of various factors: the length of time an applicant has been aware of his interest in the suit; how far the suit has progressed; the purpose for which intervention is sought; and the prejudice which could result to existing parties. Usually, the most important factor is the possibility of prejudice. One court has stated that this "may well be the only significant consideration when the proposed intervenor seeks intervention of right."12 As this suggests, courts frequently apply a more lenient standard to intervention of right than to permissive intervention.13 "[T]he relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case."14

Kentucky courts have consistently held that post-judgment intervention should be denied except in extraordinary circumstances.15 Although this view has been shared by virtually every jurisdiction,16 several courts have allowed intervention for the purpose of appealing zoning cases. One of the earliest cases, Wolpe v. Poretsky,17 allowed intervention where a zoning commission's refusal to rezone property had been reversed. The court reasoned that the failure of the zoning commission to appeal was tantamount to inadequate representation of adjacent property owners, partly because of the presumption that a zoning commission's actions are valid.18 Wolpe

9. See text accompanying notes 28-43 infra.
11. Id.
14. Id. at 267.
15. See, e.g., Murphy v. Lexington-Fayette County Airport Board, 472 S.W.2d 688 (Ky. 1971).
17. 144 F.2d 505 (D.C. Cir. 1944), cert. denied, 323 U.S. 777 (1944).
18. Id. at 507.
may be distinguished from *Pearman* in that the *Wolpe* intervenors based their right of intervention upon a zoning code provision which granted property owners a private right of action to enjoin violations of the code. If the intervenors had not been allowed to appeal, they would have lost their statutory cause of action. However, *Wolpe* was decided before the 1966 revision of Federal Rule 24. Up to that time, it was a condition of intervention of right that "the applicant is or may be bound by a judgment in the action." In 1966, the *res judicata* requirement was replaced by a more liberal approach under which it is sufficient that an intervenor's ability to protect his interest in the subject matter of the action may be impaired or impeded. At least two states, Colorado and Kansas, have rules identical to the present Federal Rule 24 and have allowed post-judgment intervention for the appeal of zoning decisions. In *Pearman*, the Kentucky Supreme Court majority implicitly conceded that the adjacent property owners were qualified as intervenors of right. Intervention was denied because the property owners failed to justify their lack of timeliness. As will be shown, this position appears to be inconsistent with the United States Supreme Court's interpretation of Federal Rule 24 in *United Airlines v. McDonald*. While Kentucky is free to reject post-judgment intervention, a conflict with federal cases will likely result.

Over the years, post-judgment intervention for the purpose of appeal has been allowed by federal courts in several situations, most often where the litigation was representative in nature. For example, when a corporation failed to appeal an action against one of its officers to recover profits made on short-swing stock deals, a shareholder was allowed to appeal. This case was decided under the pre-1966 rule, and the basis of the stockholder's intervention was a

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20. The 1966 changes are explained in the Advisory Committee's Note which may be found at 39 F.R.D. 109.
21. *Hukle v. Kansas City*, 212 Kan. 627, 51 P.2d 457 (1973); *Dillon Companies Inc. v. City of Boulder*, 515 P.2d 627 (Colo. 1973). *Contra*, *City of Bridgeton v. Norfolk Western Railway*, 535 S.W.2d 99 (Mo. 1976) (Intervention denied in a 4-3 decision). In *Hukle*, *supra*, the case was still pending in that a motion to dismiss had not been ruled upon when application was made for intervention.
22. 575 S.W.2d at 464 (Reed, J. dissenting).
23. Id. at 463.
25. Id. at 395-96, n. 16. (The leading federal cases allowing post-judgment intervention are listed).
statutory cause of action. However, since 1966 intervenors have been allowed to appeal litigation which is not representative in nature, although an intervenor "might therefore be thought to have a less direct interest" in such a case. For example, parents were permitted to intervene when a school board decided not to appeal a judgment. The parents' "concern for their children's welfare" was found to be a sufficient interest for intervention of right. Despite these exceptions, intervention after judgment remained a strongly disfavored motion, and was rarely allowed. It has been argued that the major cases allowing it are distinguishable because of the special circumstances of each of those cases. While this may be true, the recent Supreme Court decision in United Airlines v. McDonald gives undeniable legitimacy to post-judgment intervention.

III. United Airlines v. McDonald

In United Airlines, the Supreme Court ruled that post-judgment intervention to appeal a denial of class certification was proper. United was sued for employment discrimination on the basis of its no-marriage rule, which applied to stewardesses but not to stewards. The plaintiffs, former stewardesses who had been fired for violating the rule, were denied class status because they failed to satisfy the numerosity requirement of Federal Rule 23(a)(1). The Seventh Circuit refused to review the adverse class determination, because it was an interlocutory order not appealable until final judgment. Eighteen days after the entry of final judgment, Mrs. McDonald, a member of the putative class, but not a plaintiff, moved to intervene. She had not filed charges, since she knew that other former stewardesses were litigating the matter. Her motion was filed when she discovered that the plaintiffs would not appeal the denial of class certification. The district court denied intervention because of lateness. On appeal the Seventh Circuit reversed, and certified the class as well. On the sole issue of Federal Rule 24

27. See note 25, supra.
29. Id. at 180.
32. Id. at 388. At the time United Airlines was decided, the Circuits were divided over the appealability of an order denying class certification. The Supreme Court later rejected the death-knell doctrine, upon which several circuits had relied in allowing interlocutory appeal. See Cooper & Lybrand v. Livesay, 437 U.S. 463 (1978).
timeliness, the Supreme Court affirmed in a 5-3 decision.

In the majority's view, it was unnecessary for Mrs. McDonald to intervene before final judgment since she would have been merely a "superfluous spectator." The Court explained why the motion was timely:

The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.

The Court noted that the motion was filed well within the time for bringing an appeal. Having decided the case, the Court then commented on intervention in general:

Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal. The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment.

It was upon this sweeping interpretation of Federal Rule 24 that the dissenter in Pearman based their argument. Taken at face value, the dictum in United Airlines is a general approval of post-judgment intervention. This is how the Pearman dissenters understood the case, and they considered the matter settled. The Pearman majority must have considered United Airlines irrelevant, since it did not discuss the case. Justice Powell, who wrote the United Airlines dissent, considered only the impact of the decision on class actions, but there is no reason to limit the new interpretation of Federal Rule 24 to class action litigation. The failure to appeal a case has now been equated with inadequacy of representation. Thus, a wide variety of cases should now be appealable through intervention. As for the requirement of timeliness, the practical effect of United Airlines is that a motion will be timely if filed within the time period for bringing an appeal.

The argument can be made that the United Airlines Court would not have made a different ruling in Pearman. Although the Supreme Court cited as precedent nearly every major federal case allowing

34. 432 U.S. 385, 394 n.15.
35. Id. at 394.
36. Id. at 395-96.
post-judgment intervention, its approval was qualified by the statement that those cases were consistent “[i]nsofar as the motions were made within the applicable time for filing an appeal . . . .”38 The grounds for intervention in those cases were neither accepted nor rejected. Nevertheless, the proposed intervenors in Pearman were in a situation so similar to that of the United Airlines intervenor that a comparison shows why allowing intervention in Pearman would have been a more appropriate result.

In both Pearman and United Airlines, intervention before judgment would have served no real function. The record on appeal to the circuit court in Pearman included a proposed intervenor’s testimony at the zoning hearing which the court was bound to consider. Because the case had already been appealed by an aggrieved landowner, the city had to defend the denial of the zoning change whether there were intervenors or not. In United Airlines, intervention before judgment would have been equally as meaningless, inasmuch as the intervenor would have had to wait until the case was decided before she could argue her objections to the denial of class status. In both cases, the intervenors acted quickly when their participation was needed to protect their interests. To require them to intervene earlier would be to squander time, money and judicial resources.

Only a few courts have considered the United Airlines case in deciding intervention questions, which are seldom litigated.39 Of these, the Fifth Circuit has developed the most articulate test for timeliness. In Stallworth v. Monsanto,40 the court appeared eager to remove the prejudice against post-judgment intervention. The court also rejected the use of such absolute measures of timeliness as “how far the litigation has progressed when intervention is sought” and “the amount of time that may have elapsed since the institution of the action.”41 A denial of intervention was reversed in that case because the trial court determined timeliness by looking to the time that the proposed intervenors first learned of the case, instead of when they learned of their interest in the case. The court also emphasized that the possibility of interference with judicial processes

38. 432 U.S. 385, 396 n. 16.
40. 558 F.2d 257 (5th Cir. 1977).
41. Id. at 266.
is irrelevant to the question of timeliness. Despite the efforts of the Fifth Circuit to modernize intervention, other jurisdictions have not attempted to define the effect of *United Airlines.*

A recent study analyzed the use of intervention before judgment in terms of allocation of scarce judicial and societal resources. This economic analysis is justified by the simple fact that taxpayers, not litigants, bear most of the costs of litigation. It is argued that an intervenor can usually add information to a case, thereby increasing the quality and efficiency of litigation. The delay and confusion which could result from too much intervention could be prevented by rejecting proposed intervenors who would have a low information input, but “the mere cost of intervening suggests some stake in the outcome sufficient to yield the incentives essential to an adversary system of dispute resolution.” On the issue of timeliness, Professor Brunet stated: “Fear that an applicant’s complaint may be dilatory is not a reason to deny intervention; the purpose of summary judgment is to pierce unfounded complaints, including those of intervenors.” Under this type of analysis, it is inescapable that an intervenor’s appeal of a case would be as productive as a regular appeal.

In *Pearman,* post-judgment intervention would have accomplished the social benefit of reviewing a decision for correctness while eliminating the cost of litigating in a stage of the suit when informational input from an intervenor was not needed.

IV. CONCLUSION

The significance of *Pearman* is that it will likely conflict with future federal cases. A regrettable aspect of *Pearman* is the absence of any explanation for its divergence from the United States Su--

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42. Id.
43. Even the Fifth Circuit is not free from confusion over post-judgment intervention. In Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978) the United States contended that the district court erred in denying its post-judgment intervention motion, and further argued that the district court lacked jurisdiction over the case. The Court of Appeals agreed that jurisdiction should have been refused and considered it unnecessary to decide the intervention issue. Id. at 83 n.1. One judge, though concurring in result, would have first allowed post-judgment intervention. Citing *United Airlines,* he observed that “until the United States is permitted to intervene this court has no viable notice of appeal before it and no jurisdiction to examine the jurisdiction of the district court.” Id. at 83 (Godbold, J. concurring).
45. Id. at 723.
46. Id.
Supreme Court's interpretation of Federal Rule 24. Although there has been little reaction to *United Airlines*, other jurisdictions will probably recognize post-judgment intervention when appropriate cases arise.

E. Peck Lyle, Jr.

Patricia Deutsch was six to eight weeks pregnant when she consulted Dr. Melvin Shein, a specialist in internal medicine. Mrs. Deutsch did not know she was pregnant, and any communication between her and Dr. Shein concerning the possibility of pregnancy was disputed at the trial level. As part of his treatment, Dr. Shein caused Mrs. Deutsch to be subjected to a battery of x-ray and fluoroscopic studies, many of which were directed toward her lower back and the abdominal portions of her body.¹

When Mrs. Deutsch later discovered from a second doctor that she was pregnant, she became extremely upset, allegedly to the point of developing a “phobia” that the x-rays might have damaged her unborn. There was no hint of Mrs. Deutsch’s suffering any physical harm to herself or any emotional distress because she feared such physical consequences. After consulting friends, family, newspaper and magazine articles, an obstetrician-gynecologist, and a pediatrician, Mrs. Deutsch decided to undergo a therapeutic abortion. The latter physicians had so recommended “because of the significant possibility that damage to the fetus had occurred.”² Mrs. Deutsch’s resulting claim for damages was for her “phobia” and for the abortion she had to undergo as a result of the doctor’s negligent administration of x-rays without first checking to see if she was pregnant.

During the trial proceeding, Dr. Shein introduced evidence from several eminent physicians who testified that the amount and type of radiation which Mrs. Deutsch received rendered it very “unlikely to the point of being remote that any fetal damage would have occurred . . . [and] that there was no reliable evidence that such x-rays could cause fetal damage.”³ Although the jury found Dr. Shein negligent in submitting Mrs. Deutsch to the x-rays without first conducting a pregnancy test, it also concluded that such negligence was not a substantial factor causing Mrs. Deutsch’s dam-

². Id.
³. Id.
age—the phobia and the abortion. Judgment was entered for Dr. Shein.4

On appeal, Mrs. Deutsch disputed the admissibility of the testimony of appellee’s radiological experts on grounds of relevancy. Dr. Shein argued, though, that establishment of causation was an essential element and that this evidence was admissible to show it was not his negligence which caused the damage.5 Such evidence was held to be admissible going to the establishment of the issue of foreseeability contained within the element of causation and to whether the injury was a natural and probable result of Dr. Shein’s negligence.6

It is one of the fundamental duties of a physician to make a properly skillful and careful diagnosis of the ailment of a patient. If he fails to use such proper degree of skill or care, and makes an incorrect diagnosis, he may be held liable to the patient for the damage thus caused as he would be liable for the use of improper treatment.7 A mere mistake in diagnosis, though, “is not actionable where the physician uses the proper degree of care and skill,”8 and liability is not imposed “on a physician for [a] mistake in diagnosis or [an] error in judgment except where that mistake or error results from failure to comply with the recognized standard of medical care exercised by physicians in the same specialty under similar circumstances in the general area in which the physician practices.”9 A physician does not insure the correctness of his diagnosis,10 but he has a responsibility in his diagnosis to use ordinary skill and diligence and to apply the means and methods ordinarily used by physicians of ordinary skill and learning in the practice of the profession to determine the nature of the ailment and to act upon his honest opinion and conclusion.11 In a suit for injuries caused by alleged malpractice, the burden of proof is on the plaintiff to prove the lack

4. Id. at 3.
5. Id. "To be admissible over objection, evidence must tend to establish or disprove an issue in the case and must be capable of affording legitimate proof, presumption or inference regarding a fact in issue." Galbraith v. Winn, 469 S.W. 2d 153, 154 (Ky. 1970).
11. Id. at 778.
of reasonable and ordinary care or skill of the physician and to prove
the physician's negligence was the proximate cause of the injury.¹²

Numerous cases have involved a charge of negligence in failing to
recognize that the patient consulting the defendant was pregnant
and in diagnosing her condition as involving some pathological con-
dition such as a tumor.¹³ In several cases where the evidence was
such as to support a finding that the doctor's failure in diagnosis
indicated that he had not exercised the required standard of care
and diligence and that as a result the patient suffered harm, it has
been held that a verdict for the plaintiff was justified or required.¹⁴

Mrs. Deutsch asked for damages for the fear and suffering she
developed for her unborn—her phobia and for the recommended
abortion she, too, felt was necessary. The court discussed, however,
that the principal thrust of appellant's suit was to recover for the
mental and physical suffering sustained, not as a result of the afore-
mentioned phobia, but in making the decision to undergo, and in
fact undergoing, the abortion. The question can thus expressly be
stated as follows: "Was the radiation to which Mrs. Deutsch was
negligently exposed as a matter of law the proximate cause of her
subsequent abortion?"

"The determination of proximate cause has always been a diffi-
cult matter for the courts . . . . [The proximate cause is a cause
which would probably,] according to the experience of mankind,
lead to the event which happened . . . ."¹⁵ "In Kentucky we always
have determined proximate cause on the basis of whether the injury
is a natural and probable consequence of the negligent act, which
test involves the element of foreseeability."¹⁶ The Deutsch court
concluded that an abortion was not, as a matter of law, a foreseeable
consequence of the negligence of which the plaintiff complained.

According to the court, the advice Mrs. Deutsch received favoring
her getting an abortion was mistaken advice." The court's holding
that Dr. Shein was not liable can thus only be expected. "To hold
otherwise would require the appellee . . . . to foresee and be liable

89, 231 S.W. 87 (1921); Pilgrim v. Landham, 63 Ga. App. 451, 11 S.W.2d (1940).
¹⁴. See Stevenson v. Yates, 183 Ky. 196, 208 S.W. 820 (1919); Paulson v. Stocker, 53 Ohio
¹⁵. Hines v. Westerfield, 254 S.W. 2d 728, 729 (Ky. 1953).
¹⁶. Ohio Casualty Insurance Co. v. Commonwealth Dept. of Highways, 479 S.W. 2d 603,
605 (Ky. 1972).
for subsequent harm which is a direct result, not of appellee's negligence, but of a separate decision made in reaction to mistaken professional advice over which the appellee had absolutely no control. 18 Such mistaken advice can only be seen as a superseding cause of the injury thus relieving Dr. Shein of liability.

What if the advice received had not been mistaken? The law is clear that a tort action could be maintained to recover damages for prenatal injuries negligently inflicted if the injured child is born alive. 19 This rule applies to personal injury actions brought by the child and to wrongful death actions brought by the representative of the child who was born alive but subsequently died. However, although not expressly ruling against a right of action for injuries to a non-viable fetus, 20 the Kentucky courts have recognized a right of action for prenatal injuries only to a viable fetus. 21 "It is our conclusion that in order to afford a sustainable cause of action for the wrongful death of [an] unborn infant . . . the infant must be regarded as viable at the time of the injury." 22 It, therefore, follows that had Mrs. Deutsch given birth to a deformed child, the child would have no legal recourse, since it received the injury (the x-rays) before reaching a stage of viability.

The Deutsch court also analyzed this case as it relates to the negligent infliction of mental distress. Such is a recognized tort 23 in Kentucky, however, such an action will not lie where it is unaccompanied by a physical injury. 24 In this case, Mrs. Deutsch bases her complaint on a fear of some harm resulting to the unborn; Mrs. Deutsch makes no claim of receiving any physical injury.

The court in the instant case refers to Stevenson v. Yates. 25 In Stevenson, the defendant physician negligently diagnosed plaintiff's condition as kidney trouble rather than as pregnancy. The

18. Id.
20. When the unborn has reached a state of development where it can live outside its mother's body as well as within, it is a "viable fetus" and a "person" within the wrongful death statute. An unborn generally reaches a stage of viability between the sixth and seventh month of its existence. Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955). K.R.S. 441.130.
25. 183 Ky. 196, 208 S.W. 820 (1919).
defendant prescribed a strong medicine which caused plaintiff to become nauseated and nervous. He also improperly advised her to continue her housework—including work improper for a woman at her stage of pregnancy. The plaintiff’s child was subsequently born dead. The Deutsch court properly distinguished Stevenson by indicating that in Stevenson, the plaintiff, herself, suffered some pain and sustained some damage while Mrs. Deutsch did not. Recovery for the latter was thus prevented. Indeed, in other jurisdictions that require an accompanying physical injury in order to recover for infliction of emotional distress, a pregnant woman cannot recover for mental anguish alone.28

The Deutsch court also directed its attention to Ferrara v. Galluchio.27 In Ferrara, the defendant physician negligently exposed plaintiff to an overdose of radiation from which she later suffered nausea, and a reddening, blistering and peeling of the skin area around her shoulder. A second doctor subsequently advised plaintiff to have this condition checked periodically inasmuch as the area of the burn might become cancerous. Plaintiff thereafter developed a fear of contracting cancer and was awarded $25,000.

The New York court noted that Ferrara appeared “to be the first case in which a recovery has been allowed against the original wrong-doer for purely mental suffering arising from information the plaintiff received from a doctor to whom she went for treatment of the original injury.”28 The court explained that had the dermatologist aggravated plaintiff’s physical injury, the original doctor would be liable for such resulting damage plus additional mental anguish on the state’s rule that “a wrongdoer is liable for the ultimate result, though the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong.”29 Mrs. Ferrara did not receive any increased physical injury, only mental. The court, however, found no reason for distinguishing the two situations. Employing the dermatologist was a natural and logical consequence of the original injury, and the dermatologist then offered what he considered to be sound advice for the possible prevention of cancer. The

28. Id. at 252, 5 N.Y.2d at 21, 176 N.Y.S.2d at 999.
29. Id. at 251, 5 N.Y.2d at 20, 176 N.Y.S.2d at 998.
court thusly established the causal connection between the original injury and the mental anguish.

While the present court refused to expressly decide Deutsch on the grounds set forth in Ferrara, it does say in dicta that it would not so hold.\textsuperscript{30} The present court expressed its opinion that the main cause of Mrs. Deutsch's phobia was the result of making her decision to have the abortion. This is "a separate decision made in reaction to mistaken professional advice over which appellee had absolutely no control."\textsuperscript{31} Such consequences in themselves are far too remote for recovery.

The Ferrara holding was specifically rejected by another jurisdiction in Howard v. Mt. Sinai Hospital, Inc.\textsuperscript{32} Here a patient was denied relief where she had in fact developed a fear of developing cancer as a result of an intern's negligently inserting into the patient's shoulder a catheter which broke leaving two pieces they could not find and which remained in the patient's body. The court in Mt. Sinai held that public policy compelled it to excuse the defendants from liability "because of the remoteness of this element of damage . . . ."\textsuperscript{33}

As in Deutsch, negligence on the part of the physician in Mt. Sinai was conceded; the only question was one of causation.

[Neither negligence plus an unbroken sequence of events establishing cause-in-fact does not necessarily lead to a determination that the defendant is liable for the plaintiff's injuries. The determination to not impose liability (because of remoteness of cause) in instances where a negligent act has been committed and the acting is a "substantial fact" in causing the injury rests upon considerations of public policy.\textsuperscript{34}]

If the argument of public policy had been expressly used in Deutsch, the same result would still be had. Dr. Shein's negligence essentially did furnish the condition and occasion for the injury. The law, however, is that "[i]f the original negligent act set in force a chain of events which the original negligent actor might have reasonably foreseen would . . . lead to the event which happened, the original

\begin{itemize}
\item \textsuperscript{31} Deutsch, note 17.
\item \textsuperscript{32} 63 Wis. 2d 515, 519, 217 N.W. 2d 383, 385 (1973).
\item \textsuperscript{33} \textit{Id}.
\item \textsuperscript{34} Colla v. Mandella, 1 Wis. 2d 515, 517-18, 217 N.W. 2d 383, 385 (1974).
\end{itemize}
actor is not relieved of liability. . . .” 35 What court would hold, though, that a doctor should reasonably foresee subsequent mistaken advice from fellow physicians? More importantly, how could a doctor reasonably foresee a separate and independently made decision on the part of his patient? Such would be within the realm of fortune telling.

Holding on the issue of proximate cause in a similar situation as that of Mrs. Deutsch is Salinetro v. Nystrom. 36 After an automobile accident, plaintiff was subjected to ten x-rays from the defendant doctor, an orthopedic specialist. Neither was aware that at this time plaintiff was four to six weeks pregnant. Plaintiff’s pregnancy was later confirmed by a second doctor who advised her to terminate the pregnancy. After a therapeutic abortion, the pathology report stated that the fetus was dead at the time of the abortion. The defendant-physician was not found liable for failing to inquire of the patient before taking the x-rays whether she was pregnant or not; because the plaintiff testified that had she been asked, she would have answered in the negative. The physician’s standard of care, or lack thereof, was, therefore, not the proximate cause of plaintiff’s injury. Merely “show[ing] a connection between the negligence and the injury is insufficient to establish liability.” 37

Such an analysis could be offered in the instant case. Had Dr. Shein asked Mrs. Deutsch whether or not she was pregnant, it could perhaps be assumed she would have answered in the negative. Even if such questioning was the appropriate standard of care, 38 Dr. Shein’s failure to so inquire would still not be the cause of the defendant’s injury. Again, no liability would be established against Dr. Shein.

Had Mrs. Deutsch pleaded and proved some physical damage to her or the unborn, it is likely there would have been a different result. The court’s main concern was that Mrs. Deutsch’s complaint of mental anguish centered around her deciding to have the abortion and not around the possibility of her unborn being deformed. This concern led to a denial of recovery. Proof of a physical injury would alleviate this concern. Too, obtaining an abortion would at least be a more reasonably foreseeable result given a physical injury.

35. Hines, note 15 at 729.
37. Id. at 1061.
38. The court does not discuss the appropriate standard of care—or questioning—in its opinion.
Deutsch v. Shein offers a new look into the areas of proximate cause and the negligent infliction of emotional distress. While a point on which the Kentucky courts had not previously ruled, a negligent failure to conduct a pregnancy test resulting in mental distress is not necessarily actionable. Despite what may appear to be an unjust result at first glance, the court essentially upholds long standing precedent—no recovery shall be had for the negligent infliction of emotional distress unaccompanied by physical injury.

ANN S. DIX
BOOK REVIEWS


Reviewed by Frederick R. Schneider*

Clarence Morris has been recognized as an authority on the law of torts for many years. Generations of law students have studied Morris on Torts,¹ a book still of considerable usefulness to beginning law students a quarter of a century after its publication. Citations to another of his works, Studies in the Law of Torts,² are also common today, especially in law school casebooks. It is therefore fitting and proper that he should have been chosen to write this volume of the ALI/ABA Torts Practice Handbook series.³

For many years, the study of defamation has followed the two-step process utilized for so much of tort law study: first, a detailed study of the prime facia cases of libel and slander, with all the differences and similarities examined; and then an examination of the privileges and defenses. This is the format of Restatement of the Law of Torts,⁴ Morris on Torts, all four editions of the late Dean Prosser's Handbook of the Law of Torts,⁵ and of the law school casebooks.

For several years, I have wondered if this was still the best way for law students to study defamation. Since New York Times v. Sullivan⁶ in 1964, the United States Supreme Court has substantially rewritten much of the law of defamation. I have thought that it might be better to first look at the Supreme Court cases and then at the prima facie requirements and privileges to see what is left; the common law and the constitutional law could then be integrated into a better understood body of law. Equally important, the student could examine issues raised by this new source of law impacting on the common law.

Most recent casebooks follow the traditional approach. A hint of

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1. C. Morris, Morris On Torts (1953).
4. Restatement of Torts (1934).
new methodology appears in Prosser, Wade and Schwartz, *Cases and Materials on Torts, Sixth Edition*, where the constitutional cases are examined under the heading, "Basis of Liability," but only after the usual study of publication, libel rules, slander rules, and so forth has occurred. A break from tradition came in Green, Pedrick, Rahl, Thode, Hawkins, Smith and Treece, *Cases on The Law Of Torts, Second Edition*, in 1977:

The constitutional materials are presented at the outset of this chapter. Thereafter follow common law cases developing some of the traditional common law issues in defamation cases. The question to be asked and re-asked is the extent to which the constitutional cases undercut or modify the common law protection against defamation.

Professor Morris takes this new approach perhaps one additional step. He begins by examining the absolute privileges, those situations where at common law there is no liability for defamation. There we find the privileges of those who participate in government proceedings—legislators, judges, witnesses, attorneys, etc.—where the defamation takes place in the governmental process. Also noted is the privilege accorded to private statements between spouses. It seems to me that this is a very useful starting point. The new law of defamation is not nearly as rigorous in imposing liability as was the old common law. It is good to start with nonliability cases. And of even more importance, there is nothing in the constitutional cases which requires any change in these privileges.

In Chapter Two, Professor Morris examines "The Constitutional Revolution." From *New York Times Co. v. Sullivan* through the latest case, *Time, Inc. v. Firestone*, we are treated to a cogent, logical analysis. The "actual malice" standard applied to defamation of public officials and public figures is carefully considered. The new rules applied to defamation of private persons, set forth in *Gertz v. Robert Welch, Inc.* are stated in a clear, understandable fashion. The problem of who is a public figure, with which the Court wrestled in *Firestone*, is also considered. Except for the question

12. The Supreme Court has granted certiorari in two cases in which the issue of who is a
of how far Gertz extends, Professor Morris' treatment of this area is very well done. It is careful and quite readable.

In Chapter Two, Professor Morris also begins in earnest his look at the impact of these cases on the common law. For example, discussing the truth defense, he points out that at common law, falsity of the defamatory matter was presumed, and truth was available to the defendant only as a defense.

The revolution changed all this: the United States Supreme Court has, by implication, allocated an issue of falsity to the plaintiff by holding that the plaintiff has no cause of action unless he establishes the defendant's fault . . . . These constitutional burdens requiring plaintiffs to demonstrate the defendants' fault make no sense unless the plaintiff shows that the disparagement was untrue. Statements of defamatory truth are not actionable as either libel or slander.¹³

This examination of the impact of the constitutional cases on the common law continues through Chapter Three. It is well done. The example above will suffice to show the nature of the treatment given to the common law.

The theme running through the discussion is that the constitutional cases do not expand liability; they operate to contract and restrict liability, giving greater privilege to defame. The significance of this also runs to the observations in Chapter Four, "Retraction," that the impetus for publication of a retraction is severely diminished. "The revolution in defamation law, by reducing the danger of liability and the size of judgments, has diminished the pressure to retract."¹⁴

The two remaining chapters, "Counseling Claimants" and "Policy Considerations," are also useful and informative. There is seldom written guidance on counseling of clients on specific problems. This is welcome material. I suspect the difficult part is trying to convince the client of the problems. Professor Morris considers the client's possible motives a matter of special concern. It may be especially difficult to deal logically with a client motivated by revenge. We are properly told to impress the client with the restricted chances of success.

One matter, however, troubles me considerably—that is the treat-

¹⁴ Id. at 51.
ment of the scope of application of *Gertz*. When the Court decided *Gertz*, Professor Morris writes:

The Supreme Court opined that, even when matters of public concern are discussed, the states may not impose liability without fault for defamation; each state may, however, set up its own standard for measuring the fault that subjects a discussant to liability, as long as that standard requires a showing of fault at least as grave as negligence. The Court also held that the federal constitution forbade the states to award judgments for "presumed or punitive damages, at least when liability is not based on a showing of [either] knowledge of falsity or reckless disregard for the truth." ¹⁵

*Gertz* involved a media defendant. Does it also apply to a non-media defendant? If a private person defames another private person, does the *Gertz* standard apply? Professor Morris seems to think it does. For instance, he discusses *General Motors Corp. v. Piskor*.¹⁶ There, a young factory employee was searched by security guards in a plate glass guard house, within view of fellow employees passing by during the change of shifts and with many slowing to watch. No stolen property was found. The Maryland court applied the *Gertz* standards, believing that *Gertz* did apply.¹⁷ Seemingly, so does Professor Morris.

Not all courts agree. Wisconsin, for instance, has rejected application of *Gertz* in a private person defaming a private person case.¹⁸ Professor Morris suggests that the Wisconsin court may have offended the Federal Constitution.

I think the matter is not settled. I recognize that an argument can be made that the first amendment privilege extends to everyone. But then why the distinction between public and private persons? The Court has neatly and logically made the distinction. Is there not another neat, logical distinction between defamation of a private person by a media defendant as opposed to that by a non-media defendant? While the damage of a defamatory response to an inquiry of suitability for employment, for instance, is real, is it the same as if that defamation had been more widely circulated? My point is that there is disagreement on this issue and that Professor Morris should clearly set it forth. My hope is that the issue will soon be resolved by the Court.

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¹⁵. *Id.* at 15.
¹⁸. *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975).
I recommend the book. It is a refreshing approach to a topic of current concern. It is very readable. I think the reader will profit from the time spent.

My introductory comments mentioned *Morris on Torts*. This book is, as noted in its Prefatory Note, a part of a revision of that work. It is overdue. The reader should be alert to the expected publication in a year or two of the revised edition, *Morris and Morris on Torts*. 

Reviewed by Johnny C. Burris*

In a thoroughly researched and well documented examination of the Dred Scott decision Mr. Fehrenbacker presents the reader with considerably more than a dry recitation of the history of the case. His detailed discussion of the decision itself and the times in which it was rendered is both fascinating and informative.

The reader who has only a passing knowledge of the historical period may find Mr. Fehrenbacker's analysis of the events fast-paced and difficult to follow. He has structured his discussion upon the inarticulated assumption that the reader is familiar with the principal events and historical figures of the period. For the same reason the book may be difficult to follow for the unknowledgeable reader, it is of great value to the knowledgeable reader. It is not just a rehash of familiar history, but a critical examination of it. For those who are interested in Mr. Fehrenbacker's documentation, the book is cumbersome to read because the footnotes have been compiled in the back of the book. However, it is well worth the effort, since his research has been exhaustive, and the documentation provided in the footnotes contains invaluable source materials.

In part one of his book he examines the antebellum legal development of the institution of slavery in both the North and South. He traces the development of slavery into a protected institution in the South and the gradual abolition of slavery in the North. This dichotomy in the methods used by the Northern and Southern States in dealing with slavery resulted in a gradual polarization of the country along sectional lines. The syncretism over slavery led to a series of political crises. Mr. Fehrenbacker demonstrates how the ephemeral compromises which were fashioned as solutions to the crises eventually led to great pressures being placed upon the Supreme Court of the United States to act as final arbiter on an issue which defied political resolution.

Mr. Fehrenbacker attributes much of the hardening in the Southern position on the slavery issue to the moralistic tones of the aboli-

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tionists who attacked the institution and its effects on the Southern psychology in trying to defend what many viewed as an immoral institution. While this may have been a factor in the Southern attitude, it cannot be considered significant as Mr. Fehrenbacker argues.

In part two, he examines the *Dred Scott* decision itself. He points out many of the bizarre events which surrounded the case. He challenges many of the conventional theories of historical interpretation of the decision. He points out how many of these theories upon close examination are incomplete or inaccurate historical sources. He makes the telling point that, while the decision in *Dred Scott* was overruled by the Civil War and the subsequent amendments to the Constitution, the racial theory which Chief Justice Taney expounded in the case was used to emasculate the new amendments and was not truly overruled until *Brown v. Board of Education*.

In the third and final part of his book, he examines the reactions of the North and South to the *Dred Scott* decision and its effect on national politics in the years prior to the Civil War. He traces the negative reaction of the North to the decision and how it spurred the growth of the Republican party. He demonstrates how it aggravated the split between Northern and Southern democrats—the Southern democrats demanding absolute support for the institution of slavery, and the Northern democrats rejecting the Freeport Doctrine of Senator Douglas as a totally unacceptable compromise for holding the party together. This position ignored the fact that it was political suicide for a Northern democrat to adopt the Southern position on slavery, and the democratic party was irretrievably split.

Mr. Fehrenbacker also returns to his psychic analysis of the causes of the Southern attitude toward criticism of slavery. After the *Dred Scott* decision, Southerners had a moralistic position from which to defend slavery from abolitionist attacks. Because the insti-

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3. Id. at 239-416.
4. Part two includes the following: factual inaccuracies contained in counsels’ briefs and arguments; the defendant Sandford did not own the slave Dred Scott, he was actually owned by a wife of an abolitionist congressman; communication to President-elect Buchanan prior to his inauguration and the rendering of the Court’s decision, the thrust of the decision; and numerous other odd circumstances which surrounded the case.
tution of slavery had been upheld by the Supreme Court of the United States as constitutional, anyone who attacked it must be a radical anti-constitutionalist. This allowed the South to stand united in its demand that it must be the North to compromise and not the South, because the Constitution supports the Southern position on the issue of slavery.

The Southern position could not be acquiesced in by the North. Further compromise over the issue of slavery was out of the question. As a result the South viewed recession from the Union as its only solution to its continued loss of power in national politics to the Northern majority. The result was Civil War.

Mr. Fehrenbacker has presented a thoughtful and thorough analysis of the Dred Scott decision and the times which caused it, a subject which until recent years has enjoyed little discussion except for the repetition of the standard historical theories. This book provides a starting point for a reexamination of our perceptions of the Dred Scott decision and its significance in and effect upon our history.
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