Research Memorandum No. 426

FINAL REPORT ON HCR 111

Legislative Research Commission
Frankfort, Kentucky
December 13, 1985

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LEGISLATIVE RESEARCH COMMISSION

State Capitol Frankfort, Kentucky 40601 502-564-8100

M E M O R A N D U M

TO: Vic Hellard, Jr. Director

FROM: Norman W. Lawson, Jr.
Assistant Statute Revisor

DATE: December 9, 1985

RE: Final Report on HCR 111

House Concurrent Resolution 111 requested a study of the feasibility of combining the functions of the pretrial release program, administered by the Administrative Office of the Courts, pursuant to KRS Chapter 431, and those of probation and parole officers, which are administered by the Corrections Cabinet, pursuant to KRS Chapter 439.

The basic role of a pretrial release officer is to interview prisoners who are incarcerated in court jails to determine whether they may be eligible for pretrial release upon their own recognizance, on bail, or on other form of surety, and to make recommendations to a District Judge with regard to the matter of release. In performing these functions the pretrial release officer must also verify the status of the prisoner, to ascertain whether or not he is a fugitive wanted on another charge, verify the information given as to his residence, employment and other factors upon which the likelihood of his return for trial may be based, and perform other functions which may be assigned by the court. In some counties, pretrial release has operated mediation and diversion programs on an experimental basis.

The basic role of the probation and parole officer is to prepare presentence reports on persons convicted of crimes and to supervise persons placed on probation by a court or upon parole by the parole board. In performing their functions, probation and parole officers must interview the person who has been convicted and others and prepare a presentence report for the judge, who will use the report in the determination of whether the person will be granted probation, conditional discharge, or shock probation, or will be sentenced to jail, prison, fine or other authorized penalty. The second major role of the probation and parole officer is to actively supervise the persons who have been released on probation or parole, to provide guidance for these persons, and to report to the parole board or court (as appropriate) when they violate the terms and conditions of probation or parole.

The pretrial release program is administered by the Administrative Office of the Courts, which is an agency of the judicial branch and under the direct control of the Chief Justice and the Supreme Court. The probation and parole program is administered by the Corrections Cabinet and the Corrections Secretary and is ultimately responsible to the Governor, as is any other executive branch agency.

While both agencies have externally similar roles, several important differences emerge which preclude the combination of the roles into a single one. Pretrial release is essentially related to the function of bail. Bail, under Sections 16 and 17 of the Constitution of Kentucky, is a function integrally related to the operation of the courts and not under the executive branch. Pretrial release officers function under the rules of the Court of Justice and under the supervision of judges. The administration of pardons and paroles, the operation of the prisons and similar matters relating to the post-conviction administration of the criminal justice system are constitutionally within the purview of the executive branch. Numerous potentials for incompatibility of functions exist in the combining of these functions; they are spoken to specifically in the response by the Corrections Cabinet, which is appended hereto. The most serious defect, however, is the constitutional issue.

Section 27 of the Constitution of Kentucky states that the powers of government are divided into three separate branches; Section 28 prohibits one branch from exercising a function assigned to another branch of government. In the years prior to the adoption of the new "judicial article" to the Constitution of Kentucky in 1975, the county judge held the powers of parole of misdemeanants from the county jail, pursuant to KRS 439.175 and 439.177. In 1976 at a special session of the General Assembly, the provisions of KRS 439.175 were repealed and the power of parole in misdemeanor cases was given to the "sentencing judge" (i.e. a District Judge) by an amendment to KRS 439.177. In Commonwealth v. Cornelius, 606 S.W. 2d 172 (1980), the Kentucky Court of Appeals held that since the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, the vesting of paroling authority in the judiciary was unconstitutional. Earlier, shock probation, wherein a person is jailed for a short time and then released by a court on probation, was upheld by the court in Commonwealth v. Williamson, 492, S.W. 2d 874 (1973).

Given the fact that the Constitution views bail and pretrial release as functions granted to the court, and that in the court's view only shock probation (not its supervision) is a judicial function, and in view of the fact that the courts have held a parole decision to be an executive function, it is difficult to foresee a circumstance under which the combination of the functions of pretrial release and probation and parole, whether under the executive or the judiciary, would not be held unconstitutional under Section 28 of the Constitution of Kentucky.

Appended to this memorandum are:

1. Questions sent to the Corrections Cabinet and the Administrative Office of the Courts for this study and their responses.

2. Relevant Sections of the Constitution of Kentucky.

3. The Cornelius and Williamson cases.

Conclusion

As can be seen from the responses of the Corrections Cabinet and the Administrative Office of the Courts, numerous problems, other than the constitutional issue, could arise if the functions of the two programs were to be combined; costs would not necessarily be less, and there is a basic common law incompatibility between the functions which cannot be resolved. The constitutional issue is so serious as to be paramount, as it precludes consideration of the combining of the programs, except by constitutional amendment.

Recommendation

It is recommended, due to the serious constitutional problems involved, that no further action be taken with regard to this matter. The prerequisite to being able to combine the functions of pretrial release and probation and parole would be a constitutional amendment permitting the same.

LEGISLATIVE RESEARCH COMMISSION

State Capitol Frankfort, Kentucky 40601 502-564-8100

January 2, 1985

Mr. Don Cetrulo, Director
Administrative Office of the Courts
Bush Building
403 Wapping Street
Frankfort, Kentucky 40601

Dear Mr. Cetrulo:

I have been assigned the responsibility for conducting the study of the feasibility of combining the functions of pretrial release and probation and parole into a single agency.

In connection therewith I solicit your views as to:

1. The legality of combining the functions of pretrial release and probations and parole.

2. The feasibility of combining the functions of pretrial release and probations and parole.

3. The mechanics of such combination and which branch of government should prevail and should administer such an agency.

4. Any other comments and suggestions which you may have relating to the matter.

I would also like to receive the annual reports for pretrial release for the past five years. Thank you.

Sincerely,

Norman W. Lawson, Jr.

lew

LEGISLATIVE RESEARCH COMMISSION

State Capitol Frankfort, Kentucky 40601 502-564-8100

January 2, 1985

Secretary George W. Wilson
Corrections Cabinet
State Office Building
Frankfort, Kentucky 40601

Dear Secretary Wilson:

I have been assigned the responsibility for conducting the study of the feasibility of combining the functions of pretrial release and probation and parole into a single agency.

In connection therewith I solicit your views as to:

1. The legality of combining the functions of pretrial release and probations and parole.

2. The feasibility of combining the functions of pretrial release and probations and parole.

3. The mechanics of such combination and which branch of government should prevail and should administer such an agency.

4. Any other comments and suggestions which you may have relating to the matter.

I would also like to receive the annual reports for probation and parole for the past five years. Thank you.

Sincerely,

Norman W. Lawson, Jr.

lew

COMMONWEALTH OF KENTUCKY
CORRECTIONS CABINET
FRANKFORT

MARTHA LAYNE COLLINS
GOVERNOR

GEORGE W. WILSON
SECRETARY

January 18, 1985

Mr. Norman W. Lawson, Jr.
Legislative Research Commission
State Capitol
Frankfort, KY 40601

Dear Mr. Lawson:

In response to your request concerning the feasibility of combining the functions of pretrial release and probation/parole into a single agency, the following points you raised are addressed:

(1) The legality of combining the functions of pretrial release and probation/parole; This issue is currently under review by our Office of General Counsel and will be forwarded to you upon completion.

(2) The feasibility of combining the functions of pretrial release and probation/parole.

The duties and functions of the two are very distinct and different. Further, these roles may conflict at times. If a probation/parole officer served also in a pretrial release function, the effectiveness of that officer could be jeopardized. The officer recommending a ROR bond may eventually recommend an incarceration for the offender in a presentence investigation. That same officer who might recommend a high bond at the point of arrest could later have to supervise the same offender on probation. This scenario could be expanded in numerous other situations.

Our probation/parole officers currently supervise over 10,000 active clients statewide referred by the Courts, Parole Board, and other states. They also prepare thousands of presentence

investigations annually for the Courts. Additionally, investigations are prepared for other states, prisoners are transported, and support functions are performed for halfway houses and community centers. The role of our officers is demanding and requires their full time.

(3) If this proposal became law, it is our position that the Corrections Cabinet should maintain administrative control. Thus the option would be to transfer the pretrial release function intact from the Administrative Office of the Courts and make it an operating division within this Cabinet. The same budget that pretrial is currently functioning under would be necessary. We see no major cost savings by the transfer of this function.

The problems facing Corrections today, coupled with the recognized importance of community-based corrections as a viable alternative to overcrowded conditions mandate that administrative control remain with us. Our Division of Probation and Parole is recognized nationally as an innovative leader in the field. We are proud of our accomplishments and at the same time striving for improved excellence. The merger of a pretrial release function would not enhance this effort.

(4) The Cabinet feels the functions of probation/parole and pretrial to be separate and full time. Both are of utmost importance and uniting them would cause serious conflicts.

Enclosed you will find November, 1980, 1981, 1982, 1983, and December, 1984, monthly reports for the Division of Probation and Parole as the Division does not prepare annual reports.

If further information or assistance is necessary on this issue, please advise.

Sincerely,

George W. Wilson

George W. Wilson, Secretary
Corrections Cabinet

mcj

Enclosures

COMMONWEALTH OF KENTUCKY
JUDICIAL DEPARTMENT
ADMINISTRATIVE OFFICE OF THE COURTS
403 WAPPING STREET
FRANKFORT, KENTUCKY 40601
(502) 564-2350

ROBERT F. STEPHENS
CHIEF JUSTICE

DON. CETRULO
DIRECTOR

February 25, 1985

Mr. Norman Lawson
Legislative Research Commission
State Capitol
Frankfort, Kentucky 40601

Dear Mr. Lawson:

This is in response to your letter regarding the merger of pretrial services with probation and parole. It would be imprudent for me to address the issues of the legality and the mechanics of such a merger as the court may ultimately decide these questions. I would like, however, to comment briefly on the issue of the feasibility of a merger from this standpoint: what is to be gained by a merger and at what price?

The benefits discussed during the last legislative session included (1) a reduction of funds through a merger, and, (2) elimination of duplication of criminal history collection. The budgeted funds in FY 1984-85 for pretrial services (excluding the mediation/diversion programs) are $2,930,000; personnel funding is $2,322,000, operating funding is $438,000, facilities funding is $170,000. The complement consists of 105 full-time field officers, 27 part-time field officers, 14 co-op students, and 6 central office staff. Bureaucratic levels of supervision are obviously not present in this program. Pretrial serves 120 counties, providing 24-hour a day "on call" coverage. In FY 1983-84, 141,400 defendants were interviewed within 12 hours of arrest by pretrial officers; this is 74% of the 191,300 arrests made.

The probation and parole officer entry level salary, with comparable education/experience requirements, is over $2,000 higher than the pretrial officer entry level salary. Probation and parole officers are covered under hazardous duty retirement while pretrial officers are not. A merger could possibly result in increased costs due to the need to increase pretrial officers' salaries and benefits to comparable levels. Savings in the operating budget would be minimal. Perhaps the office space could be shared in some areas, resulting in a reduction of costs. 90% of pretrial's operating budget, however, is allocated to telephone and travel costs which would continue.

Some discussion during the last session involved the issue of whether there exists a duplication of criminal history collection by the two programs. First, pretrial officers collect criminal history on all defendants interviewed, misdemeanor and felony charges; probation and parole officers are normally collecting information only on convicted felons. Secondly, the criminal history collected by a pretrial officer is readily available to probation and parole officers through court rule. To my knowledge, a probation and parole officer has never been denied this information; all they need do is request it.

Since its creation in 1976, the pretrial services program has received national recognition as a model program. The National Pretrial Resource Center and the National Association of Pretrial Service Agencies routinely refer other states' requests for information and assistance to the Kentucky program. Chief Justice Stephens feels strongly that the pretrial program is a valuable, well managed program that should be left organizationally as is. Further, he has been made aware of a new effort on the part of the bail bond industry to seek drastic changes in the present law which would enable the return of the commercial bail bond system, a possibility which both the judicial and legislative branches need to guard against.

The pretrial annual reports for the past four years are enclosed as requested. We will send FY 1983-84 upon completion next month.

Sincerely,

Don. Cetrulo

DC:ab
Enclosures

1. Administrative Orders.

This section applies to valid administrative orders which have same legal force as laws. Gering v. Brown Hotel Corp. (1965), 396 S. W. (2d) 332.

Where injunction issued to postpone enforcement of minimum wage order, effective date of such order was left unchanged, since otherwise result would have been suspension of law in violation of this section. Gering v. Brown Hotel Corp. (1965), 396 S. W. (2d) 332.

2. Ordinances.

Ordinance which prohibited for two years erection, construction, alteration or use of property or buildings for business or industrial purposes in residential areas without safety board's approval was not unconstitutional as suspending city's building laws. Fowler v. Obier (1928), 224 Ky. 742, 7 S. W. (2d) 219.

3. Probation.

KRS 439.260, under which circuit courts can postpone sentence and probate defendant, is constitutional under this section as logically implied affirmation of power of general assembly to authorize such courts to suspend law requiring judgment without unreasonable delay. Lovelace v. Commonwealth (1941), 285 Ky. 326, 147 S. W. (2d) 1029.

§ 16. Right to bail—Habeas corpus.—All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

Cross-References. Credit for time spent in prison in default of bail, KRS 431.150.

Habeas corpus, KRS ch. 419.

Juvenile court proceedings, not to affect rights of other courts to determine custody upon writs of habeas corpus, KRS 208.020.

No bail in contempt cases, KRS 432.270.

NOTES TO DECISIONS

ANALYSIS

1. Bail.
2. —Capital offense.
3. — —Appeal.
4. — —Burden of proof.
5. — —Evidence.
6. — —Mistrial.
7. — —Proof or presumption.
8. —Change of venue.
9. —Extradition.
10. —Fees for bond.
11. —Post-conviction.
12. —Revocation.

1. Bail.

2. —Capital Offense.

3. — —Appeal.

Where, from a review of the record, it appears there is room for a difference of opinion among reasonable men as to whether "the proof is evident or the presumption great," a finding of the trial court authorizing the denial of bail will not be disturbed. Finn v. McClard (1967), 418 S. W. (2d) 764.

4. — —Burden of Proof.

On motion for bail in capital offense, presumption of innocence was with defendant at all times, and commonwealth had burden of showing proof of guilt to be evident or presumption of guilt to be great. Commonwealth v. Stahl (1931), 237 Ky. 388, 35 S. W. (2d) 563. See Burton v. Commonwealth (1948), 307 Ky. 825, 212 S. W. (2d) 310.

In capital case, commonwealth had burden of proving that defendant was not entitled to bail. Day v. Caudill (1957), 300 S. W. (2d) 45. See Young v. Russell (1960), 332 S. W. (2d) 629; Thacker v. Asher (1965), 394 S. W. (2d) 588.

In establishing whether or not a defendant charged with the commission of a capital offense is bailable, the burden is on the commonwealth to show that the "proof is evident or the presumption is great," and the judge who conducts the hearing is vested with a sound discretion in determining whether or not that burden has been sustained. Marcum v. Broughton (1969), 442 S. W. (2d) 307.

5. — —Evidence.

When evidence discloses that a homicide is utterly without legal justification, bail may be denied on the ground that the offense is a nonbailable one. Hacker v. Commonwealth (1941), 288 Ky. 222, 155 S. W. (2d) 867.

The judge, on the hearings of both a motion for bail and in habeas corpus actions, is vested with a sound discretion in determining whether or not the evidence, under either constitutional or statutory law, developed a case where the proof is evident or the presumption

§ 17. Excessive bail or fine, or cruel punishment, prohibited.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

Cited: Commonwealth ex rel. Lawton v. Gordon (1923), 197 Ky. 367, 247 S. W. 45; Waggoner v. Commonwealth (1934), 254 Ky. 200, 71 S. W. (2d) 421; Casey County Board of Education v. Luster (1955), 282 S. W. (2d) 333; Day v. Caudill (1957), 300 S. W. (2d) 45; Huff v. Commonwealth (1966), 406 S. W. (2d) 831.

NOTES TO DECISIONS

Cross-References. See note to Const., § 16. Braden v. Lady (1955), 276 S. W. (2d) 664.

ANALYSIS

1. In general.
2. Application.
3. Bail.
4. —Habeas corpus.
5. —Peace bonds.
6. Common law.
7. Fines.
8. —Imprisonment.
9. Punishment.
10. —Appeal.
11. —Death penalty.
12. —Deterrence.
13. —Disproportionate.
14. —Habitual criminals.
15. —Imprisonment.
16. —Judgment.
17. —Jurisdiction.
18. —Life imprisonment.
19. — —Without parole.
20. —Prisoners.
21. —Verdicts.

1. In General.

To violate this section, the penalties must be manifestly excessive and cruel. Harper v. Commonwealth (1892), 93 Ky. 290, 14 K. L. R. 163, 19 S. W. 737. See Fry v. Commonwealth (1915), 166 Ky. 670, 179 S. W. 604; Lakes v. Goodloe (1922), 195 Ky. 240, 242 S. W. 632.

2. Application.

This section has reference to the law fixing the punishment, not to a sentence assessed within the statutory limits. Bradley v. Commonwealth (1941), 288 Ky. 416, 156 S. W. (2d) 469.

This section applied to amount and duration of punishment as well as form or means. Weber v. Commonwealth (1946), 303 Ky. 56, 196 S. W. (2d) 465.

This section applied to legislative as well as judicial action. Weber v. Commonwealth (1946), 303 Ky. 56, 196 S. W. (2d) 465.

3. Bail.

Where the defendant had been released on bond but, after a change of venue, the judge of the court to which venue was changed, on his own motion, held a hearing and revoked the bond, although there was evidence that the offense might have been committed in self-defense, the defendant was entitled to bail in a reasonable amount not to exceed the amount originally fixed. Marcum v. Broughton (1969), 442 S. W. (2d) 307.

4. —Habeas Corpus.

Defendant who was held under excessive bail in violation of this section could properly petition for writ of habeas corpus. Adkins v. Regan (1950), 313 Ky. 695, 233 S. W. (2d) 402.

5. —Peace Bonds.

Peace bond of $5,000, required of husband on charge of wife beating, constituted excessive bail in violation of this section. Adkins v. Regan (1950), 313 Ky. 695, 233 S. W. (2d) 402.

6. Common Law.

In the case of common-law offenses, where the law does not prescribe any maximum penalty, the jury may not act arbitrarily but must be controlled by the nature and enormity of the offense, and an excessive verdict, apparently given under the influence of passion or prejudice, will be set aside; but the Court of Appeals has no right to say a penaity is cruel and unconstitutional unless it clearly and manifestly so appears. Weber v. Commonwealth (1946), 303 Ky. 56, 196 S. W. (2d) 465.

7. —Fines.

Law providing for fine upon railroad company of not less than $100 nor more than $500 for the offense of failing to give certain signals at highway crossings was not unconstitutional as imposing an excessive fine. Louisville, H. & St. L. Ry. Co. v. Commonwealth (1898), 104 Ky. 35, 20 K. L. R. 371, 46 S. W. 207.

A fine of $5,000 imposed by a jury on finding a party to an action guilty of a criminal contempt arising from his having corruptly and with intent to obstruct the administration of justice procured, by bribes and threats, witnesses for the adverse party, who had been summoned to testify in the action, to leave the state pending the action is

DISTRIBUTION OF THE POWERS OF GOVERNMENT

§ 27. Powers of government divided among legislative, executive and judicial departments.—The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Cross-References. Executive branch, KRS chs. 11 to 15.

Judicial branch, KRS chs. 21 to 30.

Legislative branch, KRS chs. 6, 7.

Opinions of Attorney General. It is a violation of KRS 61.^{096} and Const., §§ 27 and 28 for a person to serve as a member of the general assembly and the Kentucky real estate board at the same time. OAG 68-43.

An incompatibility exists between the office of state representative and the position of county district library trustee. OAG 69-163.

Cited: Louisville & N. R. Co. v. Garrett (1913), 231 U. S. 304, 58 L. Ed. 229, 34 Sup. Ct. 48; Fleming v. Trowsdale (1898), 85 Fed. 189; Douglas Park Jockey Club v. Grainger (1906), 146 Fed. 414; Tucker v. Hubbert (1912), 196 Fed. 849; Lynch v. Johnson (1968), 291 Fed. Supp. 906; Taylor v. Commonwealth (1830), 26 Ky. (3 J. J. Marsh.) 401; Taylor v. Beckham (1900), 108 Ky. 278, 56 S. W. 177; Pratt v. Breckinridge (1901), 112 Ky. 1, 23 K. L. R. 1356, 65 S. W. 136; Bullitt v. Sturgeon (1907), 127 Ky. 332, 32 K. L. R. 215, 105 S. W. 468, 14 L. R. A. (n. s.) 268; Greene v. Caldwell (1916), 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 604; Dunlap v. Littell (1923), 200 Ky. 595, 255 S. W. 280; Mercer v. Coleman (1929), 227 Ky. 797, 14 S. W. (2d) 144; Campbell v. Commonwealth (1929), 229 Ky. 264, 17 S. W. (2d) 227, 63 A. L. R. 932; Adkins v. Commonwealth (1929), 232 Ky. 312, 23 S. W. (2d) 277; Rouse v. Johnson (1930), 234 Ky. 473, 28 S. W. (2d) 745, 70 A. L. R. 1077; Estes v. State Highway Comm. (1930), 235 Ky. 86, 29 S. W. (2d) 583; Arbogast v. Weber (1933), 249 Ky. 20, 60 S. W. (2d) 144; Lyttle v. Wilson (1934), 252 Ky. 392, 67 S. W. (2d) 498; Meade County Board of Education v. Powell (1934), 254 Ky. 352, 71 S. W. (2d) 638; Royster v. Brock (1935), 258 Ky. 146, 79 S. W. (2d) 707; Rentz v. Campbell County (1935), 260 Ky. 242, 84 S. W. (2d) 44; County Board of Education v. Goodpaster (1935), 260 Ky. 198, 84 S. W. (2d) 55; In re Constitutionality of House Bill No. 222 (1936), 262 Ky. 437, 90 S. W. (2d) 692, 103 A. L. R. 1085; Grieb v. National Bond & Inv. Co. (1936), 264 Ky. 289, 94 S. W. (2d) 612; Commonwealth ex rel. Ward v. Harrington (1936), 266 Ky. 41, 98 S. W. (2d) 53; In re Sparks (1936), 267 Ky. 93, 101 S. W. (2d) 194; Louisville Bar Assn. v. Yonts (1937), 270 Ky. 503, 109 S. W. (2d) 1186; Kerr v. Louisville (1937), 271 Ky. 335, 111 S. W. (2d) 1046; Burton v. Mayer (1938), 274 Ky. 245, 118 S. W. (2d) 161; Bard v. Board of Drainage Comrs. (1938), 274 Ky. 491, 118 S. W. (2d) 1013; Bloemer v. Turner (1939), 281 Ky. 832, 137 S. W. (2d) 387; Morgan County v. Governor of Kentucky (1941), 288 Ky. 532, 156 S. W. (2d) 498; Crook v. Schumann (1942), 292 Ky. 750, 167 S. W. (2d) 836; Goodpaster v. Foster (1944), 296 Ky. 614, 178 S. W. (2d) 29; Kentucky Alcoholic Beverage Control Board v. Klein (1946), 301 Ky. 757, 192 S. W. (2d) 735; Hobson v. Kentucky Trust Co. (1946), 303 Ky. 493, 197 S. W. (2d) 454; Dicken v. Kentucky State Board of Education (1947), 304 Ky. 343, 199 S. W. (2d) 977; Dieruf v. Louisville & Jefferson County Board of Health (1947), 304 Ky. 207, 200 S. W. (2d) 300; Fraysure v. Kentucky Unemployment Compensation Comm. (1947), 305 Ky. 164, 202 S. W. (2d) 377; Elrod v. Willis (1947), 305 Ky. 225, 203 S. W. (2d) 18; Williams v. Board of Louisville & Jefferson County Children's Home (1947), 305 Ky. 440, 204 S. W. (2d) 490; Robertson v. Schein (1947), 305 Ky. 528, 204 S. W. (2d) 954; Henry v. Parrish (1948), 307 Ky. 559, 211 S. W. (2d) 418; Manning v. Sims (1948), 308 Ky. 587, 213 S. W. (2d) 577, 5 A. L. R. (2d) 1154; Masonic Widows & Orphans Home & Infirmary v. Louisville (1948), 309 Ky. 532, 217 S. W. (2d) 815; Kentucky State Fair Board v. Fowler (1949), 310 Ky. 607, 221 S. W. (2d) 435; Preston v. Clements (1950), 313 Ky. 479, 232 S. W. (2d) 85; In re May (1952), 249 S. W. (2d) 798; Borders v. Cain (1952), 252 S. W. (2d) 903; Guthrie v. Curlin (1953), 263 S. W. (2d) 240; Jackson v. Randolph (1958), 311 S. W. (2d) 541; Frankfort v. Triplett (1963), 365 S. W. (2d) 328; Stovall v.

Eastern Baptist Institute (1964), 375 S. W. (2d) 273; Board of Education of Ashland School Dist. v. Chattin (1964), 376 S. W. (2d) 693; Freeman v. Danville Tobacco Board of Trade, Inc. (1964), 380 S. W. (2d) 215; Louisville & Jefferson County Planning & Zoning Comm. v. Coin (1964), 382 S. W. (2d) 861; Lovern v. Brown (1965), 390 S. W. (2d) 448; Fiscal Court of Jefferson County v. Anchorage (1965), 393 S. W. (2d) 608; Gering v. Brown Hotel Corp. (1965), 396 S. W. (2d) 332; Southeastern Displays, Inc. v. Ward (1967), 414 S. W. (2d) 573; Murphy v. Cranfill (1967), 416 S. W. (2d) 363.

NOTES TO DECISIONS

Cross-References. See also notes to Const., § 28.

ANALYSIS

1. Purpose.
2. Delegation of power.
3. Infringement of power.

1. Purpose.

This section intends to divide the sovereign power, which at one time existed in one person under the divine right of a king, into three separate and distinct departments. Commonwealth v. Associated Industries (1963), 370 S. W. (2d) 584.

2. Delegation of Power.

KRS 337.510 and 337.520, fixing minimum wages for public laborers, are not an unconstitutional delegation of legislative power to private persons, associations, or corporations in contravention of Const., §§ 27 to 29. Baughn v. Gorrell & Riley (1949), 311 Ky. 537, 224 S. W. (2d) 436.

Ordinance requiring mayor's approval of junkyard location for licensing was, absent any guidelines for such official to follow pursuant to such approval, unconstitutional delegation of authority. Turner v. Peters (1959), 327 S. W. (2d) 958.

KRS 157.305, authorizing public aid to private institutions for education of exceptional children, while failing to prescribe very definite standards by which board of education was to proceed thereunder, nevertheless did not constitute invalid delegation of legislative authority under this section and Const., § 28. Butler v. United Cerebral Palsy of Northern Kentucky, Inc. (1961), 352 S. W. (2d) 203.

3. Infringement of Power.

Under this section and Const., § 28, it was for Court of Appeals to appoint replacement for its deceased clerk, and appointment thereof by governor was infringement by executive branch upon judicial branch. In re Appointment of Clerk of Court of Appeals (1957), 297 S. W. (2d) 764.

§ 28. One department not to exercise power belonging to another.— No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Opinions of Attorney General. It is a violation of KRS 61.096 and Const., §§ 27 and 28 for a person to serve as a member of the general assembly and the Kentucky real estate board at the same time. OAG 68-43.

An incompatibility exists between the office of state representative and the position of county district library trustee. OAG 69-163.

Under this section the legislature would have no constitutional authority to reserve to itself the power to appoint members of the various state boards and commissions whose duties pertain to the executive branch of the government. OAG 70-64.

Since the position of "Special Master," an appointive position made by the federal district court whose duties are to hear the evidence in a particular case and file a report with the circuit judge who then renders a decision, is neither a federal office nor a judicial office, there is no constitutional objection, either under this section or under Const., § 237, to the position being held by a member of the general assembly. OAG 70-163.

Cited: Louisville & N. R. Co. v. Garrett (1913), 231 U. S. 304, 58 L. Ed. 229, 34 Sup. Ct. 48; Fleming v. Trowsdale (1898), 85 Fed. 189; Douglas Park Jockey Club v. Grainger (1906), 146 Fed. 414; Tucker v. Hubbert (1912), 196 Fed. 849; Lynch v. Johnson (1968), 291 Fed. Supp. 906; Purnell v. Mann (1898), 105 Ky. 87, 20 K. L. R. 1146, 48 S. W. 407; Taylor v. Beckham (1900), 108 Ky. 278, 21 K. L. R. 1735, 56 S. W. 177, 94 Am. St. 357, 49 L. R. A. 258; Greene v. Caldwell (1916), 170 Ky. 571, 186 S. W. 648; Dunlap v. Littell (1923), 200 Ky. 595, 255 S. W. 280; Estes v. State Highway Comm. (1930), 235 Ky. 86, 29 S. W. (2d) 583; Royster v. Brock (1935), 258 Ky. 146, 79 S. W. (2d) 707; Rentz v. Camp-

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Judicial review.

1. In General.

The governor is charged by the constitution and law with the duty of preserving the peace and quiet of the state and protecting the life and property of its citizens and to accomplish this end, he may use all the military forces of the state. Franks v. Smith (1911), 142 Ky. 232, 134 S. W. 484, Ann. Cas. 1912D, 319, L. R. A. 1915A, 1141.

2. Judicial Review.

The governor's power to send troops into a county to inquire into alleged lawlessness prevailing there is clear under this section, and his reasons or motives for doing so may not be questioned by the Court of Appeals. Begley v. Louisville Times Co. (1938), 272 Ky. 805, 115 S. W. (2d) 345.

§ 76. Power of governor to fill vacancies.—He shall have the power, except as otherwise provided in this Constitution, to fill vacancies by granting commissions, which shall expire when such vacancies shall have been filled according to the provisions of this Constitution.

Cross-References. Vacancies to be filled by governor, Const., § 152; KRS 63.190.

NOTES TO DECISIONS

ANALYSIS

1. Circuit judges.
2. Court appointment.
3. Court of Appeals.
4. Inferior officers.
5. Legislative appointment.
6. State officers.

1. Circuit Judges.

Governor had authority to fill vacancy in office of circuit judge. Hancock v. Queenan (1956), 294 S. W. (2d) 92.

2. Court Appointment.

Law authorizing fiscal court of county to fill vacancies in office of county judge is not unconstitutional, the governor, after the appointment, commissioning the appointee as provided in Const., § 140. Frost v. Johnston (1936), 262 Ky. 592, 90 S. W. (2d) 1045.

3. Court of Appeals.

No commission was required from governor for clerk appointed by Court of Appeals as was required when governor had power to appoint. In re Appointment of Clerk of Court of Appeals (1957), 297 S. W. (2d) 764.

4. Inferior Officers.

The power of the governor to fill vacancies under this section is limited by the provisions of Const., § 152. Rouse v. Johnson (1930), 234 Ky. 473, 28 S. W. (2d) 745, 70 A. L. R. 1077.

Under this section and Const., § 152, the legislature may prescribe by law the method of filling vacancies in county or district offices. Barton v. Brafford (1936), 264 Ky. 480, 95 S. W. (2d) 6.

5. Legislative Appointment.

Appointment to office is an executive power and therefore a power which can be exercised by the legislature only where the duties of the office pertain to the legislative department. Pratt v. Breckinridge (1901), 112 Ky. 1, 23 K. L. R. 1356, 65 S. W. 136, overruling Purnell v. Mann (1898), 105 Ky. 87, 20 K. L. R. 1146, 48 S. W. 407; Poyntz v. Shackelford (1900), 107 Ky. 546, 21 K. L. R. 1323, 54 S. W. 855; Sweeney v. Coulter (1900), 109 Ky. 295, 22 K. L. R. 399, 57 S. W. 470.

The legislature had no right to designate or to itself elect members of the state highway commission and a law by which the legislature attempted to do so was invalid. Sibert v. Garrett (1922), 197 Ky. 17, 246 S. W. 455.

6. State Officers.

Only the governor may fill a vacancy in a state office. Pratt v. Breckinridge (1901), 112 Ky. 1, 23 K. L. R. 1356, 65 S. W. 136.

§ 77. Power of governor to remit fines and forfeitures, grant reprieves and pardons.—No power to remit fees.—He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspec-

tion. In cases of treason, he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth's Attorney in penal or criminal cases.

Cross-References. Pardon of person convicted of dueling, Const., § 240.

Parole of prisoners, KRS ch. 439.

Opinions of Attorney General. The governor has power to pardon infractions of state law but he does not have the power to remit fines inflicted for infractions of municipal ordinances. OAG 61-742.

Fines can be probated but not costs. OAG 66-225.

NOTES TO DECISIONS

ANALYSIS

1. In General.

Only provision of law for modification of sentence was power conferred on governor by this section to commute, reprieve, or pardon. Wooden v. Goheen (1953), 255 S. W. (2d) 1000.

2. Commutation.

3. —Effect.

4. ——Parole.

A prisoner convicted under the indeterminate sentence law and given from ten to 20 years' confinement in penitentiary, which was commuted by the governor to eight to 20 years, after eight years is not entitled to parole, as under the parole act he must serve the minimum term provided by law for the crime before he is eligible to parole. Alford v. Hines (1920), 189 Ky. 203, 224 S. W. 752.

5. Fines.

6. —Remission.

7. ——By Circuit Court.

Action of circuit court in remitting fine imposed by jury on verdict of guilty to misdemeanor charge was improper assumption of authority vested in governor by this section. Commonwealth v. Ballinger (1967), 412 S. W. (2d) 576.

8. Forfeiture.

9. —Bond.

This section does not prevent the governor from depriving the clerk, sheriff, or commonwealth's attorney of their fees in penal and criminal cases if the remission of the forfeiture of a bond is exercised before judgment on the forfeiture is rendered. Williams v. Shelbourne (1898), 102 Ky. 579, 19 K. L. R. 1924, 44 S. W. 110. See Commonwealth v. French (1908), 130 Ky. 744, 114 S. W. 255.

10. Pardon.

11. —Conditional.

The governor, in granting a pardon, may attach to it any condition, precedent or subsequent, which is not illegal, immoral, or impossible of performance. Commonwealth ex rel. Meredith v. Hall (1939), 277 Ky. 612, 126 S. W. (2d) 1056.

The granting of conditional pardons is governed by the common law. Commonwealth ex rel. Meredith v. Hall (1939), 277 Ky. 612, 126 S. W. (2d) 1056.

12. ——Failure to Comply.

The governor may expressly reserve the right to revoke a conditional pardon without notice to the convict, but, in the absence of such a reservation, the convict is entitled to a judicial determination of the question whether the conditions of the pardon have been violated. Commonwealth ex rel. Meredith v. Hall (1939), 277 Ky. 612, 126 S. W. (2d) 1056.

Where conditional pardon provided that the convict could "by executive order be rearrested and reconfined" for failure to comply with terms of pardon, such rearrest and reconfinement, though

THE JUDICIAL DEPARTMENT

THE JUDICIAL DEPARTMENT

§ 109. The judicial power — Unified system — Impeachment. — The judicial power of the commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the general assembly shall remain inviolate.

Compiler's Notes. The general assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the constitution and the substitution in lieu thereof of new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

Section 2 of this amendment read: "It further is proposed as a part of this amendment and as a schedule of transitional provisions, for the purposes of this amendment, that:

"1. The judges of the Court of Appeals in office on the effective date of this amendment shall become justices of the Supreme Court, for the duration of their terms, and the election of successors shall be in accordance with those terms.

"2. The circuit judges in office on the effective date of this amendment shall be continued therein for the duration of their terms. The term of office of eight years provided in this amendment for circuit judges shall apply to the circuit judges elected at the election at which this amendment is adopted.

"3. The term of office of judges of the Court of Appeals created by this amendment shall be deemed to commence as of the first Monday in January, 1976. The vacancies existing on that date by virtue of no election having been held for the office in November, 1975 shall be filled in accordance with section 152 of the present constitution and section 118 as created by this amendment.

"4. The term of office of judges of the District Court shall be deemed to commence as of the first Monday in January, 1978, and judges shall be elected at the regular election next preceding that date. The District Court shall be constituted and organized as of the first Monday in January, 1978.

"5. The quarterly courts, county courts as judicial bodies, justices' courts and police courts in existence on the effective date of this amendment shall continue in existence until the first Monday in January, 1978. For that period those courts shall continue to be governed by the present constitution and none of the provisions of this amendment shall apply to them, except that those courts shall be deemed a part of the unified judicial system

THE CIRCUIT COURT

§ 112. Location — Circuits — Composition — Administration — Jurisdiction. — (1) Circuit Court shall be held in each county.

(2) The Circuit Court districts existing on the effective date of this amendment to the constitution shall continue under the name "Judicial Circuits," the general assembly having power upon certification of the necessity therefor by the Supreme Court to reduce, increase or rearrange the judicial districts. A judicial circuit composed of more than one county shall be as compact in form as possible and of contiguous counties. No county shall be divided in creating a judicial circuit.

(3) The number of circuit judges in each district existing on the effective date of this amendment shall continue, the general assembly having power upon certification of the necessity therefor by the Supreme Court, to change the number of circuit judges in any judicial circuit.

(4) In a judicial circuit having only one judge, he shall be the chief judge. In judicial circuits having two or more judges, they shall select biennially a chief judge, and if they fail to do so within a reasonable time, the Supreme Court shall designate the chief judge. The chief judge shall exercise such authority and perform such duties in the administration of his judicial circuit as may be prescribed by the Supreme Court. The Supreme Court may provide by rules for administration of judicial circuits by regions designated by it.

(5) The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law.

Compiler's Notes. The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

For initial terms of office see compiler's note, Const., § 109.

Cross-References. Circuit judges, KRS ch. 22A.

Circuit courts, KRS ch. 23A.

Judicial circuits, KRS ch. 23A.

Kentucky Bench & Bar. An Overview of Kentucky's New Court System, Vol. 41, No. 2, April 1977 Ky. Bench & Bar 13.

Chenault, Administration of Judicial Circuits by Region, Vol. 43, No. 3, July 1979, Ky. Bench & Bar 8.

Pennington, Regionalization of Kentucky's Trial Courts, Vol. 46, No. 3, July, 1982, Ky. Bench & Bar 19.

Kentucky Law Journal. Kentucky Law Survey, Garvey and Doutt, Civil Procedure, 68 Ky. L.J. 529 (1979-1980).

Leathers, Rethinking Jurisdiction and Notice in Kentucky, 71 Ky. L.J. 755 (1982-83).

Opinions of Attorney General. Members of the new Court of Appeals are required to be legal residents of the Supreme Court districts they represent but not of a division which has no geographic delineation within the district. OAG 76-487.

Cited: Lee v. Porter, 598 S.W.2d 465 (Ky. App. 1980); Commonwealth ex rel. Stumbo v. Wilson, 622 S.W.2d 912 (Ky. 1981).

NOTES TO DECISIONS

ANALYSIS

1. Jurisdiction.
2. —Misdemeanor offenses.
2.1. —Lesser included offenses.
3. Checks and balances.

1. Jurisdiction.

The Circuit Court can have no more jurisdiction to issue a declaratory judgment than to issue a writ of mandamus or prohibition against the Supreme Court or against its members and administrative staff in their official capacities. Ex parte Farley, 570 S.W.2d 617 (Ky. 1978).

Where public advocate brought declaratory judgment action to force inspection of records compiled for purpose of Supreme Court review of death sentences, jurisdiction was vested exclusively in Supreme Court, not Circuit Court. Ex parte Farley, 570 S.W.2d 617 (Ky. 1978).

Where jurisdiction initially attached in the circuit court, it was not lost when that court, during the course of the trial, dismissed one

felony count of a three-count indictment; jurisdiction having attached by reason of the felony charge was not divested by its final determination. Broughton v. Commonwealth, 596 S.W.2d 22 (Ky. App. 1979).

Where a grand jury returned an indictment charging defendant with burglary in the first degree and persistent felony offender in the first degree, the issuance of the indictment on the felony charge terminated the jurisdiction in the district court and placed the sole jurisdiction in the circuit court; therefore, the district court had no jurisdiction to accept the defendant's plea to a reduced charge and there was no double jeopardy when the defendant was subsequently arraigned in the circuit court. Commonwealth v. Hamblem, 628 S.W.2d 345 (Ky. App. 1981).

2. —Misdemeanor Offenses.

After an indictment has been returned incorporating misdemeanor offenses with related felony offenses, the misdemeanor offenses may be tried in the circuit court along with the felony offenses. Keller v. Commonwealth, 594 S.W.2d 589 (Ky. 1980).

2.1. —Lesser Included Offenses.

District court has no power to dispose of any charges which constitute lesser included offenses of felony charged in indictment. Jackson v. Commonwealth, 633 S.W.2d 61 (Ky. 1982).

3. Checks and Balances.

The constitutional check-and-balance relationship between the legislative and judicial branches of the government exists by virtue of Const., §§ 110, 111, this section, § 113, and § 120. Ex parte Auditor of Pub. Accounts, 609 S.W.2d 682 (Ky. 1980).

The District Court

§ 113. Location — Districts — Composition — Administration — Trial commissioners — Jurisdiction. — (1) District Court shall be held in each county.

(2) The Circuit Court districts existing on the effective date of this amendment shall continue for District Court purposes under the name "Judicial Districts," the general assembly having power upon certification of the necessity therefor by the Supreme Court to reduce, increase or rearrange the districts. A judicial district composed of more than one county shall be as compact in form as possible and of contiguous counties. No county shall be divided in creating a judicial district.

(3) Each judicial district created by this amendment initially shall have at least one district judge who shall serve as chief judge and there shall be such other district judges as the general assembly shall determine. The number of district judges in each judicial district thereafter shall be determined by the general assembly upon certification of necessity therefor by the Supreme Court.

(4) In a judicial district having only one judge he shall be the chief judge. In those districts having two or more judges they shall select biennially a chief judge and if they fail to do so within a reasonable time, the Supreme Court shall designate the chief judge. The chief judge shall exercise such authority and perform such duties in the administration of his district as may be prescribed by the Supreme Court.

(5) In any county in which no district judge resides the chief judge of the district shall appoint a trial commissioner who shall be a resident of such county and who shall be an attorney if one is qualified and available. Other trial commissioners with like qualifications may be appointed by the chief judge in any judicial district upon certification of the necessity therefor by the Supreme Court. All trial commissioners shall have power to perform such duties of the district court as may be prescribed by the Supreme Court.

(6) The district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the general assembly.

Compiler's Notes. The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

For commencement of initial terms of office see compiler's notes, Const., § 109.

Cross-References. District courts, KRS ch. 24A.

Golden v. Blakeman (1928), 223 Ky. 517, 3 S. W. (2d) 1095.

The limitation may be pleaded against a claimant who relies on a paper title traceable to a Kentucky or Virginia patent issued before 1820 by one who shows (a) possession by himself or a predecessor under a recorded title founded on a later grant from Kentucky when the constitution became effective, or (b) five years' possession prior to commencement of action against him. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

2. Pleading and Proof.

When in a case the issue of proving title from commonwealth is res adjudicata, or the issue is confined to the location of a single dividing line rather than of an entire boundary, title from commonwealth need not be proved. Reynolds v. Cobb (1941), 286 Ky. 329, 150 S. W. (2d) 702.

3. Adverse Possession.

In action to quiet title wherein defendants claimed under a Virginia patent and plaintiffs claimed that defendants' claim was unenforceable because of limitation, case presented a question of adverse possession, with burden resting upon plaintiffs to establish title by prescription. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

Invocation of this section reduces the issue to one of adverse possession. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

4. Defective Title.

Possessor may recover though his title be defective if it is sufficient to give color of title. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

5. Five-Year Period.

Where land was occupied by plaintiff's predecessors and possession continued for over 15 years under deed describing land by metes and bounds, expansion of plaintiff's claim under subsequent deeds to adjacent lands did not cause cessation of limitation running in favor of original boundaries. Pioneer Coal Co. v. Taylor & Crate (1925), 5 Fed. (2d) 770.

This section was adopted in 1891, and there could be no recovery of land after the lapse of five years, during which time appellee and those claiming under him were in peaceable possession of the land. Steele v. Jackson (1910), 140 Ky. 821, 131 S. W. 1032.

6. Statutes.

Law providing that no action shall be maintained for recovery of land under this section unless plaintiff has paid taxes for 20 years preceding action was unconstitutional. Flinn v. Blakeman (1934), 254 Ky. 416, 71 S. W. (2d) 961.

7. Title of Record.

This section protects only persons in possession under a patent from the commonwealth issued to them or their vendors, the words "title of record" meaning a title from the commonwealth. Shaw v. Robinson (1901), 111 Ky. 715, 23 K. L. R. 998, 64 S. W. 620. See Golden v. Blakeman (1928), 223 Ky. 517, 3 S. W. (2d) 1095.

A record title otherwise valid is affected hereby only when superiority of title is based upon a Kentucky or Virginia patent issued before 1820. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

The function of a title of record is to support possession and describe its extent. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

Title of record means a title emanating from the commonwealth of Kentucky but not necessarily a title dependent for its validity upon seniority of origin as between a pre-1820 Kentucky or Virginia patent and a later Kentucky patent. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

8 Virginia Compact.

This section does not violate the Compact with Virginia nor impair vested rights. Warfield Natural Gas Co. v. Ward (1941), 286 Ky. 73, 149 S. W. (2d) 705.

9. Void Patents.

The limitation prescribed in this section may not be asserted as a defense by one who claims under a void patent. Golden v. Blakeman (1928), 223 Ky. 517, 3 S. W. (2d) 1095. See Warfield Natural Gas Co. v. Danks (1938), 271 Ky. 452, 112 S. W. (2d) 674.

§ 252. Houses of reform to be established and maintained.—It shall be the duty of the General Assembly to provide by law, as soon as practicable, for the establishment and maintenance of an institution or institutions for the detention, correction, instruction and reformation of all persons under the age of eighteen years, convicted of such felonies and such misdemeanors as may be designated by law. Said institution shall be known as the "House of Reform."

Cited: Stone v. Board of Trustees of Houses of Reform (1898), 19 K. L. R. 1977, 44 S. W. 984.

NOTES TO DECISIONS

ANALYSIS

1. Maintaining of inmates.
2. Pre-establishment.

1. Maintaining of Inmates.

Section 254 of the constitution does not apply to inmates of the house of reform but only to persons confined to the penitentiary as provided in Const., § 253, and neither this section nor Const., § 253 or 254 require the commonwealth to maintain the inmates of the house of reform and the legislature may constitutionally require, by law, counties to maintain the inmates of the house of reform sentenced thereto by them. Lang v. Commonwealth (1920), 190 Ky. 29, 226 S. W. 379.

Under this section the legislature is within its authority to require each of the counties of the state to maintain the inmates of the house of reform who may be sentenced to confinement there from the county. Lang v. Commonwealth (1920), 190 Ky. 29, 226 S. W. 379. See Tincher v. Commonwealth ex rel. Shanks (1925), 208 Ky. 661, 271 S. W. 1066.

2. Pre-establishment.

Until the legislature obeyed the mandate of this section, it was proper to adjudge the confinement of offenders under the age of 18 years in the state penitentiary. Willard v. Commonwealth (1894), 96 Ky. 148, 16 K. L. R. 343, 28 S. W. 151.

§ 253. Working of penitentiary prisoners—When and where permitted.—Persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary; and the General Assembly shall not have the power to authorize employment of convicts elsewhere, except upon the public works of the Commonwealth of Kentucky, or when, during pestilence or in case of the destruction of the prison buildings, they cannot be confined in the penitentiary.

That section 253 of the Constitution be so amended that the Commonwealth of Kentucky may use and employ outside of the walls of the penitentiaries in such manner and means as may be provided by law, persons convicted of felony and sentenced to confinement in the penitentiary for the purpose of constructing or reconstructing and maintaining public roads and public bridges or for the purpose of making and preparing material for public roads and bridges, and that the Commonwealth of Kentucky may, by the use and employment of convict labor outside of the walls of the penitentiary by other ways or means, as may be provided by law, aid the counties for road and bridge purposes, work on the State farm or farms. (Amendment, proposed Acts 1914, ch. 93, ratified, November, 1915.)

Cross-References. Working of prisoners, KRS 197.070, 197.110 to 197.160, 197.200.

Cited: Briskman v. Central State Hosp. (1954), 264 S. W. (2d) 270.

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Destruction of prison building.
3. Lease of labor.

1. In General.

Section 254 of the constitution does not apply to inmates of the house of reform but only to persons confined to the penitentiary as provided in this section. Lang v. Commonwealth (1920), 190 Ky. 29, 226 S. W. 379.

2. Destruction of Prison Building.

Under the exceptions in this section, when a workshop in the penitentiary has been burned, the convicts employed there may be temporarily employed outside the walls in another building until the burned building can be replaced, as the exception is not to be limited to the case of destruction of all the prison buildings. Harris v. Commonwealth (1901), 23 K. L. R. 775, 64 S. W. 434.

3. Lease of Labor.

In accordance with this section, where a law authorized the leasing of convict labor to be performed within the walls of the penitentiary, a contract thereunder was not against public policy, and such contract by board of prison commissioners leasing convict labor and authorizing the assignment of the lease subject to all regulations concerning government of convicts was valid. Reliance Mfg. Co. v. Board of Prison Comrs. (1914), 161 Ky. 135, 170 S. W. 941.

§ 254. Control and support of convicts—Leasing of labor.—The Commonwealth shall maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts, and the labor only of convicts may be leased.

Cross-References. Penitentiaries, KRS ch. 197.

NOTES TO DECISIONS

ANALYSIS

1. Construction.
2. Application.
3. Convicts.
4. Leasing contracts.
5. Supplies.

1. Construction.

It is the duty of the commonwealth to furnish the convict with all supplies and look to the convict's condition of health. Department of Welfare v. Brock (1947), 306 Ky. 243, 206 S. W. (2d) 915.

2. Application.

This section applies only to persons confined to the penitentiary under Const., § 253 and not to inmates of the house of reform established under Const., § 252. Lang v. Commonwealth (1920), 190 Ky. 29, 226 S. W. 379.

3. Convicts.

One held in jail awaiting trial for murder but, before trial, found to be of unsound mind and committed to a state hospital was not a convict within the meaning of this section or a prisoner within the meaning of subsection (3) of KRS 202.380; thus his estate was not relieved from the statutory liability for board and maintenance furnished him during his confinement in the state hospital. Briskman v. Central State Hosp. (1954), 264 S. W. (2d) 270.

4 Leasing Contracts.

Under a law authorizing the leasing of convict labor the control of which is in accord with this section, a contract thereunder cannot be attacked as against public policy, the public policy of state being fixed by law. Reliance Mfg. Co. v. Board of Prison Comrs. (1914), 161 Ky. 135, 170 S. W. 941.

5. Supplies.

A city ordinance regulating sale and inspection of milk is inapplicable to supply of milk for inmates of state penitentiary, as state prisons are matters of state, not local jurisdiction. Board of Councilmen v. Commonwealth (1932), 243 Ky. 633, 49 S. W. (2d) 548.

§ 255. Frankfort is state capital.—The seat of government shall continue in the city of Frankfort, unless removed by a vote of two-thirds of each House of the first General Assembly which convenes after the adoption of this Constitution.

Opinions of Attorney General. A state employe who was required to use his car several times daily to travel from a warehouse outside of Frankfort to his office in Frankfort was entitled to charge for mileage between the warehouse and the city limits of Frankfort but not between the city limits and his office. OAG 61-896.

Cited: Leep v. Kentucky State Police (1960), 340 S. W. (2d) 600.

MODE OF REVISION

COMMONWEALTH of Kentucky, Petitioner,

v.

George F. WILLIAMSON, Judge, Trimble Circuit Court, Respondent.

Court of Appeals of Kentucky.

March 16, 1973.

Rehearing Denied May 4, 1973.

Attorney General and Commonwealth's attorney petitioned in the name of the Commonwealth for an order prohibiting Trimble Circuit Court judge from entertaining motions for "shock probation" made by two prisoners who were sentenced to terms in the state penitentiary by the Trimble Circuit Court. The Court of Appeals, Cullen, C., held that Act which provides for "shock probation" of persons convicted of crime, and which reasonably may be considered as establishing a period, not unreasonably long, during which the court retains a limited control over its judgments in criminal cases, does not invade or encroach upon the executive power and is not unconstitutional.

Petition denied.

1. **Criminal Law** ⇐982.3(2)

After a court has lost statutory control over its judgment imposing a criminal sentence, the court cannot exercise the power, whether called probation, parole or pardon, to suspend the execution of the sentence.

2. **Constitutional Law** ⇐72

Criminal Law ⇐982.2

Act which provides for "shock probation" of persons convicted of crime, and which reasonably may be considered as establishing a period, not unreasonably long, during which the court retains a limited control over its judgments in criminal cases, does not invade or encroach upon the executive power of clemency and is not unconstitutional. KRS 439.265; Const. § 77.

Ed W. Hancock, Atty. Gen., Robert W. Willmott, Jr., Asst. Atty. Gen., Frankfort, Bruce R. Hamilton, Commonwealth Atty., LaGrange, for petitioner.

CULLEN, Commissioner.

Maintaining that Chapter 169 of the Acts of 1972 (compiled as KRS 439.265), which provides for "shock probation" of persons convicted of crime, is unconstitutional, the Attorney General and the Commonwealth's Attorney for the district embracing Trimble County have petitioned in the name of the Commonwealth for an order prohibiting Judge George F. Williamson of the Trimble Circuit Court from entertaining motions for "shock probation" made by two prisoners who were sentenced by the Trimble Circuit Court to terms in the state penitentiary. Being of the opinion that the statute is not unconstitutional, this court is denying the petition.

The pertinent provisions of the statute, which became effective June 16, 1972, are as follows:

"(1) Subject to the provisions of KRS Chapter 439, any county or circuit court may, upon motion of the defendant made not earlier than thirty days nor later than sixty days after the defendant has been delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon such terms as the court determines. The court which tried the defendant may also suspend the sentence and place the defendant on probation upon its own motion, made within the same thirty day period.

(2) The court shall consider any motion filed in accordance with subsection 1 of this section within sixty days of the filing date of that motion, and shall enter its ruling within ten days after considering the motion. The defendant may, in the discretion of the trial court, have the right to a hearing on any motion he may file, or have filed for him, that

would suspend further execution of sentence. Any court order granting or denying a motion to suspend further execution of sentence is not reviewable.

* * *"

On December 19, 1972, Clifford Dean was sentenced by the Trimble Circuit Court to a term of one year in the penitentiary, and Paul Thomas Pusey was sentenced to two one-year terms, to run consecutively. On January 19, 1973, each moved for "shock probation" under the 1972 Act. The Commonwealth's attorney resisted the motions, and before the circuit court undertook to make a ruling the instant proceeding for prohibition was instituted.

The contention of the petitioners is that the Act in effect seeks to confer on the courts the *pardon* power, which is exclusively relegated to the executive branch of government by Section 77 of the Kentucky Constitution. They rely upon Brabandt v. Commonwealth, 157 Ky. 130, 162 S.W. 786; Huggins v. Caldwell, 223 Ky. 468, 3 S.W.2d 1101; Commonwealth v. Polsgrove, 231 Ky. 750, 22 S.W.2d 126; Adkins v. Commonwealth, 232 Ky. 312, 23 S.W.2d 277; Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029; Grantz v. Grauman, Ky., 302 S.W.2d 364, and Commonwealth v. Fanelli, Ky., 445 S.W.2d 126.

[1] The cited cases are authority for the proposition that after a court has lost statutory control over its judgment imposing a criminal sentence, the court cannot exercise the power, whether called probation, parole or pardon, to suspend the execution of the sentence. However, those cases do not undertake to define time limits within which a court's statutory power of control over its judgments must be confined.

Prior to the adoption of the Rules of Civil Procedure and the Rules of Criminal Procedure, when by statute circuit courts having terms had control over their judgments during the term in which they were rendered, and circuit courts of continuous session had control over their judgments for 60 days, it was held, in Bax v. Fletcher, Ky., 261 S.W.2d 662, that a circuit court of continuous session, at any time within the 60-day period for which it retained control of its judgments, could set aside a judgment of conviction of crime and grant probation, notwithstanding that the defendant already had commenced serving the sentence.

The holding in Bax v. Fletcher was in substance that the action of a court, during the statutory period for which it retained control over its judgments, in setting aside a judgment of conviction of crime and granting probation, was not an invasion of or encroachment upon the executive power of clemency.

[2] It is our opinion that the 1972 Act here in question reasonably may be considered as establishing a period, not unreasonably long, during which the court retains a limited control over its judgments in criminal cases. The Act says in substance that until the expiration of the period allowed for probating the sentence it is not final as regards commitment. We see in this no substantial difference in principle from the complete 60-day control held valid in Bax v. Fletcher. Other cases supporting the same principle are Commonwealth v. Kazee, Ky., 252 S.W.2d 20, and Commonwealth v. Stevens, Ky., 378 S.W.2d 799.

The 1972 Act seems to have a worthy purpose of providing in effect for a 30-to-60 day observation period to be served before the sentencing court is required to reach a final decision as to the granting of probation. We see nothing unconstitutional in giving the courts that kind of limited control over their judgments.

Our specific limited holding is that the Act does not invade or encroach upon the executive power.

The petition is denied.

PALMORE, C. J., and MILLIKEN, OSBORNE, REED, STEINFELD and STEPHENSON, JJ., sitting.

All concur.

James P. HALLAHAN, Appellant,

v.

Charles W. FERGUSON, Appellee.

Court of Appeals of Kentucky.

Feb. 16, 1973.

Rehearing Denied May 4, 1973.

Suit against county court clerk for judgment in amount of total loss in salary for four-year term of office for which plaintiff received plurality of votes in election later held to be void. The Jefferson Circuit Court, Common Pleas Branch, First Division, Michael O. McDonald, J., entered summary judgment as prayed for, and defendant clerk appealed. The Court of Appeals, Cullen, C., held that where plaintiff was never elected to office of magistrate for district because vote-casting process in which he received plurality of the votes was not a valid election and he was not deprived of fruits of the office as a result of clerk's failure to put third candidate's name on the ballot, he was not entitled to recover damages against clerk in amount equal to salary of the office.

Judgment reversed with directions to enter judgment dismissing complaint.

Elections ⇐57

Where plaintiff was never elected to office of magistrate for district because vote-casting process in which he received plurality of the votes was not a valid election and he was not deprived of fruits of the office as a result of clerk's failure to put third candidate's name on the ballot, he was not entitled to recover damages against clerk in amount equal to salary of the office.

Cecil Davenport, Louisville, for appellant.

Jack M. Lowery, Louisville, for appellee.

CULLEN, Commissioner.

In the November 1969 election for Second District Magistrate in Jefferson County, Kentucky, Democratic candidate Charles W. Ferguson was the putative winner in that he received 26,722 votes as against 25,237 for the only other person on the ballot, Republican candidate Lee Swan. However, the election was held void in a suit brought by Theodore Rhode, who had filed nomination papers as a candidate of the American Party but whose name the county court clerk had failed to put on the ballot. See Ferguson v. Rhode, Ky., 449 S.W.2d 758.

After the election was held void, Ferguson brought the instant suit against the county court clerk, James P. Hallahan, alleging that "as a direct and proximate result" of the clerk's failure to put Rhode's name on the ballot, "the plaintiff was denied and prevented from assuming the office of Magistrate for the said District, and has sustained a loss in salary thereby of $7,200 per annum or a total loss in salary for the four-year term of $28,800." Ferguson's complaint prayed for judgment in the amount of $28,800. The circuit court entered summary judgment as prayed for. Hallahan has appealed.

While there is considerable discussion in the briefs as to whether the county court clerk, in the absence of personal negligence or deliberate wrongdoing, could be subjected to *any* liability for omission of Rhode's name from the ballot, we do not find it necessary to pass on that question because

[7] Appellant next challenges an instruction to the jury as having been overbroad and therefore improper. The instruction required that guilt be found if the defendant

(ii) Knowingly concealed from Dr. Haynes the fact that he had *on prior occasions* obtained prescriptions for Dilaudid or another controlled substance, Percodan, from Dr. Collins of South Shore, Kentucky, Dr. Hamner of Danville, Kentucky, and/or Dr. Royalty of Lexington, Kentucky .... (Emphasis added.)

Appellant asserts that such permitted the jury to find him guilty if on *any* occasion, whether within two days, two weeks, or two years of seeing Dr. Haynes, he received prescriptions from the other physicians. We agree that the instruction does encompass a wide spectrum of time; however, we also observe that it is sufficiently specific as to cover the time frame with which the action was concerned. Accordingly, we are unable to discover how appellant was prejudiced by such instruction.

[8] Finally, it is alleged that the court improperly denied appellant's motion to separate for trial the charges relating to Dr. Royalty and Dr. Haynes. *Jones v. Commonwealth*, Ky., 457 S.W.2d 627 (1970), provides a very clear guideline for this Court's posture in resolving this issue. In discussing a similar contention of error arising from the trial court's failure to direct separation of trials, the appellate Court stated:

> As in the instance of any other error, the appellate court addresses consideration to the question of prejudice.... If viewing the trial in retrospect, it is clear that there was in fact no prejudice, there is no occasion for a reversal. Here the evidence of guilt was overwhelming and the penalties imposed were the minimums. Under these circumstances the error must be considered harmless. *Jones* at 629.

We find those words to be of dispositive application to the case at bar. Appellant has failed to convince us that any actual prejudice resulted from the failure to separate. Certainly any testimony relating to appellant's association with Dr. Royalty could as readily have been admissible under the common scheme theory referred to above as in an attempt to establish the elements of the charges themselves. Thus, even were severance mandated, and we are not of the opinion that such was required, without a showing of actual prejudice there can be no grounds for reversal.

The judgment is affirmed.

All concur.

COMMONWEALTH of Kentucky, Appellant,

v.

James O. CORNELIUS, Appellee.

Court of Appeals of Kentucky.

Sept. 26, 1980.

As Modified Oct. 31, 1980.

On appeal by the Commonwealth from a judgment of the Jefferson Circuit Court, Earl O'Bannon, Jr., J., which upheld the constitutionality of statute granting sentencing courts the power of parole, the Court of Appeals, Gudgel, J., held that the power to grant parole is vested exclusively in the executive branch of government; therefore, statute which vests sentencing judges with the power to grant parole to any misdemeanant serving a sentence of imprisonment is unconstitutional and void.

Reversed and remanded.

Wintersheimer, J., filed a concurring opinion.

1. Criminal Law ⇐982.3(2)

No statute or rule of court authorizes a sentencing court to conditionally discharge a prisoner already serving a sentence.

2. Criminal Law ⇐982.6(4)

Circuit Court order of conditional discharge was a mere nullity which had no legal efficacy, and the public officials holding appellee in custody should not have honored it and released him.

3. Criminal Law ⇐982.3(2)

Appellee's release was not justified in light of the Circuit Court's power to grant shock probation pursuant to statute, since the motion on which his release was based was not made until April 11, 1979, more than four months after he commenced service of his sentence. KRS 439.265.

4. Criminal Law ⇐1134(3)

Although the Court of Appeals would be entirely justified in reversing circuit court judgment on the ground that the district court was without jurisdiction to order appellee's release on conditional discharge, the Court of Appeals would, for reasons of judicial economy, consider the issue whether the county judge executive's statutory authority (later terminated by repeal of statute) to grant parole to misdemeanants serving sentences was validly delegated to the judges of district and circuit courts, especially since resolution of this issue was of great importance to everyone connected with the Kentucky criminal justice system and the general public. KRS 439.175.

5. Constitutional Law ⇐74
Pardon and Parole ⇐2

Power to grant parole is vested exclusively in the Executive Branch of government; therefore, statute which vests sentencing judges with the power to grant parole to any misdemeanant serving a sentence of imprisonment is unconstitutional and void. KRS 439.177; Const. §§ 27, 28, 77.

Edward L. Schoenbaechler, J. Bruce Miller, Louisville, for appellant.

Joseph Martin, Jr., Louisville, for appellee.

Before GUDGEL, HOGGE and WINTERSHEIMER, JJ.

GUDGEL, Judge.

This is an appeal from a judgment of the Jefferson Circuit Court. We granted discretionary review to determine whether KRS 439.177 is unconstitutional.[1] We hold that it is and reverse.

On December 4, 1978, appellee, James O. Cornelius, pleaded guilty to the misdemeanor offense of possession of dangerous drugs in the Jefferson District Court. He was sentenced to, and commenced service of, a prison term of one year. On January 15, 1979, he filed a motion for shock probation which was overruled. A similar motion was overruled by a different judge on January 16, 1979. On April 11, 1979, he filed a motion to suspend the remainder of his sentence. On the same day the district judge who had sentenced him heard the motion and entered an order directing that he be conditionally discharged for two years.

The Commonwealth appealed to Jefferson Circuit Court from the April 11, 1979 order of conditional discharge. In the appeal the Commonwealth's sole contention was that appellee was paroled under the authority of KRS 439.177, and that this statute, which grants sentencing courts the power of parole, is unconstitutional. The Jefferson Circuit Court held that the statute was constitutional on the basis that it must be presumed to be constitutional. Accordingly, it entered a judgment affirming the April 11, 1979 order. We granted discretionary review.

[1-3] We are immediately faced with determining whether this Court should address the issue raised by the Commonwealth in light of the settled policy in this jurisdiction against considering constitutional questions if an appeal may be disposed of on other grounds. In the case at bar the appellee did not make a motion for parole under KRS 439.177, and the court did not

1. As to whether the Attorney General may seek an adjudication that a statute is unconstitutional. *See Commonwealth ex rel. Hancock v. Paxton*, Ky., 516 S.W.2d 865 (1974).

parole him. Rather, he made a post-sentence motion to suspend his sentence, and the court ordered that he be conditionally discharged, although no statute or rule of court authorizes a sentencing court to conditionally discharge a prisoner already serving a sentence. In short, the court's order was a mere nullity which had no legal efficacy, and the public officials holding appellee in custody should not have honored it and released him. Nor was his release justified in light of the court's power to grant shock probation pursuant to KRS 439.265, because the motion on which his release was based was not made until April 11, 1979, more than four months after he commenced service of his sentence. *See, Commonwealth ex rel. Hancock v. Melton*, Ky., 510 S.W.2d 250 (1974).

[4] Thus, we would be entirely justified in reversing the judgment of the circuit court on the ground that the district court did not have jurisdiction to order appellee's release on conditional discharge, thereby avoiding the issue of whether KRS 439.177 is constitutional. However, as pointed out by appellant, KRS 439.177 in one form or another has been on the statute books for many years. Undoubtedly, many district and circuit courts grant parole under it to persons serving sentences almost daily. Therefore, ultimately a case will arise which squarely presents the issue raised in this appeal. For that matter, this case could be the one, for nothing we have said so far would preclude the district court on remand from entering an order granting appellee parole, thereby precipitating another appeal. Accordingly, for reasons of judicial economy, we elect to consider the issue raised in this appeal, especially since resolution of the issue is of great importance to everyone connected with our criminal justice system and the general public. In short, we believe that five years after the enactment of our new judicial article there is a pressing need to determine whether the county judge/executive's statutory authority to grant parole to misdemeanants serving sentences, which was terminated by repeal of KRS 439.175 effective January 2, 1978, was validly delegated to the judges of district and circuit courts.

[5] The present KRS 439.177 was enacted in 1978 and became effective June 17 of that year. The statute provides, in substance, that any misdemeanant serving a sentence may petition the sentencing court for parole privileges and that after the sentencing judge studies the record of the petitioner, the judge may, in his or her discretion, order that he be paroled. Appellant contends that the power to grant parole is vested exclusively in the executive branch of our government, and that KRS 439.177, which authorizes judges to exercise such power, violates Sections 27, 28 and 77 of our Constitution and is void. We agree.

It has been settled for many years that the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, not a judicial one, and that legislation conferring upon officers of the judiciary the authority to exercise such a function violates Sections 27, 28 and 77 of our Constitution and is void. *Huggins v. Caldwell*, 223 Ky. 468, 3 S.W.2d 1101 (1928); *Brabandt v. Commonwealth*, 157 Ky. 130, 162 S.W. 786 (1914). Here, the statute under consideration, KRS 439.177, vests sentencing judges with the power to grant parole to any misdemeanant serving a sentence of imprisonment. Since the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, KRS 439.177, which vests the judiciary with the right to make such a decision is unconstitutional and void. As noted by Chief Justice Palmore in *Peck v. Condor*, Ky., 540 S.W.2d 10 (1976):

> [W]hen a person has been convicted of a crime and has begun to serve his sentence the function and authority of the trial court is finished. What then happens to the prisoner is entirely in the bailiwick of the executive branch of government, and is no business of the courts, including the trial court.[2]

2. This statement is necessarily limited in scope by virtue of the sentencing court's power to grant shock probation and work release. *See* KRS 439.265; KRS 439.179.

The judgment is reversed and remanded for further proceedings consistent with this opinion.

HOGGE, J. concurs.

WINTERSHEIMER, Judge, concurring.

Probation and parole are commonly confused. Parole is an executive function while probation is judicial in nature. The so-called shock probation is directly attributed to the sentencing judge by statute. However, the effect of all such procedures results in the release of a convicted person prior to the completion of the full sentence. The principal concern of any system of early release must be accountability by the releasing authority whether that be judicial or executive. It appears there is a gap in the system as it relates to misdemeanor offenses. If the Legislature chooses to fill that void it should do so and include in the statute requirements relative to the reporting of pending parole hearings to the prosecutors, victims, public, and press. Those who grant early release must be directly and publicly accountable for their actions.