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Recent Developments in Torts; Decisions of the Court of Appeals at the 1956-57 Terms

By PAUL OBERST*

ABOUT ONE-FIFTH of the cases decided by the Court of Appeals of Kentucky at the three terms covered by this survey were Torts cases.¹ Many of them should not have been appealed, but others are useful precedents, and a few are real land-marks in the law. The most important general impression one gains from reading through this year's output of nearly one hundred² torts cases is the increasing use to which the Court has put the Restatement of Torts and its powers under the Rules of Civil Procedure. The conflict between the Kentucky rule and the Restatement was cited several times in justification for the overruling of a line of Kentucky cases. The rules of Civil Procedure are being utilized to give the judges more control over the jury in negligence cases illustrated by a greater tendency, perhaps, to remand for entry of judgment N.O.V. These are but general impressions. Now to consider the more important cases in some analytical order.

IMMUNITIES

A new area of tort liability has opened up with the decision of the Court in *Roland v. Catholic Archdiocese*.³ Plaintiff, third-floor occupant of a tenement which had been devised to the defendant charitable corporation, was injured in a fire in the building. He sued, alleging defendant had failed to provide fire-escapes required by statute⁴ and local ordinances. The Circuit

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¹ Fall 1956, Winter 1957 and Spring 1957. The long summer recess marks the most convenient breaking point.

² The writer counted a total of 471 opinions, of which 94 were in Torts cases.

³ 301 S.W. 2d 574 (Ky. 1957).

⁴ Ky. Rev. Stat. 101.700.

Court dismissed on the basis of Kentucky's long-standing rule of complete immunity of charitable corporations for their torts. The Court of Appeals reversed, holding that the plea of immunity was not available to a charitable corporation where there is (1) *corporate* negligence in failing to perform a *statutory* duty, (2) merely income-producing property, and (3) injuries to a stranger to the charities. "This" said the Court, "is as far as we are required to go. It will be time enough when a case is presented with any of these factors absent to determine what the decision may be."⁵

The unanimous decision is rather surprising in view of the sturdy defense of the charitable immunity doctrine by Judge Sims in the recent case of *Forrest v. Red Cross Hospital*.⁶ Although Judges Cammack, Moremen and Combs had dissented without opinion in *Red Cross Hospital*, the following year in *St. Walburg Monastery v. Feltner's Adm'r*⁷ the Court again affirmed the immunity and Judge Moremen's opinion noted that only he and Judge Cammack found any reason to depart from *Red Cross Hospital*.

Obviously what happened in the *Roland* case is that the judges who have favored complete immunity in the past—Judges Sims, Stewart and Milliken—consented to a slight erosion of the immunity rule in the interests of a unanimous decision by the Court. The difficulty with this procedure, however, is the impossibility of finding any logical stopping place once it has been decided that some little diversion of trust funds is allowable and some partial liability of charitable corporations is consistent with public policy.

Surely it is irrelevant that the negligence is based on violation of a penal law, rather than on common-law standards of care. If negligence determined second-hand by the legislature is to be distinguished from ordinary care, it is arguable that statute-violating charities should not be liable unless the legislature has expressly included them. Again, it seems unrealistic to seize upon

⁵ Supra note 3 at 579.

⁶ 265 S.W. 2d 80 (Ky. 1954). Judge Sims noted that charitable immunity is the majority rule, is favored by "some quite respectable texts", is "correct and logical", and should be changed, if at all, by the legislature. Judge Sims regarded the theory that private charity had been replaced by the paternalistic welfare state in furnishing charitable services to the indigent as premature, to say the least.

⁷ 275 S.W. 2d 784 (Ky. 1955).

a failure of one of the charitable corporation's managers to provide a fire-escape as "administrative" or "corporate" negligence (or breach of a "non-delegable" duty) while the negligence of other servants of the corporation, equally injurious, is "non-corporate" or "delegable" and hence actionable.⁸

The facts that the defective property happens to be income-producing and that plaintiff is a "stranger" to the charities also seem to be unsound distinctions as they relate to the questions of public policy and depletion of the trust fund. These exceptions may be an effort to apply a rough sort of "assumption of risk" which would bar recovery only by inmates of charitable institutions.⁹

If "it is neither moral nor just that a stranger to a charity who has been injured, as is alleged in the present case, as the result of the management having violated safety laws in relation to an activity which was no part of the operation of the charity itself, should bear all the burden and the wrongdoer be entirely relieved,"¹⁰ it is equally unjust that the injured person should bear all the burden when he is not a stranger or when he is injured by employee negligence in the operation of the charity itself. There cannot in all justice be a special rule permitting servants of charities to injure beneficiaries with impunity. If assumption of risk is the test, did this plaintiff not know he was occupying property owned and poorly kept up by a charitable corporation and didn't he voluntarily assume the risk to benefit from the lower rent charged for the accommodations?¹¹

Nor is the Court's suggestion of liability insurance a convincing answer. Insurance premiums will certainly cost the charities of Kentucky more than the injured persons will receive, because insurance companies, at least, are not charitable corporations.¹²

⁸ As authority for this exception the Court cited Note, 25 A.L.R. 2d 29 at 112. No Kentucky cases are cited. The "corporate negligence" exception is discussed in 2 Harper and James, *The Law of Torts*, 1672. Their conclusion: "What are the limits of corporate negligence and how is it to be proved?"

⁹ See *Forrest v. Red Cross Hospital*, supra note 6 at 81; 2 Harper and James, supra note 8, 1669. The exception is sometimes put upon "waiver" by the beneficiary. "But it does not correspond to the facts," 2 Harper and James, supra note 8, 1669.

¹⁰ *Roland v. Catholic Archdiocese*, 301 S.W. 2d 574 at 579 (Ky. 1957).

¹¹ Indeed he was as much a beneficiary as the paying patient in a charitable hospital for a beneficiary is, by the legal definition, one who benefits from the fact that the hospital cannot be sued by patients.

¹² Judge Sims made this point in striking language in *Forrest v. Red Cross Hospital*, 265 S.W. 2d 80 at 82 (Ky. 1954):

The careful charity's trust funds will now be diverted to pay for the recklessness of us all, as surely as the charitable funds of unnamed charitable hospitals were diverted to restore the plaintiff's health after he was injured by the negligence of defendant charity in the principal case.¹³

Not only are exceptions and reasons given in the opinion in the *Roland* case rather inconclusive, but in addition the opinion is so replete with dicta denouncing the injustice of the charitable immunity doctrine and the duty of courts to keep pace with customary morality, that it seems clear that something more than the narrow distinction here is in the offing. Eventually the doctrine of charitable immunity in Kentucky will be overruled altogether. If the immunity is to go, the Court could have lightened its case-load by placing its decision on a broader basis than the peculiar facts of the instant case, which is an invitation to take every case against a charity to the Court of Appeals until firm boundaries are set.

INTENTIONAL TORTS

One of the ancient anomalies of Kentucky tort law was the rule imposing strict liability for a "trespass" resulting in physical injuries.¹⁴ Although "Trespass", the common law form of action, was said to lie for any direct, forcible and immediate injury to possession, it is generally held today that there is liability for trespass only in case of intentional invasion, negligence, or extra-hazardous activity.¹⁵ Indeed, trespass, the tort, is now properly

"If immunity from tort be abolished from charitable institutions, larger subscriptions and donations must be obtained to meet heavy premiums on liability insurance, and the present enormous operating expenses of such institutions will undoubtedly mount to dizzy heights. They are already so high that paying patients in moderate circumstances can hardly afford hospitalization of even moderate duration."

It is obvious that Judge Sims' rejection of insurance has a different basis from the arguments of those who think insurance makes a difference. He favors immunity as a sort of continuous subsidy; proponents of insurance argue that with insurance the charity can now avoid being crippled by a catastrophic loss and donors will think of insurance as cost of operation rather than diversion of funds. See *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810, 823 (D.C. Cir. 1942).

¹³ *Roland v. Catholic Archdiocese*, 301 S.W. 2d 574, 579 (Ky. 1957).

¹⁴ See Denham, "Trespass—Absolute Liability Without Fault in Kentucky," 35 Ky. L.J. 164 (1947).

¹⁵ Restatement, Torts, sec. 166. Although an action may be for a negligent trespass to land without proof of actual damage, trespass to the person without actual damage requires proof of intent. Prosser notes that a Kentucky case of "negligent assault and battery," *Anderson v. Arnold's Ex'r.*, 79 Ky. 370 (1881) was succeeded by the contra holding in *Perkins v. Stein and Co.*, 94 Ky. 433, 22

limited to intentional invasions.¹⁶ Kentucky, however, retained the rule—or perhaps adopted it in 1914¹⁷—that one could recover for personal and property damage caused by an entry even though the invasion was unintentional, non-negligent and not the result of extra-hazardous conduct. The rule was criticized,¹⁸ and the Court in 1955, in a dictum in *Jewell v. Dell*,¹⁹ cast some doubt upon it. Since the defendant in that case was clearly negligent, it was unnecessary for the Court to consider whether he could also be held strictly liable for “trespass”.

In *Randall v. Shelton*,²⁰ the plaintiff was struck by a stone which was thrown upon her premises by the wheels of a passing truck and broke her leg. She sued, alleging both negligence and trespass, and recovered \$6000. The Court reversed with directions to enter judgment for the defendant. There was no evidence of negligence and no extra-hazardous activity; the “trespass” theory was rejected, on the authority of Restatement sec. 166. The street railway precedents were expressly overruled insofar as they allowed recovery without proof of fault. The Court pointed out that some of its “trespass” cases in fact involved intentional or negligent acts or at least were “res ipsa loquitur” cases. But, said the Court:

S.W. 649 (1893) without reference to the earlier case. Prosser, *Torts* (2d ed. 1955) 28.

¹⁶ See *Jewell v. Dell*, 284 S.W. 2d 92 at 95 (Ky. 1955), where the Court also quoted *United Electric Light Co. v. Deliso Construction Co.*, 315 Mass. 313, 52 N.E. 2d 553 (1943): “A trespass requires an affirmative voluntary act upon the part of a wrongdoer and in that respect differs from negligence.”

¹⁷ Judge Clay’s opinion in *Randall v. Shelton*, 293 S.W. 2d 559, 561 (Ky. 1956) treats the rule as an exception created in *Louisville Ry. Co. v. Sweeney*, 157 Ky. 620, 163 S.W. 739 (1914).

¹⁸ Denham, *supra* note 14. See also, Prosser, *Torts* (2nd ed. 1955) 55:

“There is no great triumph of reason in a rule which makes a street railway, whose car jumps the track, liable only for negligence to a pedestrian on the sidewalk, but absolutely liable to the owner of the plate-glass window behind him.”

¹⁹ 284 S.W. 2d 92, 94 (Ky. 1955):

“We need not go into the intricacies of the rigorous common law action of trespass for damages caused by the entry or invasion of another’s property, in which action about the only defenses were or are that the entry was from causes beyond the trespasser’s control. The trend of modern authority is that an unintended entry or intrusion upon the property in possession of another does not constitute actionable trespass. . . . In the light of this modern development of the law of trespass we may leave open the subject of its application to a case of the character of the one at bar. We decide it on the issue of negligence.”

²⁰ 293 S.W. 2d 559 (Ky. 1956).

An attempt in this case to apply a strict rule of liability based upon a concept of trespass to land would lead to an incongruous result. . . . To say that she could recover for her injuries if she was in her yard but could not recover if she was one step outside of it is a patent absurdity.²¹

One case of passing interest in the law of torts was a criminal case, *Driver v. Commonwealth*,²² since it involved the privilege of recapture of personal property. There the defendant repossessed a locked financed car parked on a public street by breaking the vent glass. His conviction of a breach of the peace was sustained. The right to recapture personal property after voluntary surrender of possession to another under a conditional sales contract does not permit a breach of the peace, but the Court had previously denied recovery against a seller who towed the car out of the buyer's garage.²³

NEGLIGENCE IN GENERAL—RISK, PROXIMATE CAUSE,
ACTUAL CAUSE AND WHAT HAVE YOU

What conduct is negligent? Apart from such special problems as violation of statute and manufacturers' and occupants' liabilities, which are considered later, there were a few cases of interest. *Edge v. Hook*²⁴ involved injury to plaintiff's tobacco crop by dust from road-building. A judgment of dismissal was reversed, the Court imposing a duty on road-builders to use care not to stir up dust—which may have come as something of a surprise to that profession. In *Vaught's Adm'x v. Kentucky Utilities Co.*²⁵ the Court held that obedience to state imposed safety regulations is not itself conclusive on the negligence issue.

When defendant had been negligent in engaging in conduct unreasonably risking harm, the question of *liability for what* remains, with its subsidiary problems of actual causation and "result within the risk" versus "proximate causation". It is sometimes very difficult to classify the problem as one of actual cause or legal cause, cause-in-fact or proximate cause. Two cases decided by the Court—both involving fires—illustrate this.

²¹ Id. at 562.

²² 299 S.W. 2d 260 (Ky. 1957).

²³ C.I.T. Corporation v. Short, 273 Ky. 190, 115 S.W. 2d 899 (1938), noted by Kohrman, "Repossession of Chattels Under Conditional Sales Contracts," 4 Ky. Bar J. (No. 2) 15 at 19 (1939); cf. 47 Am. Jur., Sales sec. 953 at p. 165 (1943).

²⁴ 303 S.W. 2d 310 (Ky. 1957).

²⁵ 296 S.W. 2d 459 (Ky. 1956).

In *Verkamp Corp. of Ky. v. Hubbard*²⁶ defendant delivered cylinders of propane with defective valves to plaintiff. When plaintiff's store caught fire the heated cylinders exploded instead of venting gas as proper valves do. Plaintiff sued for \$50,000 damages for destruction of his store and was awarded \$30,000 damages. On appeal, the Court regarded the question as one of scope of the risk, which it proceeded to decide.²⁷ Ordering entry of a judgment for defendant N.O.V. the Court said:

. . . We determine as a matter of law that appellees' property damage was not within the protection of the risk of such failure since the damage was caused by fire, not explosion.²⁸

Was the defendant not liable because the result was not within the risk, or because the negligence was not even a cause-in-fact of the injury? Another sentence in the opinion suggests that perhaps actual cause was the real problem:

The safety valves were neither designed nor required to prevent the ignition of the gas after it was released from the cylinders; had the valves operated properly, the gas would have been released from the cylinders, and would have ignited when subjected to fire.²⁹

In *Amerson v. Southern Bell Telephone Co.*³⁰ defendant negligently failed to put through plaintiff's fire call, delaying the arrival of the fire department by thirty minutes. Plaintiff's barn was destroyed. Affirming a judgment N.O.V. for the phone company, the Court said that it would be impossible to establish that "but for" the negligence of defendants the injury to plaintiff would not have occurred and that the negligence was not the "proximate cause" of the loss, since many and varied agencies could have combined to consummate the loss. Finally, damages would be speculative since the proportion of loss caused by the negligence could not be accurately determined.

²⁶ 296 S.W. 2d 740 (Ky. 1956).

²⁷ *Ibid.* at 742:

"The first question that arises is whether appellees' injury was within the scope of the risk of the particular hazard which the safety valves were designed to protect. . . . This question is one which the court must decide, because the scope of the protection given appellees' property under any principle of law must have a boundary or limit."

²⁸ *Id.* at 742.

²⁹ *Ibid.*

³⁰ 303 S.W. 2d 279 (Ky. 1957).

It would seem to be within the realm of possibility, at least, that the negligence was a substantial factor in causing the loss—after all, plaintiff does not have to prove actual cause beyond a reasonable doubt.³¹ Neither were any intervening forces adduced to break the chain of “proximate cause”.³² Nor should it be the rule that when an innocent cause and a negligent cause join to contribute to a single result difficulty of apportionment results in no liability.³³ However, the case is one where the Court might conclude that the duty of a telephone company should as a matter of sound policy be defined so as not to include this particular risk. It is arguable that phone companies should be no more liable than water companies for carelessness which results in destruction of their subscribers’ homes by fire³⁴—at least in a time of almost universal fire insurance.³⁵ Despite the Court’s assurances that

³¹ Prosser, *supra* note 18 at 222. Another case in which the court reversed a judgment for failure of proof on the actual cause issue was *Kentucky Power Co. v. Howard*, 296 S.W. 2d 463 (Ky. 1956). Plaintiff had recovered for negligent destruction of his house by defendant’s failure to repair damaged insulators. The Court reversed because the evidence that the wires *could* have caused the fire was weak, and that wires did cause it was nothing more than conjecture—one speculation based upon another.

³² The opinion states that “many and varied intervening agencies . . . *could have combined to consummate appellants’ loss*,” citing the leading case of *Lebanon, Louisville and Lexington Tel. Co. v. Lanham Lumber Co.*, 131 Ky. 718, 115 S.W. 824 (1909). The opinion notes (p. 281) that it was pointed out in the *Lebanon* case that

“although the telephone company had placed the call, it would still have to be assumed that the watchman at the fire station was awake, that he would have sounded the alarm, that the other firemen would have heard it, that they would have responded, that they would have reached the scene of the fire without mishap, and that they would have been able to put it out.”

In the *Amerson* case, plaintiff put the fire chief on the stand to present evidence to destroy these hypothetical “intervening forces.” The imaginary intervening forces are quite reminiscent of those summoned up by the New York Court in *Ryan v. New York Cent. R. Co.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866) in arbitrarily limiting fire losses to the first adjoining building. Cf. Prosser, *supra* note 18, 172, where he explains the *Ryan* rule as peculiar New York social policy.

³³ Prosser suggests that when two causes combine to produce a single result such as destruction of a house by fire, *entire* liability may be imposed even where some of the causes are innocent—such as where a fire set by defendant is carried by the wind. Prosser, *supra* note 18, 226. As an alternative, he suggests Judge Peaslee’s potential damage approach, which reduces loss on the basis of potential damage from another cause: “Then what is the value of a burning house which the defendant prevents a fire engine from extinguishing. . . .” Prosser, *supra* note 18, 231.

³⁴ Oddly enough Kentucky is *contra*, one of only three states which recognize a tort duty in the water company. *Harlan Water Co. v. Carter*, 220 Ky. 493, 295 S.W. 426 (1927). It is the majority rule that the “non-feasance” of a water company which negligently fails to supply water at proper pressure, does not make it liable to a citizen whose house is destroyed by fire as a result. Prosser, *supra* note 18, 516.

³⁵ In the *Amerson* case, plaintiff was awarded \$10,000 in Circuit Court—less \$2,965 insurance.

Amerson is based on failure of proof of actual causation, it is not unlikely that limitation of risk for damage thought to be too "remote" and "speculative" played its part, perhaps unconsciously.

"Proximate cause" in the sense of injury brought about through the operation of an intervening force was present in two cases. In *Ambrosius Industries v. Adams*,³⁶ the Court held that defendant's negligence in rigging a load was not superseded by the negligence of the second defendant in moving it. In *Carr v. Kentucky Utilities Co.*,³⁷ however, the Court held that the negligence of defendant utility in rigging a high tension wire only 131½ feet above ground on a mountain was superseded by the intervening unforeseeably negligent act of another in attempting to erect a TV antenna alongside it—conduct characterized by the Court as "unusual, irregular, foolhardy". The distinction resembles that of the Restatement of Torts, sec. 442 (b): "consequences [that] appear after the event to be extraordinary rather than normal."

PROOF OF NEGLIGENCE

That before *negligence per se* will apply defendant must have violated a statute was illustrated by *Adams v. Feck*.³⁸ There plaintiff executed a left turn without giving a signal for 100 feet as required by KRS 189.380, and was hit by the defendant's car which appeared suddenly over the crest of the hill. The Court held that plaintiff's failure to signal was no bar since a signal need not be given "unless another might be affected by the movement" and the statute had not been violated. Even where literal violation is conceded, courts often find reasons for a refusal to apply the negligence *per se* doctrine—such as "no proximate cause" or "excused violation". In addition, the violation must be an *actual* cause of the accident and the result ought to be within the risk the statute was intended to guard against, important safeguards to recall when *negligence per se* threatens to run riot.³⁹

What might have been a good *res ipsa loquitur* case was destroyed by the technique of analyzing it into two components: the question of negligence and the question of cause. In *Rollins*

³⁶ 293 S.W. 2d 230 (Ky. 1956).

³⁷ 301 S.W. 2d 894 (Ky. 1957).

³⁸ 303 S.W. 2d 287 (Ky. 1957).

³⁹ See especially 2 Harper and James, *The Law of Torts*, sec. 17.6 at 1014: "The effectiveness of these devices may perhaps be suggested by the paucity of recent cases in which a plaintiff has actually been barred of recovery because of statutory violation."

v. *Avey*,⁴⁰ the plaintiff was injured and his house was destroyed by a gas explosion 30 minutes after one defendant had completed installation of a gas floor furnace. Plaintiff joined the manufacturer, wholesaler, retailer and installer. Judgment of the trial court, directed for the defendants, was affirmed, on the ground that the instrumental cause of the accident was not established. To infer the *cause* from the installation and the *negligence* from the nature of the occurrence is "compounding of inferences",⁴¹ said the Court, quoting Judge Van Sant's observation in *Le Sage v. Pitts*,⁴² that "a pyramiding of inferences never has been regarded as sound reasoning" and "the conclusion does not rise above the dignity of mere speculation".

It is submitted that although there was no direct proof of negligence or cause of the explosion, the circumstantial evidence of both is at least as strong as in some other cases in which the *res ipsa* doctrine has been applied.⁴³ Ordinarily houses do not explode thirty minutes after a gas furnace has been installed unless someone has been very negligent! The real problem is not pyramiding inferences, but "negligence of whom?"—manufacturer, seller or installer—and the problem of *res ipsa* as applied to multiple defendants. It is arguable that in such a situation it is not unreasonable to force the defendants to explain or pay—a procedural disadvantage which goes beyond negligence but stops short of strict liability.⁴⁴

MANUFACTURER'S NEGLIGENCE

*Herme v. Tway*⁴⁵ was clearly the most important negligence case at the last term. Plaintiff, who had purchased from an independent dealer a semi-trailer manufactured by defendant, recovered for damage to the trailer and cargo, caused by a defective

⁴⁰ 296 S.W. 2d 214 (Ky. 1956).

⁴¹ *Ibid.* at 216.

⁴² 311 Ky. 155, 223 S.W. 2d 347, 352 (1949).

⁴³ In Kentucky's famous *Lewis v. Wolk*, 312 Ky. 526, 228 S.W. 2d 432 (1950) plaintiff recovered although defendant testified he had been away from his car for over 30 minutes before it was put in motion and struck plaintiff.

⁴⁴ See *Ybarra v. Spangard*, 25 Calif. 2d 486, 154 Pac. 2d 687 (1944); *Prosser*, *supra* note 18 at 208. It is interesting to note that *LeSage v. Pitts*, *supra* note 42, was a case in which the injury could have resulted from the negligence of any one of several building contractors and sub-contractors. On the other hand, the two Kentucky cases of household gas explosions, cited in the *Rollins* case as justifying directed verdicts for the defendants, involved negligence of installers only—but in both cases the stoves had been in use for an extended period.

⁴⁵ 294 S.W. 2d 534 (Ky. 1956).

king-pin. The defendant did not fraudulently conceal the defect or even know of it. The defect was not obvious but could have been discovered by a proper inspection. The Court set aside the directed verdict for the defendant, abandoned "the ancient so-called general rule of manufacturer's non-liability for negligence to persons with whom he has no contractual relation", and expressly overruled the *Olds Motor* case. The Court cited as authority the Restatement of Torts, sec. 395, which imposes liability on a manufacturer of a chattel for bodily harm caused, but then extended liability to damages to property also, citing the annotation in 164 A.L.R. 569.

Even though the opinion discards all the ancient learning regarding articles "inherently or intrinsically dangerous", articles "imminently dangerous", "actual knowledge" of defects, and "defects so obvious that knowledge will be presumed", all restrictions are not abandoned. The opinion still speaks in terms of "safety" precautions and the production of a "safe" product—presumably physical safety of the person.⁴⁶ Plaintiff's property was the thing damaged in this case, but defendant's *duty* was stated in terms of unreasonable risk of causing substantial bodily harm. Does the Court answer in the negative Cardozo's famous *Palsgraf* question—Is a distinction to be drawn according to the diversity of interests invaded by the act?⁴⁷—or does it merely leave open for the time the question of whether a manufacturer may be held liable to the ultimate purchaser for failure to inspect for defects which risk harm to the property but not to the person of the purchaser and others in the vicinity of the expected use?⁴⁸

It should be noted that the "modern rule" of manufacturer's liability was adopted in this case—forty years after Cardozo's opinion in *McPherson v. Buick Motor Co.*⁴⁹—by the narrowest of margins. The brief memoranda of the dissenting judges are not crystal clear. Judges Cammack and Hogg were "of the opinion that the change in law made by this opinion should have prospective operation only". The change having been made by a 4-3 majority of the Court, do the dissenting judges now concede

⁴⁶ Id. at 537.

⁴⁷ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 at 101 (1928); Restatement, Torts, sec. 281, Com.(g).

⁴⁸ For example, the case of defective animal feed. Prosser, *supra* note 18, 502.

⁴⁹ 217 N.Y. 382, 111 N.E. 1050 (1916).

manufacturer's liability for negligence?⁵⁰ Judge Sims' dissent stands firm on Kentucky's famous precedent of 1911, saying "the Olds Motor case is sound and should not be overruled".⁵¹ Curiously enough, *Olds Motor* was relied on by Judge Cardozo in *McPherson v. Buick* as authority for the position that a manufacturer of an automobile, as a thing "imminently" dangerous was liable for ordinary negligence.⁵² On the other hand *Olds Motor* is usually read as imposing liability only for concealment of known defects, where the article is not a "dangerous instrumentality".⁵³ Judge Sims apparently believes that even though a trailer manufacturer realized that his failure to use care created an unreasonable risk of harm to the public he should not be liable if he did not actually know of and conceal the defect.

In an age when some are urging that strict liability be imposed on manufacturers, so that consumer losses may be spread among the consumers,⁵⁴ as Workmen's Compensation spreads employee losses, surely Kentucky's adoption of the rule of *McPherson v. Buick* is no startling advance. With deference, it may also be suggested that the reservations of Cammack and Hogg, JJ, are unnecessary. Retroactive change in law may work a hardship on individuals who acted on the faith of long-standing precedents, but it is doubtful in this case whether the manufacturer inspected less carefully than he might in reliance upon *Olds*. Any manufacturer who did inspect carelessly should have been forewarned by the *Gaidry Motors* case. Once the court had imposed liability on the second-hand dealer who negligently failed to inspect, liability of the manufacturer necessarily follows whether legal "logic" or social engineering is the touchstone.⁵⁵

⁵⁰ Judge Cammack wrote the opinion in *Davis v. Glass Coffee Brewing Co.*, 296 Ky. 706, 178 S.W. 2d 407 (1944), characterized as "the most disturbing indication that Kentucky has never fully departed from the antiquated approach in manufacturers' liability cases," by Pennington, "Manufacturer's Liability in Kentucky," 42 Ky. L.J. 273, 280 (1954). On the other hand, Judge Cammack voted with the majority in the *Gaidry Motors* case.

⁵¹ *Supra* note 45, at 539.

⁵² *Supra* note 49, 111 N.E. at 1054.

⁵³ This is clearly Judge Cullen's reading of *Olds* in his opinion in the principal case, *supra* note 45 at 536.

⁵⁴ Jeanblanc, "Manufacturers' Liability to Persons Other Than Their Immediate Vendees," 24 Va. L. Rev. 134, 157 (1937).

⁵⁵ *Gaidry* has been cited by Prosser as an extension of the rule in *McPherson v. Buick*. See Prosser, *supra* note 18, 501:

"The *McPherson* decision did not go beyond liability to the ultimate purchaser himself. Later cases have extended it. . . . The maker of an automobile is liable to a pedestrian who is struck because it has

Herme v. Tway is also important for the detail with which the opinion spelled out the standard of care in a manufacturer's case. Rejecting the standard of custom⁵⁶ the opinion stated that reasonable care is a question for the jury in the light of (1) risk of danger (2) availability of suitable safety methods and (3) the practicability and economic feasibility of employing safety methods. The manufacturer's defense is said by the Court to be that "more careful tests or inspections would not be practicable or economically feasible in relation to the risk of danger involved".⁵⁷

In another manufacturer's case, *James v. Hillerich and Bradshy*,⁵⁸ the Court denied recovery to plaintiff, baseball pitcher, whose eye was put out by a splinter from a bat made by defendant. Plaintiff claimed that the bat was defective in that it contained a painted-over knot which caused the bat to break cleanly in two. The Court approved the dismissal on the merits, on the ground that the defect did not materially increase the risk of harm to plaintiff. "It is common knowledge that bats frequently break, and we think that it is immaterial that a properly made bat ordinarily will splinter with the grain while one made of defective wood may break across the grain".⁵⁹ A cursory check with a few baseball players and coaches suggests that what the Court took judicial notice of may not in fact be so, which in turn suggests that disposition of the case on the pleadings may have been inadvisable.⁶⁰

bad brakes (citing Gaidry). . . . On the defendant's side the liability has been extended to the maker of a component part of the final product, and to an assembler of parts; and it has been held to apply to a second-hand dealer who reconditions automobiles for sale." (citing Gaidry)

This is to suggest that the rule in *McPherson v. Buick* was adopted by indirection in the Gaidry case in 1953. *Herme v. Tway* merely makes it more explicit by overruling *Olds*.

⁵⁶ The opinion probably goes too far in rejecting proof of custom in manufacturers' cases. Custom has its uses. See *Morris*, *Torts*, 108-112.

⁵⁷ *Herme v. Tway*, 294 S.W. 2d 534, 538 (Ky. 1956).

⁵⁸ 299 S.W. 2d 92 (Ky. 1957). Since the injury occurred in St. Louis, the court applied Missouri law, which requires that the article be "imminently, intrinsically, inherently, or essentially dangerous" and "by reason of its defective condition and intended use . . . reasonably certain to cause injury." Fortunately, however, any article involving an "unreasonable risk of bodily harm" under Restatement, sec. 395 satisfies the formidable test drawn from the Missouri cases—although a knotty bat comes within neither.

⁵⁹ *Id.* at 94.

⁶⁰ As to the propriety of feeding one's "judicial notice" apparatus, see Judge

OCCUPANT'S LIABILITY

In occupant cases, the Court faces the double problem of assigning the injured party to his proper category and then determining the occupant's duty toward him. In *Louisville and Nashville Railroad Co. v. Blevins*⁶¹ the plaintiff's automobile was struck by defendant's train as it backed along its main track parallel to a business street. Since plaintiff's car was clearly on the railroad's right of way, the railroad argued that she was an undiscovered trespasser to whom it owed no duty. The Court, however, classified her as a gratuitous licensee, to whom the railroad owed the duty to keep a look out and warn. This is a typical example of "reclassification of trespassers", and quite justified, as here the likelihood of the presence of trespassers creates a high probability of harm to someone.⁶²

The line between "licensee" and "invitee" or "business visitor" is a troublesome one. Several years ago in the *Ockerman*⁶³ case, the Court classified a visiting clergyman soliciting funds as a "licensee" on the ground that there was no mutuality of business interest as required by sec. 332, Restatement of Torts. In *Scuddy Mining Co. v. Couch*⁶⁴ the plaintiff was injured while crossing a tramway when a loose tie flew up and caused his mule to buck. On the first appeal the Court classified plaintiff as a licensee.⁶⁵ On the second appeal, after new evidence showing plaintiff entered upon the tramway "at the expressed invitation of the defendant's foreman" and crossed at a place pointed out by him, the Court classified plaintiff as an "invitee", saying:

Frank's dissenting opinion in *Triangle Publications, Inc. v. Rohrlich*, 167 F. 2d 969, 976 (2d Cir. 1948) where, faced with the question of whether "Seventeen" magazine's trade-mark was infringed by Seventeen girdles, he observed:

"As neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl, our judicial notice apparatus will not work well unless we feed it with information directly obtained from 'teen-agers' or from their female relatives accustomed to shop for them. . . . I have questioned some adolescent girls and their mothers and sisters, persons I have chosen at random. I have been told uniformly by my questionees that no one could reasonably believe that any relation existed between plaintiff's magazine and defendant's girdles."

⁶¹ 293 S.W. 2d 246 (Ky. 1956).

⁶² See 2 Harper and James, *supra* note 8, sec. 27.7.

⁶³ *Ockerman v. Faulkner's Garage*, 261 S.W. 2d 296 (Ky. 1953), noted by Soyars, 43 Ky. L.J. 328 (1955).

⁶⁴ 295 S.W. 2d 553 (Ky. 1956).

⁶⁵ *Scuddy Coal Co. v. Couch*, 274 S.W. 2d 388 (Ky. 1954).

Under these facts we conclude that there was an implied representation that care had been exercised to make the tramway safe for use. Thus, it follows that appellee was an invitee. . . .⁶⁶

Scuddy II is certainly a flat rejection of Restatement classification, which would surely regard this plaintiff as a licensee, there being no mutual business interest, and hence not entitled to recover for an injury due to a defective condition of which the occupant had no actual knowledge, invitation notwithstanding.⁶⁷ The Court's refusal to follow Restatement categories here is hardly to be regretted, however. The "business visitor" concept, which was developed in the United States by Bohlen, the reporter for the Restatement of Torts, is rejected both by Prosser and Harper and James.⁶⁸ The forthcoming Second Restatement of Torts, for which Prosser is reporter, may well return to the earlier concept of "invitee"—one given actual or implied representation that reasonable care has been exercised to make the place safe, which makes the occupant liable for defects he could have discovered by a reasonable inspection. Perhaps the second *Scuddy* case is right and *Ockerman* is wrong.

Where classification is clear scope of duty may present pitfalls. In *Otto v. Phillips*,⁶⁹ an 83 year old plaintiff tripped over the extended feet of a small boy who sat on the floor reading comics in defendant's drug store. The occupant has a duty to the licensee not only to inspect the premises for defects, but "he is required to take action . . . when he has reason to believe, from what he has observed or from past experience, that the conduct of [a third person] will be dangerous to the visitor. . . ."⁷⁰ But the Court said: "The only question involves whether a store owner must *continuously* anticipate *every* action and move of *every* person who is a licensee or invitee" (writer's italics).⁷¹ The answer to *that* question was obviously "No", and the Court sustained a judgment for the defendant on the ground of no negligence—although

⁶⁶ Supra note 64 at 554.

⁶⁷ Restatement, Torts, secs. 330, 332.

⁶⁸ 2 Harper and James, supra note 8, 1478-1488. Prosser, supra note 18, 452-458.

⁶⁹ 299 S.W. 2d 100 (Ky. 1956).

⁷⁰ Prosser, supra note 18, 460; see also Restatement, Torts, sec. 348; James, Scope of Duty in Negligence Cases, 47 NW.U.L.Rev. 778, 809 et seq. (1953).

⁷¹ Supra note 69, at 103.

the asserted contributory negligence of the plaintiff was apparently the principal issue discussed in the appellant's brief.⁷²

CONTRIBUTORY NEGLIGENCE

*Sizemore v. Bailey's Adm'r*⁷³ was perhaps the most interesting contributory negligence case last year. Plaintiff, Charles Bailey, sued as administrator to recover for the death of his twelve year old son, Bert, in a collision with defendant's car. Bert was a passenger in a car owned and operated by Charles' 17 year old son Shafter, who was driving under a permit signed by Charles. KRS 186.590 imputes the negligence of the minor permit holder to the signer, and makes him jointly and severally liable with the minor driver for negligence. Defendant argued that Shafter's contributory negligence was thus imputed to Charles and Charles' negligence should in turn be imputed to the decedent's mother.⁷⁴ Noting that the Restatement of Torts⁷⁵ took no position on this question, the Court turned to the owner-driver statutes for a parallel. Rejecting the majority rule which construes the owner-driver statutes as imputing the driver's contributory negligence to the owner to bar a recovery, the Court followed the Minnesota-New York minority view that the statutes are "financial responsibility" laws and are not intended to deal with contributory negligence. KRS 186.590 was construed as intending to provide an additional source of financial responsibility. The interpretation seems quite sound as a practical matter, although the Court unfortunately reaffirmed the anomalous rule imputing contributory negligence of one parent to another to bar any recovery against a negligent defendant for wrongful death of a child.

Death of a farmer in a "gallant attempt" to save his cow from a railroad train resulted in a \$10,000 verdict, which was reversed in *Louisville and Nashville Railroad v. Wallace*.⁷⁶ Denying the applicability of last clear chance, where decedent *knew* of the

⁷² On the issue of negligence was there proof of a custom of small boys to sit on appellant's floor to read his comic books? It is the writer's observation that drug store floors throughout the Commonwealth are cluttered with small boys reading comics.

⁷³ 293 S.W. 2d 165 (Ky. 1956).

⁷⁴ On imputation of contributory negligence between parents see *Emerine v. Ford*, 254 S.W. 2d 938 (Ky. 1953), distinguishing *Hale v. Hale*, 312 Ky. 867, 230 S.W. 2d 610 (1950). For a criticism of the Kentucky rule, see *Walden*, note, 39 Ky. L.J. 479 (1951).

⁷⁵ Sec. 485, *Caveat*.

⁷⁶ 302 S.W. 2d 561 (Ky. 1956).

danger and was himself able to escape up to the last moment,"⁷⁷ the Court quoted from *Saddler v. Parham* the statement that "it is held by the great weight of authority that it is only where the plaintiff is *physically unable* to escape from his peril that the defendant is held responsible on the ground that he should have discovered the peril".⁷⁸

Voluntary assumption of risk did not protect a railroad, negligently backing a car, from a recovery by a plaintiff on its tracks, the Court saying:

One does not assume a risk resulting from another person's active negligence or breach of legal duty to him unless he sees or should see, the risk he is incurring.⁷⁹

In *Carlisle v. Reeves*,⁸⁰ however, a motorist who stopped behind defendant's truck to take its license number after a collision and was hit by the second defendant who was driving while drunk on Fourth Street in Louisville on a dark rainy night, was barred. The Court held that he could not recover from either defendant for the loss of his leg in the second accident since

A person who, with knowledge of a dangerous situation, voluntarily places himself in a position where he takes the chance of being hurt, and is in fact injured, cannot recover for his injuries.⁸¹

It is submitted with deference that to charge plaintiff with assuming the risk of drunken driving goes quite far. If the circumstances were such that the plaintiff risked the same harm from a sober driver, however, he cannot complain that it was a drunken driver who struck him.

⁷⁷ *Id.* at 565: ". . . the decedent was not in a position where he was unable to escape from his peril if he had used proper caution. In fact, he voluntarily moved into the hazardous position in an attempt to save his property."

⁷⁸ 249 S.W. 2d 945 at 949 (Ky. 1952). Accord, Restatement, Torts, secs. 479, 480; 2 Harper and James, *supra* note 8, 1251.

⁷⁹ *Louisville and Nashville Railroad Co. v. Blevins*, 293 S.W. 2d 246 at 250 (Ky. 1956).

⁸⁰ 294 S.W. 2d 74 (Ky. 1956). The court noted plaintiff's testimony that he knew it was dangerous to stand in the street with his back to the oncoming traffic for the purpose of obtaining the license number. "While the testimony may or may not constitute a judicial admission of contributory negligence, it does show that Reeves knew the risk involved in his undertaking, and that he voluntarily assumed the risk." (at p. 75).

⁸¹ *Id.* at 75.

STRICT LIABILITY

Two negligence cases during the last year may be straws in the wind, predicting strict liability to come. Kentucky has long imposed strict liability for blasting where there is "direct" injury, but has required proof of negligence for "indirect" damage from concussion.⁸² This distinction has been characterized as a marriage of procedural technicality and scientific ignorance and persists in only a small minority of the states.⁸³ In *Aldridge-Poage v. Parks*,⁸⁴ plaintiff had recovered \$200 for "trespass" damage and \$10,000 for concussion damage. The Court reversed the award for concussion damage on the grounds that plaintiff had failed to prove negligence. The case may be less significant for its holding than for its dictum, however. Pointing out that the rule prevailing in this state denied liability for concussion damage without proof of negligence the Court said:

While we have serious doubt of the soundness of this rule, we have concluded not to re-examine it in this particular case.⁸⁵

In *Marlowe Construction Co. v. Jacobs*⁸⁶ the Court again referred to its serious doubt concerning the soundness of the concussion rule, but there sustained a verdict for the plaintiff on negligence grounds. The Court concluded that proof of concussion damage made out a prima facie case of negligence on res ipsa loquitur principles. Defendant's attempt to rebut the inference was countered by expert opinion testimony of the plaintiff, based on defendant's own proof of actual precautions taken.

The next concussion-damage plaintiff might be well advised to prosecute his case on the strict liability theory if there is any doubt of negligence, relying on the weight of authority and Restatement of Torts secs. 519 and 520 to persuade the Court to resolve its doubts in favor of strict liability for blasting damage. Prosser has suggested that all blasting liability may be a question of when and how: the use of explosives on an uninhabited mountainside is a matter of negligence only, but anyone who blasts in

⁸² *Williams v. Codell Construction Co.*, 253 Ky. 166, 69 S.W. 2d 20, 92 A.L.R. 737 (1934) and cases cited therein.

⁸³ Prosser, supra note 18, 336 at note 72.

⁸⁴ 297 S.W. 2d 632 (Ky. 1956).

⁸⁵ *Id.* at 633.

⁸⁶ 302 S.W. 2d 612 (Ky. 1957).

the center of a large city does so at his peril.⁸⁷ The difficulty in classifying the blasting in *Aldridge-Poage*, where farm property was damaged in building a water-line from the Kentucky river to the City of Nicholasville, may be grounds for preferring a blanket rule of strict liability regardless of location. Continuation of the trespass-concussion distinction does not seem justified, however, particularly after the decision in *Randall v. Shelton*.⁸⁸

DAMAGES

With *Ambrosius Industries v. Adams*,⁸⁹ the "Adequate Award" apparently came to Kentucky. In that case plaintiff, a 45 year old construction worker who suffered a spinal injury, received a judgment of \$75,000, which was characterized by appellant's attorney as "the largest ever awarded in a personal injury case in this state". No punitive damages were involved, the judgment including loss of earning power, medical expenses of \$15,000 and pain and suffering. Plaintiff's earning power was not totally destroyed, and the opinion of the Court emphasized rather the pain and loss of control of bodily function (including sexual function) in holding that the award was not excessive.

In *Sims Motor Transportation Lines v. Foster*,⁹⁰ the Court sustained a verdict of \$25,000 for fractures of the femur, jawbone and collar-bone of a 21 year old plaintiff. One doctor's testimony that plaintiff was 40 per cent disabled and that his disability would increase with age apparently impressed the Court, which said:

We are able to say with no reservation, that a verdict of \$25,000 given to a man 21 years of age who has incurred a forty percent permanent disability is not excessive.⁹¹

In *Temperly v. Sarrington's Adm.*⁹² the Court sustained awards of \$55,000 and \$20,000 for the death of a husband and wife, aged 51 and 54 respectively. There is no hint who the ultimate beneficiary of the award was or whether defendant or his insurance company ultimately paid it. As judgments in auto collision

⁸⁷ Prosser, supra note 18, 336 at note 74.

⁸⁸ Supra, note 20.

⁸⁹ 293 S.W. 2d 230 (Ky. 1956).

⁹⁰ 293 S.W. 2d 226 (Ky. 1956).

⁹¹ Id. at 229. However realistic per cent of disability testimony may be, it has a considerable vogue. One might speculate about its relative impact on the jury as contrasted with the more experienced Workmen's Compensation Board.

⁹² 293 S.W. 2d 863 (Ky. 1956).

cases grow larger, the suitability of Kentucky's wrongful death statutes becomes more and more questionable from the standpoint of social policy. In Sarrington's case did the jury destroy defendant's small business to pay a windfall of \$75,000 to remote relatives of the deceased, or did an insurance company pay a judgment which goes for the support of minor children⁹³—spreading the risk among the auto-driving public?⁹⁴

Defendants' attorneys might take some comfort from *Scuddy Mining Co. v. Couch*,⁹⁵ where the Court reversed a \$30,000 judgment for the plaintiff, who was thrown from his mule, on the ground that it was grossly excessive. Their enthusiasm for the *Scuddy Mining* case might be somewhat dimmed by the Court's disposition of the appeal, however. The Court, noting that two juries had found against the defendant on the issue of culpability, remanded the case for a new trial on the issue of damages alone, saying:

The present suit is a tort case. Evidence going to show the manner in which the accident occurred could not conceivably have the slightest bearing upon the nature and extent of appellee's injuries. . . . We think it would violate the spirit and intent of CR 59.01 to again require a retrial of the question of appellant's culpability. We regard this case as an appropriate one in which to inaugurate this procedure.⁹⁶

How extensive a departure from previous procedures is inaugurated is uncertain. The opinion suggests that in tort cases generally the issue of damages and the issue of culpability are severable. This is true analytically, but not practically. Within the expansive confines of the general verdict in a negligence case, the jury may award punitive damages against the defendant or reduce the plaintiff's recovery to allow for his contributory or comparative negligence. But this is nowhere better stated than in the opinion of Stanley, C., in *Smith v. Webber*,⁹⁷ cited in the principal case. In the *Scuddy* case itself, there was no evidence justifying either a "punitive" award or a reduction for "comparative

⁹³ The writer has been informally advised that all except \$5,000 of the judgment was in fact paid by an insurance company to an adult son, living in another state.

⁹⁴ For another case of an Adequate Award, see *Carlisle v. Reeves*, 294 S.W. 2d 74 (Ky. 1956) where the jury gave \$63,991 for loss of one leg. Reversed on grounds of assumption of risk, *supra* note 80.

⁹⁵ 295 S.W. 2d 553 (Ky. 1956).

⁹⁶ *Id.* at 554.

⁹⁷ 282 S.W. 2d 346 (Ky. 1955).

fault". The case must be read in the light of its facts and the opinion in *Smith v. Webber*: A partial retrial limited to the damages issues will be granted in a negligence case where the verdict was so excessive as to indicate passion and prejudice and where under the particular facts the issue of damages is as a practical matter distinct and separable from the issue of negligence.

PARTIES PLAINTIFF AND DEFENDANT

Several recent cases have involved the question whether an insured plaintiff who has been paid by the insurer and has executed a "loan agreement" remains a real party in interest under CR 17.01 and whether the insurance company becomes an indispensable party. The majority of the Court have concluded that the loan agreements should be recognized at their face value.⁹⁸ Judge Cammack has characterized the "loan agreements" as fictions which should be ignored. The Court's ready acceptance of the "loan agreement" stems, no doubt, from its long-standing rule against any mention of defendant's insurance in an accident case, the basis for which was seemingly undermined by the decision in *L. & N. R.R. Co. v. Mack Mfg. Corp.*⁹⁹

Indemnity and contribution between defendants were apparently confused by counsel in two cases decided in the past year. In *Phelps v. Brown*¹⁰⁰ a judgment of \$6,000 was recovered against the employer Brown and employee Phelps, jointly and severally, for the latter's negligence in tossing a flaming can of gasoline at a third party. Brown satisfied the judgment and then sued his employee for contribution. The judgment for \$3,055.29 for contribution under KRS 412.030 was affirmed. The Court observed that since the employee was the active wrongdoer primarily liable and the employer only secondarily liable, the employer might have sued to recover on the basis of indemnity the entire sum paid in satisfaction of the judgment, under *Brown Hotel Co. v. Pittsburgh Fuel Co.*¹⁰¹

In *Ambrosius Industries v. Adams*,¹⁰² Adams recovered \$25,000 against one Holloway, who negligently rigged a crane lift, and

⁹⁸ *Aetna Freight Lines v. R. C. Tway Co.*, 298 S.W. 2d 293 (Ky. 1957); *Ratcliff v. Smith*, 298 S.W. 2d 18 (Ky. 1957); and see *State Farm Mutual Automobile Ins. Co. v. Hall*, 292 Ky. 22, 165 S.W. 2d 838 (1942).

⁹⁹ 269 S.W. 2d 707 (Ky. 1954).

¹⁰⁰ 295 S.W. 2d 804 (Ky. 1956).

¹⁰¹ 311 Ky. 396, 224 S.W. 2d 165 (1949).

¹⁰² 293 S.W. 2d 230 (Ky. 1956).

\$50,000 against Ambrosius Co., which negligently lifted. Holloway cross-claimed against Ambrosius Co. for indemnity which the trial court peremptorily denied. On appeal, the Court affirmed, saying:

Indemnity between tort-feasors is allowed when the negligence of the person claiming indemnity is passive and secondary and the negligence of the person from whom indemnity is sought is primary and active.¹⁰³

Since the negligence of Holloway was a concurring *primary* cause, rather than a *secondary* one, indemnity was not permitted. Whether contribution could have been recovered in such a case is more of a problem, the solution of which may be found somewhere between the *Brown Hotel* case and *Gish Realty Co. v. Central City*.¹⁰⁴ Nothing would be more helpful than a statutory clarification of the right to indemnity and contribution, with due regard to the problems of practice under the new civil rules.

¹⁰³ *Id.* at 238.

¹⁰⁴ 260 S.W. 2d 946 (Ky. 1953).