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Recent Kentucky case law in the field of wills has generally applied existing law but has not effected many startling developments of new principles. It is the purpose of this article to survey the developments in this field in Kentucky within the past five years. Wherever appropriate, citations will be given to articles appearing in past issues of the *Kentucky Law Journal* and to companion articles in this issue.

PART I—WILLS

What instruments are testamentary: It is well settled that an instrument labelled as a deed or trust may really be testamentary in character in that it attempts to do what a will normally does and will, therefore, be held invalid in the absence of compliance with the formalities of the Statute of Wills. While a living trust created *inter vivos* by the settlor is valid as a trust even if it reserves the income to the settlor for life and is completely revocable, a present interest must be created in order to be upheld as a trust. In one interesting case[1] the Kentucky Court of Appeals upheld a living trust against a contention that it was testamentary and therefore invalid for lack of the formalities required of a will. The settlor had reserved rather substantial powers of direction

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[1] Stouse v. First National Bank of Chicago, 245 S.W. 2d 91 (Ky. 1952). Another interesting point which arose in the same case involved instruments amending the trust, but which apparently were given effect as wills (or instruments disposing of property at death), in view of the fact that a will executed of even date with the original trust was permitted to leave the residue of the estate to the trust according to its terms *as amended.* In holding this gift by will to the trust as amended to be valid the court pointed out that the trust amendments contained the two witnesses requisite for compliance with the requirements for a will. For a discussion of a further problem relating to whether a will is valid insofar as it incorporates the provisions of, or leaves property to, a trust which is or may be amended after the execution of the will, see the note by Wilkerson, *Testamentary Gifts to Amendable Trusts, infra* this volume, 42 KY. L. J. 702 (1954).

over the trustees in the management of the trust property (in addition to full power to revoke or amend and the retention of income for his life). The general principle was enunciated that in order to make the trust testamentary there must be reserved in the settlor such power of control of the details of administration that the trustee is in effect the mere agent of the settlor. Reservation of income plus the right of revocation are alone insufficient.[2] Although the instant trust came close to the line in that some of the enumerated powers of the trustees, (such as to invest, to acquire and lease real estate, to borrow money and to vote stock) could be exercised only upon written instructions of the settlor, the court found that the latter had not retained the power to deal with the property as she pleased, the power to prescribe the details of administration nor the right to possession. Thus it was not a disposition operative at death but a valid *inter vivos* trust.

The converse proposition states that an instrument purporting to be a will and complying with the requisite formalities is still not entitled to probate as a will unless it is really testamentary in character. In line with this general principle, one recent case points out that an essential element of a will is an actual disposition of property, and that a properly executed holographic will in the form of a signed statement merely reciting that decedent had turned over properties to decedent's son in full payment of the son's share in the estate of decedent's husband was not entitled to probate as a will.[3]

One sad illustration of the danger of a home-made will instead of a lawyer-made will came before the Court. The would-be testatrix tried to set out her wishes for disposal of her property upon her death in an holographic document, but the court was unable to unravel the "mammoth puzzle" and the will failed in its entirety. It was impossible to tell who the beneficiaries were, the extent of the estates devised or the persons in whom the fee was to vest.[4]

What constitutes the will: A will may be written on several sheets of paper provided that all are intended to operate as the

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[2] AMERICAN LAW INSTITUTE, RESTATEMENT OF TRUSTS, Sec. 57-2; ATKINSON ON WILLS 380 (2d Ed. 1953) I BOGERT ON TRUSTS AND TRUSTEES, Secs. 103-104 (1935).

[3] Panke v. Panke, 252 S.W. 2d 909 (Ky. 1952); 260 S.W. 2d 397 (1953).

[4] Johnson v. Johnson, 312 Ky. 773, 229 S.W. 2d 743 (1950).

will and provided further that all the papers intended to be integrated into the will are present at the time of execution.[5] Recently restated by the Kentucky court were the related principles that the will together with all codicils must be construed as a unit,[6] that inconsistent provisions of the will must yield to a later codicil,[7] and that a codicil republishes the previous will as modified by the codicil.[8]

The court also held, in *Hurley* v. *Blankinship*,[9] that a codicil may operate to republish and validate a will previously invalid due to alteration after execution, testamentary incapacity, undue influence or the like. The case permitted an holographic writing, invalid for lack of a signature, to be given life by a properly executed codicil. Perhaps the same result could have been reached by the court on the theory that the so-called codicil operated as a will which incorporated by reference the unsigned paper already in existence and described as such therein. On the facts of this case such a theory could be reconciled with the accepted Kentucky law that the doctrine of incorporation by reference cannot be applied in cases involving holographic instruments, that is, when the holographic will attempts to incorporate a typewritten or other statement the latter does not meet the requirement of the statutory definition of an holographic will as one wholly in the testator's own handwriting.[10]

Contracts to will: A recent case applied the rule that an oral contract to devise or bequeth property by will is enforceable when supported by consideration and convincing evidence of the contract.[11] The testimony of the promisee was unchallenged, and the

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[5] ATKINSON ON WILLS 177-183 (2d Ed. 1953).
[6] Bogie v. Britton, 258 S.W. 2d 898 (Ky. 1953).
[7] Stark v. Gibbons, 259 S.W. 2d 36 (Ky. 1953).
[8] *Ibid.*
[9] Hurley v. Blankinship, 313 Ky. 49, 229 S.W. 2d 963 (1950). An interesting sidepoint in this case is the court's indulgence in an assumption, without deciding the point, that the first holographic document may have been insufficient as to signature although the very last sentence contained the following in testator's handwriting: "Written by the hand of R. F. Blankinship." *Cf.* Bamberger v. Barbour, 335 Ill. 458, 167 N.E. 2d 122 (1929) (No sufficient signature where the name was written in exordium clause at beginning of an holographic paper.)
[10] Sharp v. Wallace, 83 Ky. 584 (1886).
[11] Finn v. Finn's Adm'r, 244 S.W. 2d 435 (Ky., 1951); Accord: Watts v. Mahon, 264 S.W. 2d 627 (Ky. 1954). These holdings are of course reconcilable with the principle that a verbal agreement cannot be used as part of a will or to vary its terms. See Haysley v. Rogers, 255 S.W. 2d 649 (Ky. 1952) (oral wish that donee do something with property following legatee's death did not cut down on donee's fee simple estate). *Cf.* the prior cases of Maloney v. Maloney, 258 Ky.

court considered that the exclusion of the heirs in return for a home and the companionship of the promisee during the decedent's lifetime was not an unnatural disposition in view of the fact that the only heirs were distant cousins who showed up only after the testator's death. The particular oral contract in that case was upheld against a contention that the requirement of a writing for a "sale" of real property was applicable.

It might be noted, however, that any contract to will property will be held subject to the right of a wife to her dower interest in land and her statutory share in personal property. This was recently held to be the case in interesting litigation, even though the contract to will was in writing and by court record made a part of a divorce settlement and incorporated into the divorce decree, where the second wife did not have actual knowledge of the previous contract to will or of the decree of the divorce court approving such contract.[12]

In one case involving a joint will by husband and wife, executed pursuant to a contract whereby each was to leave his property to the other and at the death of both to the plaintiff, the court refused to enforce a trust in favor of the plaintiff where the wife had destroyed the joint will upon her husband's death.[13] The reason given was failure of the petition to allege that the husband continued to recognize the will up to the time of his death, and the case is therefore explainable as an illustration of the principle that the inability to produce a will must be explained and non-revocation shown.

567, 80 S.W. 2d 611 (1935) and Gibson v. Crawford, 247 Ky. 228, 56 S.W. 2d 985 (1932). The Court of Appeals seems to recognize, however, that where the parties pursuant to a contract actually do execute a formal joint will there is a sufficient monument to the agreement, and the estate may be impressed with a trust for the use and benefit of the legatees in the joint will. Watkins v. Covington Trust and Banking Co., 303 Ky. 644, 198 S.W. 2d 964 (1947); Epley v. Epley, 251 S.W. 2d 451 (Ky. 1952).

[12] Wides v. Wides Ex'r, 299 Ky. 103, 184 S.W. 2d 579 (1944). The widow's adversaries in this case then moved the circuit court to take evidence on the question of whether or not the widow had actual knowledge of the contract or the decree of divorce. On appeal from the court's refusal to do so, the Court of Appeals affirmed, holding that although it did not rule in the earlier appeal that knowledge by the second wife was immaterial, here the controlling factor was the policy of the law to protect the widow in securing her distributable share in her husband's estate. Wides v. Wides Ex'r, 300 Ky. 344, 188 S.W. 2d 471 (1945). Thus, although the widow's knowledge or lack of it is said to be "a matter of considerable equity" it apparently will not be considered sufficient to deprive her of her distributable share in her husband's estate.

[13] Romans v. Belcher, 251 S.W. 2d 453 (Ky. 1952).

Probate Procedures: The matter of probate procedures in Kentucky is dealt with in a note, *infra* this issue,[14] and will not be discussed here.

Execution: With regard to statutory formalities on such matters as the testator's signature, the number and competency and order of signing of witnesses, publication, etc., there are no significant new developments. Several recent cases involved the testator's signature.[15]

Another case involved the requirement that the testator sign in the presence of witnesses in an unusual situation in which two joint testators signed the same will. The will was held improperly executed because one of the two joint testators had not signed in the presence of the subscribing witnesses.[16]

The meaning of the requirement of acknowledgment was dealt with in two rather interesting cases. In *Barton's Adm'r* v. *Barton*[17] the Kentucky Court of Appeals reiterated the proposition that K.R.S. 394.040 specifically refers to the will and not to the signature as the subject of acknowledgment by the testator. The court appeared to take a rather lax attitude in the *Barton* case. There the subscribing witnesses did not sign the will in the presence of each other. Nor did the testator sign the will in the presence of either of the witnesses, although it was shown that he had signed the will in the proper place before either of the witnesses had subscribed their names. The court held it was sufficient that he had acknowledged to each of them that it was his will, saying that:

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[14] 42 KY. L. J. 709 (1954).

[15] Georgetown College, Inc. v. Webb, 313 Ky. 25, 230 S.W. 2d 84 (1950) (Two documents in testator's handwriting and styled "codicils" were not given effect as such since they were not signed and hence did not comply with KY. REV. STAT. 394.040); Cline v. Wenger, 263 S.W. 2d 91 (Ky. 1953) (Testimony of contestant, a banker and a handwriting expert, that testator's signature was a forgery was held merely to create a suspicion and was not enough to overcome the positive testimony of four unimpeached witnesses that the will was signed by testator in their presence); Johnson v. Johnson, 257 S.W. 2d 533 (Ky. 1953) (The testimony of two sons of a deceased attesting witness that their father's signature was not genuine, and the testimony of the cashier of the bank where testator had done his banking that the signature on the will was not testator's was permitted to overcome that of the sole surviving witness and the incomplete testimony of the wife of the principal beneficiary).

[16] Pott's Ad'm. v. Commonwealth ex rel. Reeves, 312 Ky. 845, 229 S.W. 2d 990 (1950).

[17] 244 S.W. 2d 770 (Ky. 1951).

> To execute a valid will it is not essential that the testator subscribe his name to the instrument in the presence of the attesting witnesses; it is sufficient if he acknowledge the will before the two witnesses.[18]

In an earlier case[19] the court held that K.R.S. 394.040 had not been complied with where neither of the witnesses saw the testator sign the will although both testified that his signature was on the will at the time they signed. Although the language used here seems to conflict with the holding in the *Barton* case it is probable that the controlling factor here was that one of the witnesses had not been requested by the testator to sign, nor had the latter acknowledged to him that it was his will.

Mental capacity: The general requirements for capacity necessary to make a will have been well stated.[20] A testator may be held to have understanding of the nature and natural objects of his bounty and be able to understand the relationship of these elements to each other to a degree sufficient to make an orderly disposition of his property even though he has to have a guardian to manage his estate.[21] Mere failure of memory, momentary forgetfulnes, or lack of strict coherence in conversation does not render one incapable of executing a will.[22] If this be all that is shown the court should direct a verdict for the proponents of the will. There must be *substantial* evidence in order to take the case to the jury. Where no more than a "scintilla of evidence" has been introduced the court will direct a verdict for the proponents.[23]

If a will is unnatural and inconsistent with the testator's obligations to his family, the propounders have the burden of giving reasonable explanation therefor.[24]

Two cases have involved the duty of the jury or of the court when sitting without a jury. The general rule was reiterated that

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[18] *Id.* at 772. *Cf.* Pott's Ad'm. v. Commonwealth ex rel. Reeves, 312 Ky. 845, 229 S.W. 2d 990 (1950).

[19] Lowrance v. Moreland, 310 Ky. 533, 221 S.W. 2d 649 (1949).

[20] ATKINSON ON WILLS 228-253 (2d Ed. 1953); 27 KY. L. J. 224 (1939); 155 A.L.R. 281.

[21] ATKINSON ON WILLS 239 (2d Ed. 1953); Green, *The Operative Effect of Mental Incompetency on Agreements and Wills,* 21 TEX. L. REV. 554, 584 (1943); Note, 18 TULANE L. REV. 620 (1944).

[22] Tye v. Tye, 312 Ky. 812, 229 S.W. 2d 973 (1950).

[23] Bennett v. Kissinger, 313 Ky. 417, 231 S.W. 2d 74 (1950).

[24] Pardue v. Pardue, 312 Ky. 370, 227 S.W. 2d 403 (1950).

when there is a conflict in testimony of a great number of witnesses on both sides, the question of mental capacity is for the jury.[25] When sitting without a jury the decision of the court will not be disturbed unless it is not sustained by the evidence or is arrived at as a result of passion and prejudice.[26]

Undue influence: There continue to be a relatively large num- of cases involving undue influence. The general rule laid down by the Kentucky court states that invalidity because of undue influence requires such influence as destroys the free agency of the testator in his will.[27] The case law continues to be rather strict in adhering to this requirement.

In determining whether or not undue influence has been exercised it is not enough to show merely that there was an opportunity to do so or a possibility that it was exercised. There must be substantial evidence that it actually was exercised.[28] In addition, there must be more than mere existence of confidential relations between the testator and a beneficiary. It is necessary to submit evidence of activity or overt acts or incriminating statements, etc.[29]

Where a will is unnatural in its provisions, such fact, when unexplained and when corroborated by even slight evidence, is sufficient to take to the jury the question of whether or not undue influence was exerted.[30] Mere inequality in the testator's distribution of his estate is not alone sufficient to take a case to the jury.[31] When a case gets to the jury, however, the latter may consider the testator's age and evidence of physical weakness and enfeeblement likely to impair his mind and powers of resistance.[32]

Revocation and Lost Wills: The Kentucky Revised Statutes provide that revocation of a will must be by subsequent will or codicil, by some physical act such as cutting, tearing or destruction by the testator or by some person at his direction with the

[25] Hines v. Price, 310 Ky. 758, 221 S.W. 2d 673 (1949).
[26] Lynn v. Stratton, 309 Ky. 721, 218 S.W. 2d 962 (1949).
[27] Jackson v. Feldhaus, 313 Ky. 552, 233 S.W. 2d 109 (1950). *Accord:* Nunn v. Williams, 254 S.W. 2d 698 (Ky. 1953).
[28] Bennett v. Kissinger, 313 Ky. 417, 231 S.W. 2d 74 (1950). *Accord:* Clark v. Johnson, 268 Ky. 591, 105 S.W. 2d 576 (1937); Jones v. Beckley, 173 Ky. 831, 191 S.W. 627 (1917).
[29] Palmer v. Richardson, 311 Ky. 190, 223 S.W. 2d 745 (1949).
[30] McKinney v. Montgomery, 248 S.W. 2d 719 (Ky. 1952).
[31] Prichard v. Kitchen, 242 S.W. 2d 988 (Ky. 1951).
[32] Hines v. Price, 310 Ky. 758, 221 S.W. 2d 673 (1949).

intent to revoke, or by certain well defined circumstances such as subsequent marriage.[33] One case involved partial revocation by cutting, one involved a revocation by codicil, and several involved the possibility of destruction when there was a lost will which could not be produced, together with questions involving admission to probate.

Total versus partial revocation was the problem involved in *Flora* v. *Hughes*,[34] where there was a cutting of only one item from the instrument. Item five, a bequest of $500, had been cut or torn out and both pieces were found in the testatrix' safe deposit box. There was no evidence that anyone, other than the testatrix, had tampered with the will or that it had been out of her possession. The court affirmed the holding that the testatrix did not intend to revoke the will in its entirety but only to eliminate the one item.

Thornton v. *Kirtley*[35] was the case in which an invalid codicil effectively destroyed a provision of the original will. The original will contained a provision creating a trust of bank stock for the testatrix' three children. The codicil, however, had the effect of rendering the entire disposition invalid, for it attempted to amend the original trust by suspending the power of alienation for a fifty year period and thus was invalid under statute.[36] Revocation of the original trust and invalidity of the codicil caused the trust property to pass to the three children in fee simple as on intestacy. It was argued that the trust in the original will should be allowed to stand by application of the doctrine of dependent relative revocation since the intention would not have been to revoke by codicil if the testatrix had known that the provision in the codicil was invalid. The court, however, held the doctrine of dependent relative revocation inapplicable since the codicil's change or revocation was not dependent upon any mistake, act or condition, citing previous cases and articles in the *Kentucky Law Journal* by Dean Evans and Mr. Woodson D. Scott.[37] An earlier Kentucky

[33] KY. REV. STAT. 394.080 (1953).
[34] 312 Ky. 478, 228 S.W. 2d 27 (1950).
[35] 249 S.W. 2d 802 (Ky. 1952).
[36] KY. REV. STAT. 381.220 (1953).
[37] Evans, *Dependent Relative Revocation*, 16 KY. L. J. 251 (1928); Evans, *Testamentary Revocation by Act to the Document and Dependent Relative Revocation*, 23 KY. L. J. 559 (1935); Scott, *The Doctrine of Dependent Relative Revocation in Kentucky*, 16 KY. L. J. 54 (1927).

case[38] holding that the original provision remained unaffected by a void codicil was distinguished in that there the codicil did not amount to a revocation of the original provision. In the instant case the modification of the original provision by the codicil was substantial so that the contention that the testatrix would have preferred the original provision to complete invalidity was unsuccessful.

Numerous recent cases follow the proposition that when a lost will, the original of which is not produced, is offered for probate, the proponents have the burden of establishing the execution, its loss or misplacement, its contents, and the fact that it continued to be recognized by the testator as his unrevoked will.[39]

Adopted children: Two interesting cases involved the rights of adopted children as "heirs" or "legal heirs", when those or similar terms are used in a will.[40] In both cases the testator had left the property to the "heirs" of a child of the testator following the death of such child, and in both cases adopted children of such child were held within the beneficial disposition of the testator's usage of the term "heirs." Had the testator, instead of the word "heirs," used the word "children" in describing the persons to take following death of the first beneficiary, adopted children would have been left out, according to the Kentucky cases so far decided.[41] It is, however, quite arguable that a testamentary

[38] United States Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S.W. 328 (1909).

[39] Noland v. Turley, 255 S.W. 2d 495 (Ky. 1953) (allowed *copy* of lost will to be probated); Watson v. Watson, 245 S.W. 2d 586 (Ky. 1952) (testimony of daughter, not a devisee, that she had burned the will should have been admitted); Hall's Ex'r v. Haynes, 247 S.W. 2d 45 (Ky. 1952) (allowed a lost or concealed holographic will to be probated—one of the beneficiaries had made a copy and the contents were established by several witnesses to whom the will had been shown); Loy v. Loy, 246 S.W. 2d 578 (Ky. 1952) (mere declarations of the testator were held insufficient to establish lost will as the valid, unrevoked will of testator); Epley v. Epley, 251 S.W. 2d 459 (Ky. 1952) (Court upheld dismissal of petition based upon allegation that husband and wife had executed a joint will pursuant to an agreement to leave property to the plaintiff after the death of both the husband and wife, because the petition failed to allege that the husband continued to recognize the will up to the time of his death); White v. Brannan's Adm'r, 307 Ky. 776, 212 S.W. 2d 299, 3 A.L.R. 2d 943 (1948) (testimony of scrivener of lost will, an attorney of considerable repute, that the will was duly executed in accordance with the laws of the state sufficiently established execution of the will).

[40] Isaacs v. Manning, 312 Ky. 326, 227 S.W. 2d 418 (1950), *noted* 39 KY. L. J. 335 (1951); Major v. Kammer, 258 S.W. 2d 506 (Ky. 1953), *noted infra* this volume, 42 KY. L. J. 700 (1954).

[41] Kolb v. Ruhl's Adm'r, 303 Ky. 604, 198 S.W. 2d 326 (1946); McLeod v. Andrews, 303 Ky. 46, 198 S.W. 2d 473 (1946); Copeland v. State Bank & Trust

gift to the "children" of the testator himself would have included adopted children. Distinctions have been sought to be made, turning upon whether the adoption was prior to or subsequent to the will or upon whether a will or some other instrument is involved. These and other distinctions are discussed in two recent notes in the *Kentucky Law Journal.*[42]

Afterborn children: Kentucky's pretermitted child statute was recently applied for the protection of unmentioned children born after the execution of the will.[43] The *Journal* noted a novel situation which arose in an Illinois case, involving the question whether the fact that the wife was known to be pregnant at the time of execution of the will showed an intention to disinherit the subsequently born child to prevent the statute from operating.[44]

Lapse: The Kentucky lapse statute is somewhat unusual in that it provides that a gift lapsed for failure of the beneficiary to outlive the testator will pass under the laws governing intestate distribution unless the testator manifests an intention that the property shall pass under the residuary clause.[45] Recent litigation involved the question of when such intention can be found from language in a will and the surrounding circumstances, and is discussed in a note in this issue.[46] The same rule applies to the share of a deceased residuary legatee who was to share the residuary estate with the other residuary legatees. The statutory rule overrides any presumption against intestacy and prevents the surviving residuary legatees from taking the lapsed portion against the heirs at law.[47]

Co., 300 Ky. 432, 188 S.W. 2d 420 (1945), *discussed* 39 KY. L. J. 335, 337 (1951); Parke v. Parke's Ex'r, 295 Ky. 634, 175 S.W. 2d 141 (1943); Sanders v. Adams, 278 Ky. 24, 128 S.W. 2d 223 (1939). *Cf.* the holding that *subsequently* adopted children are not included within benefit of word "heirs" used in a deed of gift, Woods v. Crump, 283 Ky. 675, 142 S.W. 2d 680 (1940), 29 KY. L. J. 481 (1941).

[42] Cox, *Adopted Child as "Legal Heir" under Will,* 39 KY. L. J. 335 (1951); see also a note *infra* this issue, Youngblood, *Adopted Child as "Heir,"* 42 KY. L. J. 700 (1954).

[43] Mann v. Peoples Bank & Trust Co., 256 S.W. 2d 489 (Ky. 1953).

[44] Tulkoff, *Failure to Mention Afterborn Children in Will Made while Wife Is Pregnant as Showing Intent to Disinherit,* 41 Ky. L. J. 357 (1952), *noting* Hedlund v. Minor, 395 Ill. 217, 69 N.E. 2d 862 (1946).

[45] KY. REV. STAT. 394.500 (1953).

[46] Cundiff v. Schmitt, 243 S.W. 2d 667 (Ky. 1951), *noted infra* this issue, 42 Ky. L. J. 688 (1954).

[47] Schonberg v. Lodenkemper's Ex'r, 314 Ky. 105, 234 S.W. 2d 501 (1950).

Construction: Although judicial determination of testator's intention with respect to substantive property rights created by will is sometimes classified as a problem of will construction, cases of this sort are not treated extensively in this article because they are quite numerous and also because the court's decision usually turns on the application of legal principles involving the law of future interests or trusts. Many of the important "wills" cases of this sort decided during the period have been treated in a recent article on Kentucky Decisions on Future Interests (1938-53) by Professor W. Lewis Roberts (*Supra,* this volume, p. 3.) Other cases dealing specifically with the construction which the Court of Appeals will give to a gift over following an attempted devise or bequest of a fee simple will be treated in another article now in preparation.

PART II

DESCENT AND DISTRIBUTION

Qualifications and Appointment of Administrators: This subject is discussed in an article, *supra* this issue, entitled "Statutory Right to Administer Assets," by Mr. Pierce Lively. One recent case might be cited here wherein deceased's husband was denied the right to act as coadministrator of his wife's estate on the ground that he had a substantial interest antagonistic to that of the heirs and legatees.[48]

Powers, duties and liabilities of administrators: In *Johnson* v. *Ducobu*[49] expenses incurred in a suit against the administrator for settlement of the estate were denied upon a showing that a major portion of the assets had been distributed before filing of action, and the action itself, in addition to being fruitless, appeared to have been wholly unnecessary.

For failure to report the estate for federal taxes or to cause inheritance taxes to be paid the executor was held personally liable in *Sanford* v. *Sanford's Adm'r.*[50] In another recent case no misconduct on the part of the administratrix was found on the facts presented.[51]

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[48] Cosby v. Hays, 257 S.W. 2d 575 (Ky. 1953).
[49] 258 S.W. 2d 509 (Ky. 1953).
[50] 262 S.W. 2d 827 (Ky. 1953).
[51] Miller v. Miller's Adm'x, 261 S.W. 2d 293 (1953).

Claims against the estate: In *Quin* v. *Quin*[52] a claim for payments was disallowed where it appeared that a voluntary gift was intended. In *Franklin* v. *Franklin*[53] the court stated that an administrator will be permitted to offset his legitimate expenses against the amount for which he is liable for failure to account, even though such payments were designated in his final settlement as donations. Other recent cases in this area of the law include *Benjamin* v. *Goff*[54] and *Murphy* v. *Henry*.[55]

Adopted children: A small segment of Kentucky's descent and distribution laws has been affected by the recent enactment of the new provisions governing adoption of children. A section in the 1950 adoption statute repeals the provision in the chapter on descent and distribution relating to inheritance by and from adopted children.[56] The new provision in effect goes all the way in treating an adopted child the same as a natural child for inheritance and succession purposes.

Previous statutory law that the adopted child may inherit from the adoptive parents as well as from the adoptive parents' collateral kin (in case there are no nearer relatives to preclude him) is retained in substantially the same form. Added is a new provision permitting the kin of the adoptive parents as well as the adoptive parents themselves to share in the estate on death of the adopted child. Unchanged is the previous law that an adopted child is not prevented by the adoption from inheriting his share in the estate of his natural parents, if any.

Under this statute regarding inheritance by adopted children, the Court of Appeals has held, correctly it is believed, that when an adopted child predeceases his adoptive parent the children of the adopted child will take the share in his place.[57]

Other changes made by the 1950 adoption statute are discussed in a previous article in the *Journal*.[58]

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[52] 259 S.W. 2d 23 (Ky. 1953).
[53] 311 Ky. 276, 223 S.W. 2d 992 (1949).
[54] 314 Ky. 639, 236 S.W. 2d 905 (1951) (holding that debt for a stallion fee was not barred by the statute of limitations contained in KY. REV. STAT. 376.400).
[55] 311 Ky. 799, 225 S.W. 2d 662 (1949) (upheld the compromise of a doubtful claim under a will).
[56] KY. REV. STAT. 199.530, repealing KY. REV. STAT. 391.080.
[57] Bailey v. Wireman, 240 S.W. 2d 600 (Ky. 1951).
[58] Wetzel and Rosenbaum, *Child Welfare and Public Assistance,* 39 KY. L. J. 28 (1950).

Disqualification from inheriting: Perhaps the most interesting development in the descent and distribution rules of Kentucky arose on a question of interpretation of the statute preventing one convicted of felonious homicide from sharing in the estate of his victim. In *Bates* v. *Wilson*[59] the question was whether the child of the convicted killer (a son of decedent) was also prevented from taking her share in the victim's estate. Although the murderer was himself barred by his conviction, the court nevertheless permitted the only child of the murderer to take the share which he would have taken had he not been convicted.

Had the murderer been considered as being alive at the decedent's death, it is difficult to see how more remote kin such as a child of the murderer could share in the estate. The scant case law bearing upon similar statutes would deny the child of the murderer, also the grandchild of intestate, any standing as heir in view of the fact that the murderer was still living and was of nearer relationship.[60] The Kentucky court, however, by judicial interpretation was able to read into the statute an intention that the person convicted of killing the intestate "shall be considered as though he had preceded in death the person he killed."[61]

Even considering the killer to have predeceased the victim, another logical difficulty to permitting the child to share could arise, in that there was another son of the victim living and it would seem that the child would have to take through his parent, the killer. One aspect of the doctrine of representation might fasten upon the child the same disabilities as his parent.[62] Nevertheless, in limiting the penalty of the statute to disinherit only the murderer himself, the Kentucky court reaches a less harsh result than contrary case holdings. In effect, this interpretation avoids attaint of the blood of the slayer. Admittedly the statute did intend to change the common law,[63] and to accomplish its purpose

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[59] 313 Ky. 572, 232 S.W. 2d 837 (1950), *criticized* 39 KY. L. J. 496 (1951), *approved* ATKINSON ON WILLS 156 (2d ed. 1953).

[60] In re Norton's Estate, 175 Ore. 115, 151 P. 2d 719, 156 A.L.R. 617 (1944).

[61] 39 KY. L. J. 496 at 498 (1951).

[62] ATKINSON ON WILLS 72 (2d ed. 1953).

[63] The common law rule was that the killer could inherit from the estate of his victim, for to hold otherwise would be to permit a common law principle (that a wrongdoer shall not be allowed to profit by his own wrong) to destroy a statutory right [of inheritance]. Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487 (1916).

it seems unnecessarily harsh to extend its provisions to the child of the wrongdoer in addition to the wrongdoer himself.

Another case under the statute, stemming from the same facts as the one above, invalidated an attempted avoidance by the device of a mortgage executed by the slayer prior to his conviction on the victim's realty to secure fees of the attorneys who were defending his prosecution.[64]

Advancements: Another case, *Popplewell* v. *Flanagan*,[65] involved determination of what transfers made by an intestate decedent to his children during his lifetime are advancements as well as some interesting angles on the problem of valuation of the property transferred. Familiar law was reaffirmed to the effect that such transfers to constitute advancements must be made with a "view to a portion or settlement in life,"[66] which prevented from being advancements the gifts upon marriage, payments of hospital bills and maintenance of children and grandparents, and a $500 check to a helpful daughter. Recognizing the familiar principle that when property is transferred by way of advancement its valuation should be taken as of the date of the transfer, the court discussed difficulties in several possible ways of valuation of the transferred property when a portion of the product therefrom was reserved for the lifetime of another person.

Surviving spouse's share: During the five year period several cases construed different phases of the widow's dower rights. In one the existing Kentucky rule that statutory dower means one-third of the gross, rather than merely net, rents in real property was followed;[67] and in another the court could not find sufficient testamentary intention to entitle the widow to dower rights *in addition* to her benefits under the will, but held she must instead renounce the will or be confined to the will's bounty.[68]

One case involved a difficult problem of apportionment of the dower interest in oil and gas royalties paid into court, as well as future rolayties.[69] During the five year period the *Kentucky Law*

[64] Wilson v. Bates, 313 Ky. 353, 231 S.W. 2d 39 (1950).
[65] 244 S.W. 2d 445 (Ky. 1951).
[66] KY. REV. STAT. 391.140 (1953).
[67] Frasure v. Martin, 247 S.W. 2d 51 (Ky. 1952).
[68] Mann v. Peoples-Liberty Bank & Trust Co., 256 S.W. 2d 489 (Ky. 1953).
[69] Yost v. Ratliff, 246 S.W. 2d 447 (Ky. 1951) (the lessee of oil and gas rights was permitted to bring a bill of interpleader in equity to determine the apportion-

Journal published an extensive study dealing with the interests in land subject to dower in Kentucky.[70]

Several cases mention the surviving spouse's right to quarantine, or occupancy of the "mansion house" pending assignment of dower or curtesy. Denial of the right was ordered where the widow was not living with her husband, the decedent, on the property as a residence at the time of his death,[71] and was granted, free from rents and other charges, when the statutory requisites existed.[72]

Emblements: The statute[73] entitling the personal representative to the growing crops which are severed before the end of the calendar year from the lands of a decedent who dies after March 1st was construed not to deprive the widow, as the one in possession of the homestead property for life, to the use of the corn crop as against those entitled to the remainder.[74] Had there been debts the statutory requirement would have compelled the widow, as executrix, to apply the crops to the debts, but the statutory intent was not to deprive her of any of the product of the land as against remaindermen.

Conclusion

While most of the recent Kentucky cases fit well into the existing pattern of the law, the litigation on wills and intestate distribution continues to be heavy. In view of the fact that there have been no very startling developments in this field, the purpose of this article has been to collect and bring together in compact form the recent cases and articles dealing with current litigation.

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ment). On the subject of the right of the widow to dower in oil and gas leases, see notes, *Right of the Widow of Lessee in Oil and Gas Leases—Van Camp* v. *Evans*, 37 KY. L. J. 204, 208 (1949).

[70] Blair, *Interests in Land Subject to Dower in Kentucky*, 39 KY. L .J. 120 (1950).

[71] Frasure v. Martin, *supra* note 67.

[72] Johnson v. Docubu, 251 S.W. 2d 992 (Ky. 1952).

[73] KY. REV. STAT. 395.350 (1) (1953).

[74] Miller's Ex'rs v .Miller, 310 Ky. 721, 221 S.W. 2d 654 (1949).

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