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William H. Fortune

University of Kentucky College of Law, fortunew@uky.edu

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Venue of Civil Actions in Kentucky

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Venue of Civil Actions in Kentucky

BY WILLIAM H. FORTUNE*

CONTENTS

	Page
HISTORY AND INTRODUCTION	498
I. DISTINCTION BETWEEN JURISDICTION AND VENUE	502
II. DISCUSSION OF THE STATUTES	506
A. <i>Actions Involving Land</i>	506
B. <i>Actions Against Corporations</i>	512
C. <i>Actions for Injury to Person or Property</i>	518
D. <i>Transitory Actions</i>	521
III. MAJOR VENUE PROBLEMS IN THE STATE	526
A. <i>Property or Person Outside the State</i>	526
B. <i>Actions Involving More Than One Claim or Theory of Relief</i>	533
C. <i>Multiple Defendants</i>	543
D. <i>Counterclaims, Cross-claim and Third-Party Complaints</i>	543
E. <i>Dismissals and the Statute of Limitations</i>	548
F. <i>Change of Venue</i>	550
IV. THE PATH TO REFORM	552
A. <i>The Ohio Experience</i>	552
B. <i>Recommendations for Kentucky</i>	557
1. <i>Regulation by the Court of Appeals</i>	557
2. <i>Specific Recommendations</i>	559
a. <i>The Broad-Based Rule</i>	559
b. <i>Multiple Defendants</i>	561
c. <i>Multiple Claims</i>	562
d. <i>Transfer of Actions Where Venue is Improper</i>	563
e. <i>Transfer of Actions Where Venue is Proper</i>	564

* J.D. University of Kentucky (1964). Assistant Professor of Law at University of Kentucky College of Law since 1969, teaching Civil Procedure and Federal Courts.

HISTORY AND INTRODUCTION

In 1851 the Kentucky General Assembly followed the lead of New York State¹ and enacted a Code of Civil Practice² to replace the antiquated system of common law pleading. The Code with revised somewhat and re-enacted by the General Assembly in 1854.³ Johnson's Code, as it was called, regulated civil practice in the state until 1877. Title V of Johnson's Code was designated "The County in which an Action may be Brought," and contained eighteen sections setting out rules to govern the location of lawsuits. This was Kentucky's original venue code. As well as regulating the venue of such actions as partition of real property⁴ and settlement of estates,⁵ the Code also addressed itself to problems of the time, designating the venue of actions to sell slaves⁶ and to sue turnpike road companies⁷ and the owners of mail stages.⁸

In 1877 Johnson's Code was replaced by a code which came to be known as Carroll's Code, after its chief annotater, John D. Carroll.⁹ The venue sections were re-enacted without substantial change (although references to slaves were omitted) as Title V of the Code of 1877 and styled "The county in which Action must or may be Brought." The use of the word *must* is significant. It indicates a growing confusion as to whether some of the sections in Title V expressed geographical limitations on the power of courts to act. If they did limit the power of courts to act they were jurisdictional rather than merely venue statutes.

Practice in Kentucky was to be governed by Carroll's Code for seventy-six years, until July 1, 1953, the effective date of the Rules of Civil Procedure. In 1950, however, the General As-

¹ The New York Code of 1848 (the Field Code) was the precursor of all practice codes in the United States. C. CLARK, CODE PLEADING, 21 (2d ed. 1947).

² Kentucky Code of Practice, enacted March 22, 1851, prepared by M.C. Johnson, James Harlan, and P. S. Loughborough.

³ Kentucky Code of Civil Practice, enacted in 1854, prepared by M.C. Johnson, James Harlan, and J.W. Stevenson [hereinafter cited as Johnson's Code].

⁴ Johnson's Code § 93.

⁵ Johnson's Code § 96.

⁶ Johnson's Code § 97.

⁷ Johnson's Code § 103.

⁸ Johnson's Code § 102.

⁹ Civil and Criminal Codes of Practice of Kentucky, enacted in 1876, prepared by Richard A. Buckner and Joshua F. Bullitt, Commissioners, and Alvin Duvall, Umpire. Carroll's first annotated edition appeared in 1888. Code sections will be hereinafter referred to as "CC" and the Code itself as "Carroll's Code."

sembly reacted to sentiments for simpler and more flexible rules of practice by establishing a Civil Code Committee to study the existing code and recommend changes.¹⁰ The Committee was restricted to proposing changes which would not abridge, enlarge, or modify the substantive rights of litigants.¹¹

It was not surprising that the Civil Code Committee¹² turned to the Federal Rules of Civil Procedure [hereinafter referred to as FRCP] which had been enacted in 1938. Sentiment among the bench and bar was strongly in favor of the Federal Rules¹³ as they provided a well researched and thoroughly tested model in simplicity and liberality.

The Federal Rules did not, however, purport to deal with venue, other than to make it clear that venue was not jurisdiction and was a personal defense waived if not timely asserted.¹⁴ To make it clear that the Rules did not regulate venue, FRCP 82 provided that "the rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." The Kentucky Civil Code Committee apparently at one time considered a broad revision of the venue sections¹⁵ but ultimately submitted a draft to the Court of Appeals which, like the Federal Rules, did not purport to regulate venue. The Committee substantially adopted FRCP 82¹⁶ and the comments to that rule provide in part,¹⁷ "[T]hey [jurisdiction and venue] appear more as matters of substantive law addressing themselves to legislative action, rather than a proper subject for court rules dealing with practice and procedure."

¹⁰ Ch. 151, [1950] Ky. Acts 609.

¹¹ *Id.* at § 2.

¹² Committee: Judge Porter Sims, Chairman, Hon. Morton J. Holbrooke, Secretary, Judge Lawrence S. Grauman, Judge A. J. Bratcher, Hon. T. C. Carroll, Hon. Marion W. Moore, Hon. Allen Prewitt; Staff: Judge Robert U. Cullen, Judge Watson Clay, Hon. Ben B. Fowler, Hon. George M. Catlett.

¹³ Fowler and Catlett, *Report of the Civil Code Committee*, 16 Ky. St. B.J. 23 (1951).

¹⁴ FED. R. CIV. P. [hereinafter cited as FRCP] 12(h) provides that the defense of improper venue is waived if not asserted in the initial motion to dismiss under FRCP 12 or, in the event no motion to dismiss is made, in the initial answer.

¹⁵ Clay, *What about the Civil Code Revision?*, 15 Ky. St. B.J. 68, 70 (1950): In one Code we have many provisions relating to the venue of different types of actions. It is proposed to broaden the base of venue and to make it more uniform and specific.

¹⁶ The only difference between FRCP 82 and Ky. R. Civ. P. [hereinafter cited as KRCP] 82 is the substitution of "any court of this Commonwealth" for "the United States district courts."

¹⁷ Kentucky Rules of Civil Procedure Tentative Draft, at 237 (undated, on file University of Kentucky Law Library).

Furthermore, the Committee stated they felt precluded from proposing regulation of venue by the terms of the act establishing the Committee, which stipulated that no changes in the substantive law were to be made. To drive the point home the Court of Appeals itself added the following sentence to proposed Rule 18, governing the joinder of claims, "The right of a plaintiff to join claims in his complaint is subject to the statutes governing venue." The Kentucky Rules of Civil Procedure [hereinafter KRCP], as adopted, did not then regulate venue except to make it clear that venue was a personal defense which was waived if not timely asserted.¹⁸

At the time of the adoption of the Civil Rules in 1952 the venue sections of Carroll's Code were transferred intact into the Kentucky Revised Statutes. The General Assembly of 1952 authorized the Court of Appeals to promulgate rules of civil procedure with the initial rules to become effective on July 1, 1953.¹⁹ At this time the Civil Code Committee had made its report and the legislature knew the sections of Carroll's Code which would be supplanted by the new rules and those which would not. Thus, the legislature repealed the sections to be supplanted and authorized the Statute Revision Commission to transfer unrepealed sections of the Code to the Kentucky Revised Statutes.²⁰ The Statute Revision Commission transferred the venue sections of Carroll's Code to Chapter 452 of the Statutes where they appear as Kentucky Revised Statutes [hereinafter KRS] §§ 452.400—452.480. The effective date of the transfer was July 1, 1953.

It is unfortunate that the Civil Code Committee did not see fit to grapple with the monster venue had come to be. The venue code was designed for practice in 1851, not 1951, and had not been particularly inspired in the beginning. Amendments²¹ and court decisions²² had confused reasonably straight-forward statutes. The problem was compounded by the fact that venue

¹⁸ KRCP 12.08.

¹⁹ Ch. 18, [1952] Ky. Acts 29.

²⁰ *Id.*

²¹ For example the revision of 1898 (ch. 59, [1898] Ky. Acts) turned CC 65, a simple section governing actions to settle estates, into an unintelligible jumble.

²² For example the decision in *Ocean Accident and Guarantee Corporation v. Milford Bank*, 33 S.W.2d 312 (Ky. 1930), discussed in detail in the section of this paper on the venue of actions against corporations.

provisions could now be found throughout the Kentucky Revised Statutes as a result of the adoption of substantive laws with their own venue sections.²³ The Civil Code Committee furthermore must have known that practice provisions retained as code pleading relics were not in keeping with the spirit of the new procedural rules and that conflict would arise.

The refusal of the Committee to deal with venue was doubly unfortunate because the leading authority on venue in the United States had, in 1951, specifically addressed himself to Kentucky's venue problems and suggested a simple and broad-based venue code. George Neff Stevens at the time was Dean of the University of Buffalo Law School and had just completed a comprehensive analysis of the venue statutes of all 48 states, which was printed in the *MICHIGAN LAW REVIEW*.²⁴ In this article Dean Stevens pointed out a number of venue problems inherent in most codes and proposed a model venue code to serve, as he put it, as a guide "for those who are interested in eliminating needless confusion in this field."²⁵ Dean Stevens was solicited by the *KENTUCKY LAW JOURNAL* to address himself specifically to Kentucky's problems. Because of his ties to Kentucky he accepted the opportunity and his article appears in volume 40 of the *KENTUCKY LAW JOURNAL* in a symposium on the reform of civil procedure,²⁶ designed to assist the Civil Code Committee which was then engaged in the work thrust upon them by the 1950 General Assembly.²⁷

Stevens analyzed the general problems in Kentucky but attempted no specific analysis of the statutes. He proposed a venue code almost identical to that he had proposed in the *MICHIGAN LAW REVIEW*.²⁸ It was, of course, not adopted or apparently even considered by either the committee or the legislature.

²³ For example adoption, where venue is regulated by Kentucky Revised Statutes [hereinafter KRS] § 199.470.

²⁴ Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1951). Stevens is now a professor at University of California, Hastings College of Law.

²⁵ *Id.* at 322.

²⁶ Stevens, *Venue Reform in Kentucky—A Proposal*, 40 KX. L.J. 58 (1951). Stevens has a master's degree from the University of Louisville and taught there from 1936 to 1941.

²⁷ Sims, *The Work of Kentucky's Civil Code Committee*, 40 KX. L.J. 7 (1951).

²⁸ Stevens, *supra* note 24, at 332-340; Stevens, *supra* note 26, at 66-75. The only difference between the original model and that proposed for Kentucky is that the proposed code for Kentucky defines the place of residence of a prisoner.

Stevens found Kentucky to have five problems connected with venue: 1) confusion with subject matter jurisdiction; 2) difficulties in joining actions; 3) confusion with jurisdiction over the person; 4) difficulties in joining parties; and 5) irrational grounds for venue. Of these general problems only the first has been solved. KRCP 12.08 laid to rest any confusion between venue and subject matter jurisdiction.²⁹ But the other four problem areas remain unsolved today.

The purpose of this paper is primarily to analyze the statutes themselves (which has never been done) and secondarily to suggest the path to reform. The paper is divided into four parts. Part I is a brief history of the confusion in Kentucky between jurisdiction and venue. Some exposure to this history is essential to an understanding of the older cases, which in some areas are the only cases in point. Part II is an analysis of the four major venue statutes in KRS Chapter 454: KRS § 452.400—actions involving land; KRS § 452.450—actions against corporations; KRS § 452.460—actions for personal injury or property damage; and KRS § 452.480—transitory actions. Part III is an analysis of the major venue problems in Kentucky: (a) actions involving a non-resident or property outside the state; (b) actions involving more than one claim or theory of relief; (c) the problem of multiple defendants; (d) cross-claims and third-party complaints; (e) dismissals and the statute of limitations; and (f) changes of venue. Part IV traces the Ohio experience and suggests that the Kentucky legislature and Court of Appeals follow the example set by Ohio.

I. DISTINCTION BETWEEN JURISDICTION AND VENUE

The distinction between venue and subject matter jurisdiction is fundamental. Subject matter jurisdiction is the power to adjudicate a particular matter whereas venue is the statutory designation of the county or district in which that power should ordinarily be exercised. The parties cannot confer subject matter jurisdiction on a court by waiver or agreement, while improper

²⁹ This was done by providing that venue is a personal defense waived if not timely asserted whereas subject matter jurisdiction is a limitation on the authority of the court to proceed and can be raised at any time.

venue is a personal defense for the protection of the defendant and may be waived.³⁰

In Kentucky the distinction between venue and subject matter jurisdiction was recognized and articulated in the early case of *Gillen v. Illinois Cent. R.R. Co.*³¹ The plaintiff sued in McCracken county for fire damage to her realty allegedly caused by defendant's negligence. At the trial it was ascertained that the land did not lie in McCracken county and the court, on defendant's motion, dismissed the case for lack of "jurisdiction." Civil Code [hereinafter CC] § 62 (now KRS § 452.460) provided that an action for injury to realty *must* be brought in the county in which the land is located. The defendant in *Gillen* had not, however, objected to the maintenance of the suit in McCracken county in his answer and amended answer. The Court of Appeals reversed the dismissal and flatly held that Title V (Section 62 through 77) of Carroll's Codes, headed "County in which an Action Must or May Be Brought" was not jurisdictional but only an expression of venue, and the defense of improper venue was waived unless raised in the manner specified for personal defenses.³²

The *jurisdiction* of the McCracken circuit court was said to be governed by CC § 966 (now KRS § 23.010) which provides that "[the circuit court] has original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal . . ." To illustrate the difference between jurisdiction and venue the Court hypothesized a suit brought for the amount in the case at bar (\$800) in the McCracken *quarterly* court. The amount in controversy would be beyond the jurisdiction of the quarterly court³³ and the objection to jurisdiction would not be waived by the failure to include the defense in the demurrer or answer.³⁴ The *Gillen* case is well reasoned and articulated. The opinion is particularly enlightened

³⁰ C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS 149 (2d ed. 1970); Stevens, *supra* note 24, at 317; cf. *Nierbo Co. v. Bethlehem Shipping Co.*, 308 U.S. 165 (1935).

³¹ 125 S.W. 1047 (Ky. 1910). This case was discussed by Professor Stevens in some detail in his analysis of Kentucky's venue problems.

³² 125 S.W. 1047, 1050 (Ky. 1910).

³³ KRS § 25.410 (formerly CC § 1051) provides that the jurisdiction of the quarterly courts is limited to actions where the amount in controversy, exclusive of interest and costs, is \$500 or less.

³⁴ 125 S.W. 1047, 1048 (Ky. 1910).

in recognizing that the difference between subject matter jurisdiction and venue is fundamental and statutes must be construed so as not to confuse the two.

Prior to the adoption of the Civil Rules in 1953, unfortunately the Court of Appeals did not adhere to the clear reasoning of the *Gillen* case. The Court, although sometimes recognizing the personal nature of venue,³⁵ at times regarded the venue statutes as if they expressed jurisdictional limitations on the power of courts.³⁶ Undoubtedly the failure of Carroll's Code to deal with the problem of how and when to attack improper venue was a primary factor in the confusion. Improper venue was called lack of jurisdiction by defendant's counsel, as lack of jurisdiction was a specific ground which could be raised by special demurrer and could not be waived,³⁷ and the courts often accepted that designation without question.³⁸ The fact that most of the code provisions used the mandatory "must be brought" may have contributed to the confusion.

The Court of Appeals at one point concluded that part of the venue code was jurisdictional and part merely a designation of proper venue. In *Britton v. Davis*³⁹ the Court held that a suit against an executor of an estate on a debt of the decedent was a matter of jurisdiction not venue. The Court first repeated the traditional definitions; "Venue is the county in which the action may or must be brought, while jurisdiction is the power to hear and determine the cause,"⁴⁰ but went on to draw a distinction between "actions of a transitory character, and those that are localized purely for the convenience of the defendants," and "certain classes of actions that are so localized with respect to their subject matter that only the court of a particular county has jurisdiction."⁴¹ In this latter category the Court put actions involving land, the settlement of estates and winding up of

³⁵ *James v. Holt*, 244 S.W.2d 159 (Ky. 1951); *Kentucky Utilities Co. v. Steenman*, 141 S.W.2d 265 (Ky. 1940); *de Charette v. St. Matthew's Bank and Trust Company*, 283 S.W. 410 (Ky. 1926).

³⁶ *Shadoin v. Sellars*, 4 S.W.2d 717 (Ky. 1928).

³⁷ CC § 92 enumerated the matters which could be raised by special demurrer. Lack of jurisdiction over the person and subject of the action were enumerated grounds; improper venue was not. CC § 118 provided that objections to the jurisdiction of the court could not be waived.

³⁸ *Stevens*, *supra* note 26, at 61.

³⁹ 103 S.W.2d 665 (Ky. 1937).

⁴⁰ *Id.* at 666.

⁴¹ *Id.* at 667.

corporations, and actions against estates for debts of the decedent.

The distinction drawn in *Britton* is between cases localized purely for the convenience of the parties and cases localized because the subject of the action seems to dictate that only a certain court should hear the matter. While the decisions in this era were in conflict, the *Britton* distinction approaches an adequate rationale of the Court's behavior. The Court may have felt that there was a real need for certain kinds of actions to be tried in certain counties regardless of the desire of the parties. Land cases are the obvious example. Geographical limitations on the bringing of personal injury actions, on the other hand, could be regarded as purely for the benefit of the defendant and thus be deemed waivable.⁴² The defense of improper venue in such a case bore the same consequences as a defense of lack of jurisdiction over the person.

In 1953 KRCP 12 supplanted CC § 92 and CC § 118 which together had governed the manner in which the defense of lack of jurisdiction over the person and over the subject matter were to be raised. KRCP 12 lumps improper venue with other personal defenses and provides clearly that the defense is waived if not properly raised, either by motion—in which case all personal threshold defenses must be raised—or by the initial answer if no motion to dismiss is made.⁴³ Case law has construed a motion to dismiss for failure to state a claim upon which relief may be granted as raising the defense of improper venue only if the impropriety of venue is evident on the face of the complaint; otherwise the filing of a motion to dismiss for failure to state a claim waives the defense of improper venue (as well as other personal threshold defenses such as improper service of process).⁴⁴

The enactment of KRCP 12 should have laid to rest any confusion between jurisdiction and venue, and, with the exception

⁴² "The provision of section 74 of the Civil Code of Practice that a personal injury action must be brought in the county in which the defendant resides, or in which the injury was done, is not an absolute requirement, but is one that must be invoked by the defendant if he wishes to compel compliance with it." *James v. Holt*, 244 S.W.2d 159, 160 (Ky. 1951).

⁴³ "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course." KRCP 12.08(1).

⁴⁴ *Licking River Limestone Co. v. Helton*, 413 S.W.2d 61 (Ky. 1967).

of *dictum* in one case,⁴⁵ the Court of Appeals has been consistent in deeming KRS §§ 452.400-452.500 (now in a chapter titled "Venue and Change of Venue") as mere designations of counties in which defendants have a right to insist that actions be tried.⁴⁶

II. DISCUSSION OF THE STATUTES

There are four venue statutes of general application, and most venue problems arise in the application of those statutes. They are: KRS §§ 452.400—actions involving lands; 452.450—actions against corporations; 452.460—actions for injury to person or property; and 452.480—transitory actions. The other statutes in the venue chapter are specific in nature and discussion will be restricted to the four general statutes with more specific statutes discussed only insofar as they relate to the general statutes.

The predictions as to the future actions of the Court of Appeals made in Parts II and III of this paper are predictions based on the statutes as they are now written. If a broadly based venue rule, as suggested in Part IV, is adopted by the legislature or the court, many of the suggestions made in Parts II and III will be moot.

A. *Actions Involving Land*

KRS § 452.400, requires the following actions to be brought in the county in which the subject of the action, or some part thereof, is situated:

- 1) Actions for the recovery of realty or an interest in realty;
- 2) actions for partition except actions brought for the partition of a decedent's estate among his heirs [which must be brought in the county in which the personal representative is qualified];
- 3) for the sale of real property of a person under disability pursuant to KRS Chapter 389 or for the sale of real prop-

⁴⁵ In *20th Century Coal Co. v. Taylor*, 275 S.W.2d 72 (Ky. 1955) the plaintiff by amended complaint asked that he be adjudged an interest in land located outside the county in which the suit was pending. The trial court granted the relief and the Court of Appeals reversed. In so doing the Court stated, "We finally come to a serious jurisdictional question, which involves the power of the court to adjudge the plaintiff an interest in land situated wholly in another county." 275 S.W.2d at 75. This unfortunate statement can be considered *dictum* as it does not appear in the opinion whether or not the defendant made a timely objection to the venue of the amended complaint.

⁴⁶ *Licking River Limestone Co. v. Helton*, 413 S.W.2d 61 (Ky. 1967); *Clark County National Bank v. Sanderson*, 316 S.W.2d 64 (Ky. 1958).

erty under a mortgage, lien, or other encumbrance or charge, except for the sale of realty to satisfy the debts of the decedent (in which case the action must be brought in the county in which the personal representative is qualified) and;

4) actions for injury to realty.

In considering whether the venue of an action is governed by KRS § 452.400 it is first necessary to determine whether the subject of the action is realty. "Land or real estate" is statutorily defined in Kentucky to include "lands, tenements, hereditaments and all rights thereto and interests therein, other than a chattel interest."⁴⁷ This is an encompassing definition⁴⁸ which includes easements and passways,⁴⁹ standing timber,⁵⁰ and subsurface minerals.⁵¹ A lease for a term of years, however, is deemed a "chattel real"⁵² and is not land or real estate within the meaning of the venue statutes.⁵³ Timber and subsurface minerals are converted from realty to personalty at the time of separation from the earth.⁵⁴ The Court has held that a contract for the sale of standing timber which contemplates immediate cutting works a constructive severance of the timber so that the contract is one for the sale of personalty rather than realty.⁵⁵ The execution of a mineral "lease" on the other hand does not serve to transform the minerals conveyed from realty to personalty. The "lease,"

⁴⁷ KRS § 446.010(13).

⁴⁸ "Tenements" and "hereditaments" are common law terms often used with the term "land" to define realty. The word "tenement" most commonly means a house or building. 42 AM. JUR. PROPERTY § 16 (1942). The word "hereditament" means something capable of being inherited. 42 AM. JUR. PROPERTY § 17 (1942). The Kentucky Court of Appeals has not found it necessary to hold something to be a "tenement" or "hereditament," apparently feeling that the term "land" includes things which at common law would have been deemed "tenements" or "hereditaments."

⁴⁹ Harp v. Brookshire, 248 S.W. 177 (Ky. 1923).

⁵⁰ Meehan v. Edwards, 18 S.W. 519 (Ky. 1892).

⁵¹ Williamson v. Williamson, 4 S.W.2d 392 (Ky. 1928).

⁵² Kentucky Tax Commission v. Jefferson Motel, Inc., 387 S.W.2d 293 (Ky. 1965).

⁵³ Edwards v. Bernstein, 21 S.W.2d 133 (Ky. 1929).

⁵⁴ Timber: Cheatham v. Head, 262 S.W. 622 (Ky. 1924); Minerals: Kennedy v. Hicks, 203 S.W. 318 (Ky. 1918).

⁵⁵ Cheatham v. Head, 262 S.W. 622 (Ky. 1924); Tillford v. Dotson, 51 S.W. 583 (Ky. 1899). In *Cheatham* the Court held that "immediate" meant within a reasonable time and that, on the facts of the case, two years was not an unreasonable time. This holding may have been dictated by the equities of the case. The defendant had sold the standing timber to a furniture company and then had sold the property under a general warranty deed to another party who knew of the sale of the timber. The Court's holding prevented the plaintiff from taking advantage of the covenant of general warranty.

which in the case of coal or stone is usually tantamount to an absolute conveyance⁵⁶ and in the case of oil and gas is a right to explore and take,⁵⁷ is deemed to be a grant of an interest in real estate.⁵⁸ The minerals remain an interest in realty, separate from the surface interest until actual separation from the surrounding earth, at which point the minerals become personality.⁵⁹

If the action is one for the "recovery" of realty KRS § 452.400(1) provides that it must be brought in the county in which the land is located. Ejectment and quiet title are examples of actions for the recovery of real estate.⁶⁰ An action for the recovery of real estate is essentially an action where the plaintiff asks the court to find that his interest in real property is superior to that of the defendant and to enter an order accordingly. The relief sought is *in rem*—an adjudication of rights in the property, rather than *in personam*—an order against the defendant personally.⁶¹ Actions for specific performance, for example, are not actions for the recovery of realty, as the court is being asked to order the defendant personally to convey property, and it has been held that actions for specific performance are not localized by KRS § 452.400 but are transitory, to be brought where the defendant resides or is summoned.⁶²

⁵⁶ *Williamson v. Williamson*, 4 S.W.2d 392 (Ky. 1928); *Kennedy v. Hicks*, 203 S.W. 318 (Ky. 1918).

⁵⁷ *Williams' Adm'r v. Union Bank & Trust Co.*, 143 S.W.2d 297, 299 (Ky. 1940).

⁵⁸ *Id.*

⁵⁹ *Cent. Ky. Nat. Gas Co. v. Stevens*, 120 S.W. 282 (Ky. 1909) held that an action by a lessor for accrued royalties was an action for the recovery of personality; *Kentucky Bank & Trust Co. v. Ashland Oil & Transportation Co.*, 310 S.W.2d 287 (Ky. 1958) held that the reserved royalty interest itself, as opposed to accrued royalties which are payable after the oil is extracted, was an interest in realty.

⁶⁰ *Daniels v. Gillum*, 262 S.W. 272 (Ky. 1924).

⁶¹ Historically "local" actions were actions where land was the subject matter of the action and the relief was *in rem*, or the action was in trespass where the title to the land was technically in question. These actions were required to be brought in the county in which the land was located. 1 J. MOORE, *FEDERAL PRACTICE* (hereinafter cited as MOORE) para. 0.142(2.-2) at 1463-66 (1964). MOORE lists the following *in rem* actions as historically local: quiet title, ejectment, foreclosure of a mortgage or vendor's lien, proceedings to cancel a mortgage, condemnation, suits to set aside a transfer, abatement of a nuisance, and partition. 1 MOORE para. 0.142 [2.-1] at 1457-58 (1964). Kentucky should hold all of these historic *in rem* actions to be within the scope of either KRS § 452.400 (1) or the more specific subsections, KRS §§ 452.400(2) and 452.400(3).

⁶² *Caudill v. Little*, 293 S.W.2d 881 (Ky. 1956). Suits for rescission of land contracts, as opposed to actions to set aside a transfer, are also deemed to be *in personam* and therefore not required to be brought in the county in which the land is located. 92 C.J.S. *Venue* § 30 at 739 (1955). Kentucky has acknowledged this principle in two old cases: *Thompson v. Elmore*, 18 S.W. 235 (Ky. 1892) and

(Continued on next page)

KRS § 452.400(2) and KRS § 452.400(3) merely provide that in the *in rem* actions of partition, foreclosure, and sale of real property of a person under disability,⁶³ venue is proper in the county in which the land is located. Both sections contain exceptions in the event the partition or forced sale is incident to the settlement of a decedent's estate.⁶⁴

Under certain conditions a plaintiff may attach property of the defendant at the commencement of an action as security for the satisfaction of any judgment recovered.⁶⁵ The Court of Appeals has made it clear that when the defendant is a resident and amenable to process that such an attachment does not alter the basic character of the case from a transitory action to one localized by KRS § 452.400(3).⁶⁶ If the defendant is a non-resident and

(Footnote continued from preceding page)

Todd v. Lancaster, 47 S.W. 336 (Ky. 1898). In the second of these cases, however, the defendant was a non-resident and the Court held that, in such a case, specific performance or rescission could be granted by the court in the county in which the land was located. The court had jurisdiction over the land and had the power to effectuate a decree of specific performance or rescission by simply adjudicating plaintiff the owner of the land. The action was then one for the "recovery of land" with venue proper in the county in which the land was located. The *Todd* case illustrates that specific performance or rescission can be ordered by a court with jurisdiction over either the land or the defendant; that the relief granted is *in personam* (and the action therefore transitory) so long as the defendant is within the state; that if the defendant is outside the state the relief is *in rem* and the action governed by KRS § 452.400(1).

⁶³ KRS § 389.010(13) also serves to localize an action for the sale of the property of a person under disability to the county in which the land is located.

⁶⁴ KRS § 452.400(2) excepts partition actions provided for in KRS § 452.420; KRS § 452.420 fixes the venue of suits to partition a decedent's property among his heirs in the county in which the personal representative is appointed. KRS § 452.400(3) excepts actions for the sale of real property for the debts of a decedent which, by virtue of KRS § 452.420, are to be brought in the county in which the personal representative qualified. The Court held in Galloway v. Craig, 92 S.W. 320 (Ky. 1906) that a foreclosure action pursuant to a mortgage executed by the decedent prior to his death could be maintained in the county where the land is located, unless the personal representative had already initiated an action in the county of his appointment for the sale of decedent's property to settle the estate. It is the general rule that a statute fixing venue for land actions controls over a statute fixing venue for actions against personal representatives. Annot., 93 A.L.R.2d 1199, 1209 (1964) citing *Cox v. Simmerman*, 98 S.W.2d 915 (Ky. 1936). In *Cox v. Simmerman*, however, it is clear that the action was not one for partition among the decedent's heirs and there was no conflict between the statutes.

⁶⁵ KRS § 425.184 provides for attachment at or after the commencement of the action against: non-residents, persons avoiding service of process, or persons who have or who are about to convey or remove property to defraud creditors. In the event the sole ground for attachment is that the defendant is a non-resident the action must be on a contract or judgment.

⁶⁶ In *Hatton v. Rogers*, 121 S.W. 698 (Ky. 1909) plaintiff sued a Kentucky resident on a debt, a transitory action required to be brought in the county in which the defendant resides or is summoned. Plaintiff sued in a county in which the defendant owned property, attaching the property at the commencement of the

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not amenable to process the attachment at the commencement of the action will convert the action to one *quasi-in-rem* with the plaintiff limited in his recovery to the value of the property seized.⁶⁷ The venue of such an action is in the county in which the property is located by virtue of KRS § 452.465, which fixes venue in actions against persons who may be served by a warning order attorney.⁶⁸

A court which enters an *in personam* judgment against a defendant may order the sale of defendant's land (or other property), wherever situated in the state, to satisfy the judgment.⁶⁹ The court has the power to order such a sale as an *incident* to the litigation properly before it and to afford complete relief between the parties.⁷⁰ Similarly if the plaintiff proceeds in an independent action against a debtor of the defendant to satisfy his judgment the court which entered the original judgment can decree the property of the third party sold.⁷¹

In an action for damages or for the recovery of personalty it may be necessary to make a finding as to the ownership of land. For example, an action for conversion of timber will require a finding that the plaintiff was owner of the land on which the timber grew. If so the court may make such a finding without regard to the location of the property even though the parties will be collaterally estopped from challenging this finding in a later proceeding.⁷²

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action. The Court held the venue of the action improper as the defendant neither resided nor was summoned in the county of suit.

⁶⁷ Harris v. Balk, 198 U.S. 215 (1904).

⁶⁸ KRS § 452.465 provides that actions against persons who may be proceeded against by warning order attorney must be brought in the county in which the defendant resides or has property subject to attachment, or the county in which a debtor of the defendant resides. The statute excepts actions mentioned in KRS §§ 452.400-452.425 and in 452.440 and 452.470. Under KRCp 4.05 the following types of defendants may be proceeded against by warning order: 1) non-resident individuals absent from the state; 2) corporations without an appointed process agent within the state; 3) a resident absent from the state for four months or who has departed to defraud creditors; 4) a resident who is avoiding service of process; and 5) an individual whose name or place of residence is unknown. Service by warning order does not authorize an *in personam* judgment.

⁶⁹ Hargis v. Hargis, 151 S.W.2d 417 (Ky. 1914).

⁷⁰ *Id.*

⁷¹ KRS § 452.440 fixes the venue of actions against debtors of defendants in the county in which the debtor resides or is summoned or in the county in which the original judgment was entered. Noe v. Brock, 91 S.W.2d 546 (Ky. 1936) makes it clear that such actions are not required by KRS § 452.400 to be maintained in the county in which the land is located.

⁷² In Cent. Ky. Nat. Gas Co. v. Stevens, 120 S.W. 282 (Ky. 1909) plaintiff

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If, however, the plaintiff by complaint or amended complaint seeks an order decreeing his rights in land superior to those of the defendant the action is one for the "recovery of land"—required by KRS § 452.400 to be brought in the county in which the land is located.⁷³ The fact that the plaintiff seeks incidental personal relief against the defendant, for example a personal judgment in a foreclosure action, does not affect the character of the action. For example, the venue of an action to set aside a fraudulent conveyance is in the county in which the land is located;⁷⁴ the action is for a personal judgment against the transferor, to have the conveyance to the transferee set aside, and to adjudicate the plaintiff a lien on the property. The gravamen of the plaintiff's action against the transferee is the adjudication of a superior right in real property and the transferee can insist that the action be maintained in the county in which the land is located.⁷⁵

Subsection (4) of KRS § 452.400 fixes the venue of actions for "injury to real property". Actions brought under this subsection are local rather than transitory, just as are foreclosure and quiet title actions, but the relief sought by the plaintiff is *in personam* rather than *in rem*. If the gravamen of the action can be considered to be injury to realty the suit must be brought in the county in which the land is located.⁷⁶ The plaintiff can, in many cases, however, convert the claim to a transitory action by drafting his complaint to sound in contract or for conversion of personal property. For example, the Court of Appeals has held that a suit for the value to the defendant of the wrongful use and occupation of land is an action for *quantum meruit*, rather than

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lessor sued defendant lessee for accrued royalties on a gas-producing well located outside the county. Defendant answered that the neighbor of plaintiff (with whom defendant also had a lease) was claiming that the gas-producing well was on his property and that he was entitled to the royalties. Defendant asked that the neighbor be made a party and that the court adjudicate the ownership of the site of the gas-producing well. The Court of Appeals held that it was error for the trial court to refuse to bring the neighbor into the action. The ownership of the land was merely a finding of fact to be made in order to adjudicate the rights of the parties to the accrued royalties.

⁷³ In *20th Century Coal Co. v. Taylor*, 275 S.W.2d 72 (Ky. 1955) plaintiff originally sued for an accounting and subsequently asked for an adjudication of a one-half interest in land owned by the defendant located outside the county. The Court held venue to be improper as to the amended complaint.

⁷⁴ *Williams v. Davenport*, 205 S.W. 551 (Ky. 1918).

⁷⁵ *Daniels v. Gillum*, 262 S.W. 272 (Ky. 1924).

⁷⁶ *Meredith v. Ingram*, 444 S.W.2d 551 (Ky. 1969); an action against a life tenant primarily for waste.

injury to realty, and is thus maintainable in the county in which the defendant resides.⁷⁷ The Court reached a similar result in a suit for the wrongful cutting of timber where the measure of damages sought was the value of the timber rather than diminution of the value of the realty (the tort measure of damages for injury to land).⁷⁸

The analysis of KRS § 452.400 has been limited to problems which arise when the land is located within the state. If the land is located outside the state mixed questions of venue and jurisdiction arise; these are discussed in Part III. It is suggested in Part IV that the venue of actions involving real estate, whether *in rem* or *in personam*, be proper in the county of the defendant's residence as well as in the county in which the land is located. Such a change would give the plaintiff a choice of forums, neither of which would be unfair to the defendant, and would also eliminate controversies as to whether something was or was not realty.

B. Actions Against Corporations

The second statute of general application to be analyzed is KRS § 452.450⁷⁹ which governs suits against corporations. The statutes governing the venue of actions against banks or insurance companies (KRS § 452.445) and against common carriers (KRS § 452.455) relate closely to KRS § 452.450 and will be discussed herein. It is fair to say that the Kentucky venue statutes, other than those involving land, represent a legislative balancing of the interests of plaintiff and defendant in having the case tried in a convenient place before a jury which will be fair to their

⁷⁷ Swart v. Reveal, 29 S.W. 29 (Ky. 1895).

⁷⁸ Roberts v. Moss, 106 S.W. 297, (Ky. 1907). In Asher v. Cornett 113 S.W. 131 (Ky. 1908) the plaintiff erred in framing his complaint in *quantum meruit* and suing in the county in which the trees were cut. The Court held the venue improper. See also Annot. 42 A.L.R. 197, 217 (1926) and Annot. 30 A.L.R.2d 1219, 1223 (1953) to the effect that actions for conversion of timber, stone, crops, and the like, which become personalty on severance from the land, are transitory actions and are not subject to the rule of *Livingston v. Jefferson* (discussed *infra* in this article).

⁷⁹ Excepting the actions mentioned in KRS §§ 452.400-452.420 both inclusive, and in KRS §§ 452.430, 452.440, 452.445, 452.455, 452.465 and 452.475, an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or if it be for a tort, in the first-named county, or the county in which the tort is committed.

respective positions.⁸⁰ The balancing usually results in a statute which gives the plaintiff a choice of forums which appear either to be neutral or favorable to the defendant. A plaintiff suing a natural person in tort, for example, must proceed in the county in which the injury occurred or in which the defendant resides.⁸¹ On the other hand, when the defendant is a corporation, particularly a large corporation, the plaintiff has a virtually unlimited choice of forums.

KRS § 452.450 controls the venue of all actions against resident⁸² corporations except actions whose venue is established by the more specific statutes in the venue chapter.⁸³ The statute gives the plaintiff the option of suing in the county: (1) where the tort was committed; (2) where the contract was made; (3) where the contract was to be performed; (4) where the chief officer or agent resides; and (5) where the office or place of business is located.

A corporation may, of course, have more than one office or place of business within the state, and the Court held in *Hill v. Cumberland Dairies*⁸⁴ that venue is proper, under the fifth option above, in any county in which the defendant corporation is "doing business to such an extent that it is actually present there and has such a responsible agent in the county as would presumptively bring home to the corporation notice of summons served upon him as its representative."⁸⁵ The corporate defendant is

⁸⁰ 56 AM. JUR., *Venue* § 4 (1947).

⁸¹ KRS § 452.460, discussed *infra*.

⁸² A "resident" corporation is one with an office or place of business within the state or a chief officer or agent residing in the state.

⁸³ Those actions excepted by KRS § 452.450 in which the defendant might be a corporation are: 452.400—land; 452.410—actions to establish or set aside wills; 452.415 and 452.420—actions involving decedents' estates; 452.440—actions against third parties after a "no property found" return on an execution against defendant; 452.445—actions against banks and insurance companies; 452.455—actions against common carriers on a contract to carry property or for personal injury or property damage; 452.465—actions against a defendant who may be proceeded against by warning order attorney; and 452.475—actions against a public works contractor for wages, or money owing for material or supplies. As discussed *infra*, KRS § 452.445 has been construed to be cumulative with KRS § 452.450.

⁸⁴ 288 S.W.2d 341 (Ky. 1956).

⁸⁵ *Id.* at 343. The language of *Cumberland Dairies* is reminiscent of the now-repudiated "presence" theory for rationalizing the exercise of jurisdiction over foreign corporations. This theory has now yielded to the "minimum contacts" theory of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See generally Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 583-4 (1958). Although *Cumberland Dairies* was a contract action there is no ground on which to believe the holding is restricted

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thus amenable to suit in any county in which it maintains places of business, as defined, regardless of the degree of relationship of the subject of the action to the particular locale. This leaves the path clear for a plaintiff to shop for a favorable judge or jury or to harass the defendant with a deliberately inconvenient forum.

KRS § 452.450 also fixes venue in the county in which "a chief officer or agent" resides. A question raised and left unanswered by *Hill v. Cumberland Dairies* is whether venue would be proper in all counties in which agents of corporations reside. Simple statutory construction (the word "chief", indicating one, appears to modify "agent" as well as "officer") plus an appreciation of the potential unfairness of *Cumberland Dairies* should lead a court squarely presented with the question to hold venue proper under this subsection only in the *single* county in which the chief officer or chief agent resides.⁸⁶

As noted above KRS § 452.450 excepts actions localized by more specific statutes. One of the statutes excepted on the face of KRS § 452.450 is KRS § 452.445⁸⁷ governing actions against banks and insurance companies. In *Ocean Accident & Guarantee Corporation v. Milford Bank*,⁸⁸ however, the Court read KRS § 452.450 as cumulative with KRS § 452.445, so that a plaintiff suing an incorporated bank or insurance company has the option of suing in the locale provided by both statutes. The Court's decision in *Milford Bank* is squarely bottomed on the legislative history of the statutes involved⁸⁹ and is not authority for KRS §

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to contract actions. The part of the statute construed was the first part which is of general application to all actions brought against corporations.

⁸⁶ An additional reason for so holding is that *Cumberland Dairies* emphasized corporate activity. An agent may engage in no corporate activity in the county in which he lives and it would be inconsistent to hold the corporation to be "present" (to use the language of *Cumberland Dairies*) in that county.

⁸⁷ Excepting the actions mentioned in sections KRS 452.400 to 452.420 both inclusive, and in KRS § 452.440 and KRS § 452.465, an action against an incorporated bank or insurance company may be brought in the county in which its principal office or place of business is situated; or, if it arises out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place.

⁸⁸ 33 S.W.2d 312 (Ky. 1930).

⁸⁹ The original code of civil practice (Johnson's Code of 1851) provided for the venue of actions against insurance companies, banks and corporations in one section (section 127) with the venue of actions against banks and insurance companies more extensive than the venue of actions against corporations. The section was divided in the revision of 1876 into a section on banks and insurance companies (essentially what is now KRS § 452.445) and a section on corporations (what is now KRS § 452.450). The revision did not retain the expansive language

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452.450 to be read cumulatively with the other statutes excepted on its face.

In fact, the only additional forum available to the plaintiff when the corporate defendant is a bank or insurance company is the county in which a "transaction" with an agent occurred if the cause of action arose out of that transaction.⁹⁰ "Transaction" is a much more encompassing word than "contract", which is the operative word in the general corporation statute. The Kentucky Court of Appeals has construed "contract" narrowly and held that an action against a corporation on *quantum meruit* cannot be brought, under KRS § 452.450, in the county in which the contract is made or to be performed.⁹¹ "Transaction," on the other hand, has been construed by the Court to embrace "every variety of affairs which can form the subject of negotiations, interviews, or actions between two persons."⁹² Such a definition would easily embrace actions against a bank or insurance company for implied contract when the contract would be implied in law from a conversation between the plaintiff and the agent of the defendant.⁹³

There is a separate statute⁹⁴ governing the venue of actions

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applicable to corporations generally in the statute governing actions against banks and insurance companies. The Court in *Milford Bank* reasoned it was illogical for the revisors to have intended to make the venue for actions against banks and insurance companies more limited than that against corporations generally. The Court then construed the word "may" in the statute governing actions against banks and insurance companies to indicate *permitted* but not *mandatory* forums, with the result that a plaintiff, faced with a corporate bank or insurance company, could add to the choice of forums provided in KRS § 452.450 those provided in KRS § 452.445. *Ocean Accident & Guarantee Corporation v. Milford Bank*, 33 S.W.2d 312, 313-314 (Ky. 1930).

⁹⁰ KRS § 452.445 fixes venue in an action arising out of a transaction with an agent in the county in which the transaction took place. It also fixes venue in the county in which the principal office or place of business is located but this is more restrictive than the like provisions of KRS § 452.450 and is therefore without practical significance.

⁹¹ *Holcomb v. Kentucky Union Co.*, 90 S.W.2d 25 (Ky. 1936).

⁹² *Barnett's Adm'r v. Brand*, 177 S.W. 461, 463 (Ky. 1915), construing KRS § 421.210(2) (the "Dead Man's" statute); definition quoted with approval in *Stovall's Ex'r v. Slaughter*, 268 S.W.2d 943 (Ky. 1954).

⁹³ In *Spurlin v. Ranier*, 457 S.W.2d 491 (Ky. 1970) the appellant insurance company argued that the suit was not based on the policy but was a suit in implied contract and therefore transitory. The Court did not meet this, as suggested in the text, by reliance on KRS § 452.445, the insurance venue statute, but found the action to be in fact on the policy and proper under either KRS §§ 452.445 or 452.450.

⁹⁴ KRS § 452.455 provides:

With the exception of the actions mentioned in KRS § 452.465, an action against a common carrier, whether a corporation or not, upon a contract

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against common carriers,⁹⁵ which is limited to actions upon a contract to carry property and actions for personal injury or property damage. If the action is on a contract to carry property the carrier may be sued in three counties: (1) the county in which the defendant "resides"; (2) the county in which the contract was made; and (3) the county in which the carrier agrees to deliver the property.⁹⁶ For venue purposes the carrier "resides" in only one county, that being the county in which the registered office of the corporation is located.⁹⁷ There is only a slight difference between the operative word in KRS § 452.455, "resides", and the comparable term in KRS § 452.450, "an office or place of business," but court construction of the two terms has led to vastly different results. The carrier can be sued (under this provision) only where its registered office is located, while the general corporation can be sued any place it maintains an office.

If the action can be classified as an action for injury to a person or his property, whether the plaintiff is a passenger or not, venue is stated to be proper in either: (1) the county in which the defendant, or either of several defendants, resides; (2) the county in which the plaintiff or his property was injured; or (3) the county in which the plaintiff resides if he resides in a county into which the carrier passes. The statute provides that if the action is brought by a personal representative that the residence of the deceased controls, eliminating the possibility of appointing an administrator to establish venue in a certain county. The provision for suing in the county of plaintiff's residence in the event the carrier passes into that county is unique. It does not, however,

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to carry property, must be brought in the county in which the defendant, either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides; if he resides in a county into which the carrier passes; provided, if the action be brought by a personal representative, the residence of the decedent, and not that of the personal representative shall control.

⁹⁵ *Commercial Carriers v. Matraccia*, 311 S.W.2d 565 (Ky. 1958); statute applicable to both foreign and domestic carriers; no denial of equal protection of the laws.

⁹⁶ The county in which the goods are "delivered" is the county in which the goods are turned over to a connecting line rather than the county of ultimate destination. *Brunk v. Ohio & Ky. Ry.*, 105 S.W. 443 (Ky. 1907).

⁹⁷ *Tufts v. Cheasapeake & O. Ry.*, 401 S.W.2d 58 (Ky. 1966).

work an unfairness to the defendant as the defendant must be doing business in the county for venue to be proper and the plaintiff is precluded from arbitrary forum shopping by the requirement of residence in the county at the time of suit.⁹⁸

If the action is not one on a contract for the conveyance of property, or for personal injury or property damage, venue is not controlled by KRS § 452.455. Logic would dictate that the venue of an action against a corporate carrier not controlled by KRS § 452.445 would be controlled by KRS § 452.450. That statute after all makes an exception for those actions "mentioned" in KRS § 452.455 rather than excepting all suits against common carriers. In *Gainsboro Telephone Company v. Buckner*,⁹⁹ however, the Court held that neither KRS § 452.455 nor KRS § 452.450 was applicable to a suit against a corporate telephone company for failure to convey a death message. The suit could not be classified as one for injury to the person or as one on a contract to convey property within the terms of KRS § 452.455. The Court then ignored the wording of KRS § 452.450 and held that *all* actions against common carriers were excepted from KRS § 452.450, with the result that the action was then classified as a transitory action. While dicta in a later case¹⁰⁰ supports *Buckner* and while *Buckner* yields an equitable result in light of the over-broad construction given KRS § 452.450, the decision does violence to ordinary rules of statutory construction and would probably be overruled if the question were presented to the Court again.

The complexity and arbitrariness of venue in suits against corporations is intolerable. In any general statutory revision corporations should be treated as natural persons, deemed to reside (for venue based on residence) only where the principal place of business is located. The special treatment of common carriers, banks and insurance companies should be rejected as anachronistic. These matters are discussed in Part IV.

⁹⁸ Residence is determined as of the time of suit, not injury. *Illinois Central Ry. v. Stith's Adm'x*, 85 S.W. 1173 (Ky. 1905). KRS § 452.465 is the successor to CC § 73 which in turn succeeded section 102 of Johnson's Code. Under the original section of Johnson's Code the carrier could be sued in any county in the state without regard to the residence of the plaintiff.

⁹⁹ 169 S.W. 1000 (Ky. 1914).

¹⁰⁰ *Knight v. Penn. Ry.*, 94 S.W.2d 1013, 1014 (Ky. 1936).

C. *Actions for Injury to Person or Property*

Tort actions against resident individuals are for the most part governed by KRS § 452.460¹⁰¹ which gives the plaintiff the choice of two forums: the county in which the defendant resides or the county in which the injury was done. The statute covers injury to person, property and character and is made subject to all preceeding venue statutes in the chapter. Thus, torts involving land or tort actions against corporations are not governed by KRS § 452.460. The statute was recently held to be inapplicable to non-residents¹⁰² and tort actions against non-residents will ordinarily be controlled by KRS § 452.210(4), the venue provision of Kentucky's long-arm statute (discussed in Part III).

Contract actions against individuals are transitory and maintainable only where the defendant resides or is summoned. However, there may be personal injury or property damage as a result of a breach of contract. Is an action for injury to person or property based on a contract theory of liability, transitory or governed by KRS § 452.460? The argument that such an action is transitory finds support in *Wood v. Downing's Administrator*¹⁰³ in which the Court held injuries resulting from the defendant's malpractice were merely the consequence of the breach of contract for treatment and did not serve to alter the basic transitory nature of the action. The Court had earlier reached the same result on a question of statute of limitations.¹⁰⁴ The two cases together led to an amendment to the one-year statute of limitations to make it clear that that statute, and not the five-year statute, applied in malpractice actions.¹⁰⁵ *Wood v. Downing's Administrator* is bottomed on the common law antecedents to

¹⁰¹ "Every other action for an injury to the person or property of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done. Provided, that in actions for libel the actions shall be brought in the county in which the plaintiff resides or in the county in which the newspaper or publication is printed or published, or in the county in which the transaction or act or declaration to which the publication relates is stated, or purported to have been done or taken place.

If an injury occurs on a river or stream dividing two or more counties any county bounding the river at the point the injury occurred may be considered the county in which the injury is done for purposes of bringing the action."

¹⁰² *Jones v. Campbell*, 434 S.W.2d 653 (Ky. 1968).

¹⁰³ 62 S.W. 487 (Ky. 1901).

¹⁰⁴ *Menefee v. Alexander*, 53 S.W. 653 (Ky. 1899).

¹⁰⁵ Comment, 59 Ky. L.J. 990, 991 (1971); Ky. Acts ch. 92, § 2516 (1916).

modern causes of action¹⁰⁶ and yields the unfortunate result that a plaintiff injured by a breach of contractual duty must depend on the vagaries of suing in the county in which the defendant resides or is summoned, whereas a plaintiff injured by a stranger can sue under KRS § 452.460 in the county in which the injury was inflicted. The *Wood* decision is theoretically applicable not only to malpractice actions but to any action for property damage or personal injury where the theory of liability is contractual. An example would be a suit for personal injury based on breach of warranty. When presented with the opportunity, whatever the context, the Court of Appeals should overrule *Wood* and hold that the determining factor is the nature of the injury, not the theory of liability, and that any action for injury to the person against a natural person can be maintained under KRS § 452.460.

When the wrong complained of is not damage to property or injury to person or character, the action, even though in tort, is not localized by KRS § 452.460. Thus the Court held in *Gover v. Wheeler*¹⁰⁷ that an action for claim and delivery with damages for the wrongful detention of the property was not localized under KRS § 452.460 and must be brought in the county in which the defendant resided or was summoned. The injury to the plaintiff was the wrongful seizure and detention of his personal property, an injury the Court held was not an injury to property. In a later case for loss due to fraudulent misrepresentation, however, the Court did not analyze the plaintiff's injury to ascertain whether it could be classified as damage to property.¹⁰⁸ The Court assumed that the case was controlled by KRS § 452.460 and concerned itself with a determination of where the loss occurred. This case is inconsistent with the approach taken in *Gover v. Wheeler* and is not warranted by the literal wording of the statute. It does yield an equitable result, however, as otherwise the plaintiff cannot proceed for purely economic loss other than in the county of the defendant's residence.

Just as the venue of tort actions involving economic loss is uncertain it is unclear whether the Court of Appeals views KRS § 452.460 as governing the venue of actions for injuries to rela-

¹⁰⁶ 62 S.W. 487, 489 (Ky. 1901). The Court reasoned that assumpsit was the proper writ for malpractice, that assumpsit was *ex contractu* and transitory.

¹⁰⁷ 178 S.W.2d 404 (Ky. 1944).

¹⁰⁸ *Scott v. Farmers State Bank*, 410 S.W.2d 717 (Ky. 1967).

tional interests. KRS § 452.460 does not appear to cover any relational torts other than those like defamation¹⁰⁹ and malicious prosecution¹¹⁰ which affect the character of the plaintiff. The Court has held, however, that wrongful death is an "injury to person" within the meaning of KRS § 452.460.¹¹¹ In so doing the Court relied heavily on the fact that wrongful death has consistently been held to be an "injury to the person" within the meaning of the statute of limitations.¹¹² In spite of dicta in later cases that wrongful death is transitory,¹¹³ it is probable that the Court would today hold it to be localized by KRS § 452.460, even though wrongful death conceptually is a relational tort; the relation harmed being that of the surviving spouse and children to the person killed. There is a dearth of authority on the venue of other relational torts, such as actions for damage to consortium, alienation of affections, and interference with contract. It must be assumed that the Court of Appeals would read KRS § 452.460 literally as excluding tort actions not involving injury to person, property or character. Such a holding would isolate wrongful death as the only relational tort maintainable under KRS § 452.460. It would further yield the unfortunate result of forcing plaintiffs to the defendant-oriented transitory statute for redress in a developing area of the law. The suggestion is made in Part IV that the plaintiff always have the option of suing in the counties in which the plaintiff's cause of action arose. The adoption of such a proposal would cure the uncertainties and potential inequity connected with the problems outlined herein: economic loss, relational torts, civil injury to person or property for which redress is sought on a contractual theory of liability.

It often happens that joint tortfeasors are sued for personal injury or property damage. If the defendants reside in different

¹⁰⁹ The statute clearly covers defamation and in fact limits the number of forums available to plaintiff in libel actions.

¹¹⁰ *Bowman v. Combs*, 273 S.W. 719 (Ky. 1925).

¹¹¹ *Cottengim's Adm'r v. Adams' Adm'r*, 255 S.W.2d 637 (Ky. 1953). In *Melton's Adm'r v. Southern Ry. Co.*, 33 S.W.2d 690 (Ky. 1930), relied on by the Court in *Cottengim's Adm'r*, the Court construed similar language in the common carrier statute as localizing wrongful death actions. In *Melton's Adm'r* the Court added an interesting note: where the accident occurred in county A and death occurred in county B the injury took place for venue purposes in county A.

¹¹² *Cottengim's Adm'r v. Adams' Adm'r*, 255 S.W.2d 637, 638 (Ky. 1953).

¹¹³ *Both Stewart's Adm'r v. Bacon*, 253 Ky. 748, 70 S.W.2d 522 (1934) and *Bankemper v. Boone County Aviation Inc.*, 435 S.W.2d 58 (Ky. 1968) contain the statement that wrongful death is "transitory."

counties the venue is proper as to both only in the county in which the injury was inflicted. In *Crume v. Taylor*¹¹⁴ the plaintiff argued that he should be permitted to rely on the statute governing transitory actions and maintain a multiple defendant tort action in the county in which one of the defendants resided or was summoned. The Court held that this was not a permissible reading of the statute and that each defendant had a right to insist that, *as to him*, the action be maintained in the county of his residence or in which the injury occurred.¹¹⁵

D. *Transitory Actions*

At early English common law all lawsuits were required to be tried in the county where the cause of action arose, the function of the jury being to decide the matter on the basis of personal knowledge.¹¹⁶ The courts at a very early time modified this rule in fact, if not in form, by permitting the plaintiff to make a fictitious allegation that the cause of action took place in the county in which suit was brought when in fact it did not. The allegation would be that the cause of action occurred in county A (the county in which the cause of action in fact occurred), *to wit* in county B (the county in which the suit was brought). The courts then decided in which cases a denial (or in the parlance of the day a "traverse") of this fictitious allegation would be permitted. The courts thus distinguished between "local" actions where the fictitious averment could be denied and "transitory" actions where it could not.¹¹⁷

The basic distinction developed by the courts was between causes of action which could only have occurred in one place (usually involving land) which were classified as local, and causes of action which could have occurred anywhere and which were classified as transitory.¹¹⁸ The transitory action could be brought

¹¹⁴ 114 S.W.2d 1119 (Ky. 1938).

¹¹⁵ *Id.* at 1120.

¹¹⁶ T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 127 (5th ed. 1956).

¹¹⁷ 56 AM. JUR. *Venue* § 2, at 4 (1947); 1 J. MOORE, FEDERAL PRACTICE para. 0.142, at 1465 (2d ed. 1964). In *Livingston v. Jefferson*, 15 F. Cas. 660 (No. 8411) (C.C.D. Va. 1811), the action was for trespass to land in New Orleans and the action was brought in Richmond, Virginia. Plaintiff prayed that the trespass took place in the "city of New Orleans, district of Orleans, *to wit* at Richmond, county of Henrico, and district of Virginia."

¹¹⁸ *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (No. 8411) (C.C.D. Va. 1811); 56 AM. JUR. *Venue* § 3, at 5 (1947).

only where the defendant was found. The basic unfairness to the plaintiff (and in some instances to the defendant) of fixing the venue of most actions in the county or district where the defendant was summoned led many states, including Kentucky, to "localize" many actions which were transitory at common law.¹¹⁹

In Kentucky the venue statutes localize actions according to the nature of the subject matter (for example KRS § 452.400—land), the nature of the defendant (for example KRS § 452.450—corporations) and the nature of plaintiff's injury (for example KRS § 452.460—injury to the property, person or character of plaintiff). The localizing statutes often take into account more than one factor. KRS § 452.460, for example, is applicable only to resident defendants who injure plaintiff's person, property or character.

Actions not localized by KRS §§ 452.400—452.475 are governed by KRS § 452.480,¹²⁰ titled "Where Transitory Actions may be Brought." This statute is the successor to the common law transitory action and provides for venue in the county of the defendant's residence as well as the county in which he is summoned. The statute's scope is negatively defined, "An action which is not required by the foregoing provisions of KRS §§ 452.400—452.475 to be brought in some other county may be brought. . . ."¹²¹ All of the statutes from KRS §§ 452.400—452.475, except two, use the mandatory "must" in designating the proper venue of the action. The two exceptions, which use the permissive "may", are KRS § 452.445, governing the venue of actions against incorporated banks and insurance companies, and KRS §§ 452.475, governing the venue of actions against public works contractors. The fact that KRS § 452.445 has been construed to be cumulative with KRS § 452.450 has already been discussed. Because KRS §

¹¹⁹ Wood v. Downing's Adm'r, 62 S.W. 487, 488 (Ky. 1901). See generally Stevens, *supra* note 24, (noting at 315 that only three states, Tennessee, Mississippi, and Pennsylvania, adhere to the common law approach).

¹²⁰ An action which is not required by the foregoing provisions of KRS §§ 452.400—452.475 (1971) to be brought in some other county may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned.

¹²¹ See Crume v. Taylor, 114 S.W.2d 119 (Ky. 1938), specifically holding that KRS § 452.480 (1971), cannot be resorted to if the action is localized by one of the preceding statutes.

452.450, which uses the mandatory "must", is applicable to banks and insurance companies there is no possibility of interplay between KRS § 452.445 and KRS § 452.480. It is possible, on the other hand, to regard KRS § 452.475 as giving plaintiff the *option* of suing a public works contractor in the county in which the labor or supplies were furnished but not requiring him to do so.¹²² Such a construction would mean plaintiff could, if he so desired, proceed under KRS § 452.480 and file the action where the defendant resides or is summoned.¹²³ This analysis illustrates the arbitrariness of Kentucky's venue statutes and the fact that venue questions will be determined in many cases by nothing more profound than the drafter's choice between words he may have thought of as synonyms—if he gave the matter any thought at all. KRS § 452.480 forms a respository for actions not localized elsewhere in the venue chapter. Notable examples of transitory actions are contract actions against individuals,¹²⁴ claim and delivery of personal property,¹²⁵ actions for specific performance of land contracts,¹²⁶ and controversies over leases.¹²⁷

In the event of multiple defendants the venue is proper under KRS § 452.480 in any county in which one of the defendants resides or is summoned. All other venue statutes except KRS § 452.455, governing actions against common carriers, require the venue to be proper as to all defendants.¹²⁸ It is possible that a plaintiff might in either a transitory action or an action brought under KRS § 452.455, name a straw man as defendant in order to establish venue in a certain county. KRS § 452.490¹²⁹ eliminates

¹²² *Contra*: *Gillen v. Ill. Cent. Ry. Co.*, 125 S.W. 1047, 1048 (Ky. 1910) (dictum).

¹²³ This assumes of course that in the case of a corporate contractor that the Court would not construe KRS § 452.450 (1971) as cumulative to KRS § 452.475 (1971); in other words that the court would not extend the rule of *Ocean Accident and Guarantee Corporation v. Milford Bank*, 33 S.W.2d 312 (Ky. 1930). As that case was bottomed primarily on the legislative history of the code sections applicable to banks, insurance companies and corporations this is a safe assumption.

¹²⁴ *Williams v. Sanders*, 168 S.W.2d 552 (Ky. 1942).

¹²⁵ *Gover v. Wheeler*, 178 S.W.2d 404 (Ky. 1944).

¹²⁶ *Caudill v. Little*, 293 S.W.2d 881 (Ky. 1956).

¹²⁷ *Smith v. Wells*, 112 S.W.2d 49 (Ky. 1937).

¹²⁸ *See* *Crume v. Taylor*, 114 S.W.2d 1119 (Ky. 1938), where the plaintiff unsuccessfully tried to rely by analogy on provisions for multiple defendant actions in KRS §§ 452.455 and 452.480 (1971).

¹²⁹ "In an action brought pursuant to KRS § 452.480, against several defendants, no judgment shall be rendered against any of them, upon the service of a summons out of the county in which the action is brought, if no one of them

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this possibility for actions brought under KRS § 452.480.¹³⁰ If there are defendants not served or residing in the county in which the transitory action is brought *and they object to the venue at the commencement of the action as required by KRCP 12*, the plaintiff must succeed against the in-county defendant to hold the out-of-county defendants in the case. A dismissal of the action against the in-county defendant for any reason and at any time will render the venue of the whole action improper. In isolated cases this may work an injustice to the plaintiff who has a meritorious claim against an in-county defendant but loses on a jury verdict (although succeeding against the out-of-county defendant). In any revision of the statutes KRS § 452.490 should be amended to require the court to rule at the commencement of the action on a timely motion, whether or not the plaintiff had named a defendant solely to control venue.¹³¹ If the motion to dismiss is overruled subsequent events could not render the venue improper.

There is another statutory quirk which must be discussed in an analysis of transitory actions. Improper venue is a personal defense and is waived unless raised in the proper manner. If the defendant is subject to the personal jurisdiction of the court, either because he is within the state or has minimum contacts with the state, and is properly served with process, he is before the court and a default judgment may be taken against him if he does not defend. His defenses to the action, including any objection to venue, are waived by non-compliance with the Civil Rules.

If the action is transitory, however, KRS § 452.485¹³² spe-

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be summoned in that county, nor resided therein when the action was commenced; nor if the action be discontinued or dismissed as to the defendant who resided, or was summoned, in that county; nor if judgment be rendered in his favor, unless a defendant summoned out of that county make defense without objecting to the jurisdiction of the court: Provided that a judgment for a defendant, who resided or was summoned in that county upon a plea of his discharge as a bankrupt, shall not prevent a judgment against any other defendant, in an action brought before the commencement of the proceedings in which the discharge was obtained; but after such judgment, upon a plea of discharge in bankruptcy, a defendant not summoned in the county, nor residing therein at the commencement of the action, may, by answer, deny the liability of such bankrupt. The issue as to the original liability of such bankrupt shall be tried as if he were still a party, and the plaintiff shall not have judgment against the defendant not summoned nor residing in the county, unless it be decided that the bankrupt was originally liable."

¹³⁰ It is apparently possible to create venue by naming a straw defendant in an action brought against a carrier under KRS § 452.455 (1971).

¹³¹ Stevens, *supra* note 24, at 320; cf. OHIO R. Civ. P. 3(E).

¹³² "In action brought pursuant to KRS § 452.480, against a single defendant,
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cifically precludes a default judgment for failure to appear where venue is improper. In *Cash v. E'Town Furniture Co.*¹³³ the Court of Appeals held that KRS § 452.485 must be given effect in spite of its seeming conflict with the waiver provisions of KRCP 12.08. The Court reasoned that the statute prevailed because it was retained by the legislature in 1952 at the time of the adoption of the Civil Rules. This jurisdictional aspect of the statutes has been severely criticized¹³⁴ but KRS § 452.485 may have a salutary effect on the collection practices of retail creditors. Actions against individuals on accounts or retail sales contracts are transitory actions. They are also the kinds of actions most likely to result in default judgments. A retail creditor might be tempted to file all of its collection suits in one court without regard to the place of residence of the debtors, having garnishments issued by the court after taking default judgments. KRS § 452.485 makes this practice unattractive by rendering the default judgment void on collateral attack by the non-resident debtor or his employer when the creditor attempts to satisfy the judgment.¹³⁵

Venue based on the place of service of summons is unsound for two reasons. First, the propriety of venue cannot be determined at the time suit is filed because the plaintiff doesn't know whether he will be able to serve the defendant in the county. Secondly, the place where summons is served has nothing to do with the subject of the action or the parties, other than that the defendant happens to be in that county on the day he is served. As discussed in Part IV it is suggested this type of venue be abolished and that the plaintiff always be afforded a choice of forums based on: (1) the defendant's residence; (2) the situs of the defendant's wrongful acts; and (3) the county in which the injury occurred. Such a revision would totally supplant KRS § 452.480.

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there shall be no judgment against him, unless he be summoned in the county wherein the action is brought; or, unless he reside in such county when the action is brought and be summoned elsewhere in this state; or, unless he make defense to the action before objecting to the jurisdiction of the court."

¹³³ 363 S.W.2d 102 (Ky. 1962).

¹³⁴ Stevens, *supra* note 26, at 62, 63.

¹³⁵ In Ohio the new rules are designed to discourage all deliberate choices of improper venue by providing that the court may, before entering default judgment, transfer the case to a county in which venue is proper with the defendant to have additional time in which to answer. OHIO R. CIV. P. 3(C)(3).

III. MAJOR VENUE PROBLEMS NOT RELATED TO A SINGLE STATUTE

Part III of this paper is an analysis of the major venue problems in Kentucky which do not involve interpretation of the statutes themselves. Analyzed in Part III are the following problems: (a) actions involving a non-resident or property outside the state; (b) actions involving more than one claim or theory of relief; (c) the problem of multiple defendants; (d) counterclaims, cross-claims and third party complaints; (e) dismissals and the statute of limitations; and (f) changes of venue. The emphasis in Part III is an analysis of the existing situation. Reference will, however, be made to the proposals suggested in Part IV.

A. *Property or Person Outside the State*

When either the defendant or specific property affected by the action is outside the state, mixed questions of jurisdiction and venue can arise. The basic rules are fairly simple. If the relief sought is *in personam* the Court must be able to assert jurisdiction over the person of the defendant, either by personal service within the state or by service pursuant to a "long-arm" statute¹³⁶ which predicates jurisdiction on statutorily defined "minimum contacts" with the state.¹³⁷ There are usually special provisions for the venue of *in personam* actions against non-residents. If the relief sought is *in rem* the court must be able to assert jurisdiction over the *res* either because of the physical presence of the *res* within the state or because the *res* is presumed to be located at the place of residence of the defendant.¹³⁸ The venue of *in rem* actions is controlled by statutes fixing venue according to the subject matter of the action rather than the type of defendant. Thus whether the defendant is a resident or non-resident should not affect the venue of an *in rem* action.

There are, however, uncertainties in the application of these general rules in Kentucky. Kentucky has no statute regulating the venue of *in rem* actions where the *res* is personal property. There are also some doubts as to the applicability and constitutionality of Kentucky's long-arm statute. Furthermore prob-

¹³⁶ See e.g., KRS § 454.210 (1971).

¹³⁷ Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹³⁸ For example intangible personal property is presumed to be located at the domicile of the owner for purposes of taxation by the state of domicile. See generally 84 C.J.S. *Taxation* § 116 (1954).

lems are presented by *in personam* actions involving real estate outside the state by the famous case of *Livingston v. Jefferson*.¹³⁹ In that case, decided in 1811, Judge Tyler and Chief Justice John Marshall, sitting on circuit, held that Edward Livingston's action for trespass to land against former President Thomas Jefferson could not be maintained in Richmond, Virginia, where Jefferson was amenable to process and was served, when the land was in New Orleans in the territory of Louisiana.¹⁴⁰ The court applied English common law which required that actions for trespass to land be brought where the land was located.¹⁴¹ Actions for trespass to land were classified as local rather than transitory, and the court reasoned that such an action could be brought only where the land was located, even though the relief was *in personam* and the defendant was not amenable to service at the forum. Chief Justice Marshall applied the common law rule out of respect for precedent even though he felt it to be illogical and was cognizant of the fact that Livingston was without a remedy unless he could obtain service on Jefferson in Louisiana.¹⁴²

In Kentucky all *in personam* actions are either transitory or localized according to the nature of the defendant or plaintiff's injury except trespass to land. Trespass to land must, according to KRS § 452.400 (4), be brought in the county in which the land is located, and this statutory provision appears to dictate the same result as that reached in *Livingston v. Jefferson*: that proper venue cannot be laid in an action for trespass to land if the land is located outside the state. The Kentucky Court of Appeals, however, has exhibited a grudging attitude toward *Livingston v. Jefferson* in a number of cases. In *Campbell v. W.M. Ritter Lumber Company*¹⁴³ the Court held an action by a lessor against a lessee to be transitory, reading *Livingston v. Jefferson* to be restricted to cases where the defendant could challenge plaintiff's title to the land (which a lessee could not, of course, do). In *Roberts v. Moss*¹⁴⁴ the Court left the door open for a plaintiff, in

¹³⁹ 15 F. Cas. 660 (No. 8411) (C.C.D. Va. 1811).

¹⁴⁰ *Id.* See generally 1 MOORE para. 0.142 [2.-3], 1466-1472 (1964).

¹⁴¹ *Doulson v. Matthews*, 4 Term. Rep. 503, 98 Eng. Rep. 1143 (K.B. 1792). See generally 1 MOORE para. 0.142 [2.-3], 1463-1466 (1964).

¹⁴² 15 F. Cas. 664.

¹⁴³ 131 S.W. 20 (Ky. 1910).

¹⁴⁴ 106 S.W. 297 (Ky. 1907). In *Asher v. Cornett*, 113 S.W. 131 (Ky. 1908),

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a case of wrongful quarrying or timbering, to avoid *Livingston v. Jefferson* by couching his prayer for relief in contract rather than in tort. This would be accomplished by seeking damages according to the value to the defendant of the timber or minerals taken (waiving the tort and suing in assumpsit). In *Smith v. Southern Railway Co.*¹⁴⁵ the Court held that an action could be maintained in Kentucky for damage to realty located in Jellico County, Tennessee caused by an explosion across the state line in Whitley County, Kentucky.¹⁴⁶ These cases, in establishing means to avoid *Livingston v. Jefferson*, indicate that the Kentucky Court would, if forced to a decision, join the ranks of state courts which have refused to follow Justice Marshall's preference for precedent over logic.¹⁴⁷ This would have the effect of limiting the applicability of KRS § 452.400(4) to land located within the state.

If the defendant is a non-resident and not amenable to personal service within the state¹⁴⁸ *in personam* jurisdiction may be asserted pursuant to KRS § 454.210, Kentucky's modern long-arm statute,¹⁴⁹ which provides for jurisdiction for injury caused by single wrong-

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the plaintiff erred in framing his complaint in contract and suing in the county in which the trees were cut. The court held the venue improper.

¹⁴⁵ 123 S.W. 678 (Ky. 1909).

¹⁴⁶ In so holding the Court acknowledged the rule of *Livingston v. Jefferson* but determined that the common law rule permitted a plaintiff to sue for trespass to land either where the land was located or where the wrongful act took place. *Smith v. Southern Railway Co.*, 123 S.W. 679 (Ky. 1909).

¹⁴⁷ Notable cases are *Little v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 67 N.W. 846 (Minn. 1896); and *Reasor-Hill Corp. v. Harrison*, 249 S.W.2d 994 (Ark. 1952). Annot., 30 A.L.R.2d 1213 (1953).

¹⁴⁸ In *Jones v. Campbell*, 434 S.W.2d 653 (Ky. 1968), the Court held that an action against a non-resident for personal injury was a transitory action with venue fixed by KRS § 452.480, where the defendant was served with process in the state.

¹⁴⁹ There is a possibility that the Kentucky Court may construe KRS § 454.210 to be limited to those situations in which *in personam* jurisdiction cannot be asserted on the basis of previously enacted narrower long-arm statutes (*infra* note 156). This is what an Ohio trial court did to the Ohio statute in *Hayslip v. Conrad Produce Inc.*, 222 N.E.2d 839 (Ohio 1967). In that case the court held that the venue of suits against non-resident motorists would continue to be governed by the venue section (Sec. 4515.01) which localized auto accident cases against residents and non-residents to the county in which the accident happened in spite of the provision in the recently enacted long-arm statute (Sec. 2307.384) calling for venue at the plaintiff's option in the county of his residence. This case has been legislatively overruled by the passage of the Ohio Rules of Civil Procedure. Furthermore the Kentucky situation can be distinguished in that KRS § 452.460, controlling the venue of auto accidents, is limited on its face to *residents* [a fact recognized by the Court of Appeals in *Jones v. Campbell*, 434 S.W.2d 653 (Ky. 1968)], and because there is every reason to believe the earlier and narrower long-arm statutes have been repealed by the enactment of KRS § 454.210 (see text at footnotes 157 and 158).

ful acts within the state,¹⁵⁰ as well as for jurisdiction for causes of action attributable to the doing of business within the state.¹⁵¹ Kentucky's long-arm statute is very similar to that of Ohio¹⁵² which was patterned after the Uniform Interstate and International Procedure Act.¹⁵³ The Kentucky statute has been held constitutional and given a liberal construction by a federal court¹⁵⁴ in a recent decision which is in accord with the trend toward upholding jurisdiction over non-residents based on considerations of fairness and minimum contacts rather than physical presence.¹⁵⁵

There are other Kentucky long-arm statutes¹⁵⁶ enacted prior to KRS § 454.210 which may provide slightly different methods for the service of process.¹⁵⁷ There is no need, however, to resort to any of the previously enacted long-arm statutes, as KRS § 454.210 provides for jurisdiction in every situation covered by the other statutes. There is, in fact, a positive danger in relying on the narrower statutes, such as the non-resident motorist statute. This danger arises from the fact that the legislature, at the time of passage of KRS § 454.210, amended KRS § 454.165, which had read "[n]o personal judgment shall be entered against a defendant constructively served who has not appeared in the action," by adding the words "except as provided in KRS § 454.210." The effect of this amendment may have been to broaden the concept of *constructive* service from service by warning order under KRCP 4¹⁵⁸ to include what formerly would have been defined

¹⁵⁰ KRS § 454.210(3).

¹⁵¹ KRS § 454.210(1), (2), (4), (5).

¹⁵² OHIO REV. CODE § 2307.382 (1965). The only difference being that the Kentucky legislature added language to subsection 6 (liability for causes of action arising out of an interest in, or the use or possession of real property within the state) to make it clear that liability could not be imposed on the owner or possessor of property unless he voluntarily instituted the relationship. The Ohio statute was held to be constitutional as applied prospectively in *Bruney v. Little*, 222 N.E.2d 446 (Ohio 1966).

¹⁵³ UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03. See also Comment, 35 CINN. L.J. 157 (1966).

¹⁵⁴ *Miller v. Trans World Airlines Inc.*, 302 F. Supp. 174 (E.D. Ky. 1969).

¹⁵⁵ Annot., 27 A.L.R.3d 397 (1969); Annot., 20 A.L.R.3d 1201 (1968); Annot., 78 A.L.R.2d 397 (1961).

¹⁵⁶ KRS § 188.030—non-resident motorists, KRS § 271.610—non-resident corporations, KRS § 304.578—non-resident insurers, and KRS § 454.270—non-resident boaters.

¹⁵⁷ KRS § 188.030 provides that the Secretary of State shall mail the defendant a copy of the summons; KRS § 454.210 provides that the process server shall mail the summons.

¹⁵⁸ KRCP 4 provides for service by warning order on non-residents, persons absent from the state or avoiding process, and persons whose names or addresses are unknown.

as *substituted* service, *i.e.*, service on a statutory agent. If this is true all of the former long-arm statutes were implicitly repealed by the amendment of KRS § 454.165 and the enactment of KRS § 454.210. Reliance on the procedure set out in the earlier statutes may lead to a successful quashing of service of process.

The venue of actions brought pursuant to KRS § 454.210 is in the county where the plaintiff resides or in which the cause of action, or any part thereof, arose.¹⁵⁹ A similar provision in Kentucky's original non-resident motorist act was held unconstitutional in *Henry Fischer Packing Co. v. Mattox*¹⁶⁰ as a denial of equal protection of the laws to non-residents. The Kentucky Court of Appeals reached its conclusion by reasoning that residents were not amenable to suit in the county of plaintiff's residence and to subject non-residents to suit there worked an unfair discrimination. This case was criticized at the time¹⁶¹ and its precedential value is seriously undermined by decisions from other jurisdictions holding to the contrary on similar facts. In *Lane v. Hughes*¹⁶² the Oklahoma Supreme Court upheld precisely the same discrimination which Kentucky held unconstitutional in *Mattox*. In *Conner v. Willet*¹⁶³ the Alabama Supreme Court held that a non-resident of a state had no legally recognized interest in having an action tried in a particular county within the state, and that following the common law rule that a non-resident could be sued in any county in the state did not work a denial of equal protection of the laws. Much the same result has been reached in Oregon¹⁶⁴ and Arkansas.¹⁶⁵ The recently enacted Ohio Rules of Civil Procedure provide for venue in the county of the

¹⁵⁹ KRS § 452.450(4).

¹⁶⁰ 90 S.W.2d 70 (Ky. 1936). The statute (Carroll's Code Sec. 12-2) provided for venue in the county of the plaintiff's residence or in the county in which the loss occurred. The holding in *Mattox* was reiterated in *Kennedy v. Lee*, 113 S.W.2d 1125 (Ky. 1938).

¹⁶¹ Comment, 26 Ky. L.J. 258 (1938).

¹⁶² 408 P.2d 281 (Okla. 1965). The Court in *Lane* pointed out that in *Power Manufacturing Co. v. Sanders*, 274 U.S. 490 (1927), relied on by the Kentucky Court in *Mattox*, that the foreign corporation had registered to do business in the state and had a fixed place of business. Hence there was no rational basis to discriminate between foreign and domestic corporations. In *Lane*, as indeed in *Mattox*, the non-resident had no county of residence in which he could be sued under a statute fixing venue in part by the county of defendant's residence. There was a rational basis for permitting plaintiff to sue in the county of his own residence.

¹⁶³ 91 So.2d 225 (Ala. 1956).

¹⁶⁴ State *ex rel.* Blackledge v. Latourette, 205 P.2d 849 (Ore. 1948).

¹⁶⁵ Bowsher v. Digby, 422 S.W.2d 671 (Ark. 1968).

defendant's residence if he is a resident of Ohio, and in the county of plaintiff's residence if the defendant is a non-resident.¹⁶⁶ The Kentucky Court when it is presented with the constitutionality of KRS § 454.210(4) will in all likelihood follow other states in holding the discrimination between residents and non-residents to be on a rational basis; that the non-resident can be presumed to have no interest in having the case tried in a particular county and that all the statute does is to give the plaintiff a choice of two counties, a choice which he would have were the defendant a resident.¹⁶⁷

If the action is *in rem* and the *res* is located outside the state, the general rule is that the court is without jurisdiction over the subject matter and cannot proceed.¹⁶⁸ Kentucky cases are in accord with this general principle.¹⁶⁹ As noted in the discussion of KRS § 452.400, however, the plaintiff can often accomplish his goal involving out-of-state property by asking the court to order the defendant to do something, rather than asking the court to operate directly on the property.¹⁷⁰ The best example of this is an action for specific performance which is held to be transitory and maintainable where the defendant resides or is summoned.¹⁷¹

When the *res* is within the state, it is logical that an *in rem* action be brought in the county in which the *res* is located. When the *res* is land, there is no question but that this is the rule.¹⁷² The Kentucky statutes do not, however, appear to localize *in rem* actions involving personal property, or cases in which *status* is the

¹⁶⁶ OHIO R. CIV. P. §§ 3(B)(1) and 3(B)(7) (1970).

¹⁶⁷ KRS § 452.460. In *Conner v. Willet*, 91 So.2d 225 (Ala. 1956), the Alabama court suggested that restricting the plaintiff to the county in which the cause of action arose would tend to discriminate against the plaintiff.

¹⁶⁸ *Fall v. Eastin*, 215 U.S. 1 (1909). See generally *F. JAMES, CIVIL PROCEDURE*, 628-630 (1965).

¹⁶⁹ *Walden v. Johnson*, 417 S.W.2d 220 (Ky. 1967) (child custody proceeding is *in rem* and the child must be domiciled in the state); *Birch v. Birch*, 239 S.W.2d 483 (Ky. 1951) (action which was essentially to quiet title to land was improper where the land was located outside the state); *People's Nat. Bank v. Jones*, 61 S.W.2d 17 (Ky. 1933) (replevin action for personal property could not be maintained if the personal property were located outside the state).

¹⁷⁰ See *JAMES, supra* note 168 at 629; see also note 62. Equitable actions are *in personam* and generally are not required to be brought in the county in which the land lies. 56 AM. JUR. *Venue* § 21 (1947).

¹⁷¹ *McQuerry v. Gilleland*, 12 S.W. 1037 (Ky. 1890) (action for specific performance of a contract to convey land situated in Iowa could be maintained in the county in Kentucky where the defendant resided). For a recent application of *McQuerry*, see *Caudill v. Little*, 293 S.W.2d 881 (Ky. 1956).

¹⁷² KRS § 452.400.

res (other than divorce which is localized by KRS § 452.470).¹⁷³ In response to the absence of statutory direction the Court of Appeals has held actions to foreclose on¹⁷⁴ and recover¹⁷⁵ personal property to be transitory, to be brought where the defendant resides or is summoned. In *Minary v. Minary*,¹⁷⁶ however, the Court seems to have regarded a suit by a trustee for declaration of rights in the trust to be localized at the situs of the trust corpus. This is a reasonable position but seems to fly in the face of the statutory pattern that actions not specifically localized are transitory. The conflict could be reconciled, if need be, by holding that KRS § 452.480, the transitory statute, is permissive (it uses the term "may be brought") and that a court is not precluded from creating additional forums by judicial decree.

Such a holding would of course, be the creation of venue by court decision, outside the statutory pattern. The Court would not, however, abuse its authority if it created venue rules to cover gaps in the statutes. The common law of venue was after all the result of court decision rather than legislation. Indeed, it appears from the facts of the child custody cases that the venue of an equitable action to determine the right of custody of a child is in the county in which the child is domiciled.¹⁷⁷ There is no statute localizing such actions, but it would be unjust to deem such an action transitory, and the courts seem to have assumed that the county in which the child is domiciled is the proper venue.¹⁷⁸

If the defendant in an *in rem* action involving personalty or status is a non-resident so that he is not amenable to personal service, it is possible to conceive of service as taking place at the forum, where the warning order attorney is appointed and makes his report.¹⁷⁹ This would mean that venue in a transitory action

¹⁷³ KRS § 452.470 localizes actions for divorce in the county of the wife's residence if she has an actual residence in the state. If she does not, the venue lies in the county of the husband's residence.

¹⁷⁴ *Ramey v. Weddington*, 105 S.W.2d 824 (Ky. 1937).

¹⁷⁵ *Cover v. Wheeler*, 178 S.W.2d 404 (Ky. 1944).

¹⁷⁶ 395 S.W.2d 588 (Ky. 1965). In this case the action was maintained in the county in which the trust was located, but it is unclear whether the trust involved realty or personalty or both.

¹⁷⁷ *Petrey v. Sampson*, 184 S.W.2d 898 (Ky. 1945); *Chamblee v. Rose*, 249 S.W.2d 775 (Ky. 1952).

¹⁷⁸ Jurisdiction over the subject matter depends on the child being a domiciliary of the state. *Walden v. Johnson*, 417 S.W.2d 220 (Ky. 1967).

¹⁷⁹ KRCP 4.07 requires the appointment of an attorney of the court as warning order attorney who is to attempt to notify the defendant of the nature and
(Continued on next page)

would be proper against a non-resident in any county in which the plaintiff chose to sue.¹⁸⁰ KRS § 452.465, however, limits the venue of actions against defendants proceeded against by warning order to the county in which the defendant resided at the commencement of the action or in which he has property. As noted in the discussion of KRS § 452.400 the *quasi-in-rem* action is obviously localized by this statute. It is difficult, however, to consider a non-resident's beneficial interest in a trust corpus to be within the statutory term "has property", and it is impossible to consider a non-resident's interest in the status of a child to be within that term. It is likely that the Court would, as suggested above, fill in the gaps in the statutory pattern by holding venue proper in the county in which the *res* is located.

The problems raised by the non-resident or property located outside the state could be solved by simply making venue proper in any county in which the *res* is located and in the county in which the defendant resides, or, if the defendant is a non-resident, in the county in which the plaintiff resides. This is basically the proposal suggested in Part IV.

B. *Actions Involving More Than One Claim or Theory of Relief*

Prior to the adoption of the Rules of Civil Procedure in 1953 joinder of claims was regulated by Section 83 of Carroll's Code¹⁸¹ which restricted joinder to claims which could be brought independently in the same county and which further restricted joinder to the same kinds of claims. For example, actions in contract and tort could not be joined under Section 83. The plaintiff with

(Footnote continued from preceding page)

pendency of the action and to report to the court within 50 days. There is no requirement that the defendant actually receive notice. KRCP 4.08 provides that the defendant "shall be deemed to have been summoned on the 30th day after the entry of a warning order."

¹⁸⁰ This appears to have been the common law rule. *Conner v. Willet*, 91 So.2d 225 (Ala. 1956); *Bowsher v. Digby*, 422 S.W.2d 671 (Ark. 1968).

¹⁸¹ "Causes of action may be joined. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action, and if all of them be brought:

1. Upon contracts, express or implied; or,
2. For the recovery of real property and the rents, profits and damages for taking or withholding it; or,
3. For the recovery of specific personal property, and damages for the taking or withholding it; or,
4. For partition of real or personal property, or both; or,
5. For injuries to character; or,
6. For injuries to person and property."

alternate theories of liability in contract and tort was required to elect the theory under which he would prosecute the action.¹⁸²

The Kentucky Civil Code Committee in their draft of rules of procedure¹⁸³ proposed that the pleader be permitted to join in his complaint or counterclaim as many claims as he had against the opposing party, even though the claims might be unrelated conceptually (as required by the old code) or functionally, in the sense of arising out of the same transaction or occurrence.¹⁸⁴ The Civil Code Committee knew at the time that the sections of Carroll's Code governing venue were to be transposed intact to the Kentucky Revised Statutes. Those venue sections had of course been enacted at a time when the joinder section of the code required that venue be proper as to each claim of a multiple claim action, and there was no provision in the venue code itself providing for venue in a multiple claim action. Furthermore the venue sections, in the spirit of restrictive joinder, classified actions according to the pleader's concept of liability or injury and set rules accordingly for the maintenance of actions. The Civil Code Committee apparently recognized the potential conflict between the liberality of proposed KRCP 18.01 and the conceptual rigidity of the venue sections for they included the following in their comments to the proposed rule:¹⁸⁵

Civil Code Section 83 also requires that actions can only be joined which may be brought in the same county. This is an additional bar to joinder and we have considered that the proper rule should be that if there is venue of one claim it would support the venue of all other claims. There should be, however, a power of the court to transfer claims to other courts where the forum is more convenient and where some fundamental policy of venue requires its trial in that county. This power of the court should be discretionary.

At the same time, however, the committee proposed KRCP 82 to provide, "These rules shall not be construed to extend or limit the jurisdiction of any court of this Commonwealth or the

¹⁸² *Hovermale v. Cent. Ky. Natural Gas Co.*, 282 S.W.2d 136 (Ky. 1955).

¹⁸³ Kentucky Rules of Civil Procedure Tentative Draft, prepared by Kentucky Civil Code Committee (undated, on file University of Kentucky Law Library).

¹⁸⁴ Kentucky Rules of Civil Procedure Tentative Draft, 64-65—proposed rule 18.01.

¹⁸⁵ Kentucky Rules of Civil Procedure, Tentative Draft, 66.

venue of actions therein,"¹⁸⁶ and commented as follows:¹⁸⁷

Proposed Rule 82 is based upon Federal Rule 82. None of the proposed rules attempts a statement in regard to jurisdiction or venue, . . . [T]he adoption of such a rule as Rule 82 is almost essential to the Code Committee which was enjoined from abridging, enlarging, or modifying substantive rights of litigants. Chapter 151, Acts of 1950. The possibility of some given rule being construed as altering the existing law relative to jurisdiction or venue is precluded.

At this point the General Assembly of 1952 passed enabling legislation¹⁸⁸ to permit the Court of Appeals to promulgate, from time to time, civil rules with the initial rules to be promulgated by and to be effective on July 1, 1953. Pursuant to this act the Court of Appeals promulgated the Rules of Civil Procedure. To the proposed rule governing joinder of claims, KRCP 18.01, the Court added the following sentence: "The right of a plaintiff to join claims in his complaint is subject to the statutes governing venue." The original committee note indicating that the proper venue of one claim would support the entire action was not modified, however, and appears today in Baldwin's edition of the Kentucky Revised Statutes.¹⁸⁹

It was clear to others,¹⁹⁰ however, that the venue of all claims in a multiple-claim action had to be proper under KRCP 18.01. Watson Clay commented on KRCP 18.01 as follows:¹⁹¹

The last sentence of this Rule was added to make it clear that the joinder by the plaintiff of independent claims was subject to the possible objection of improper venue. Rule 82 perhaps adequately preserves this objection but this Rule emphasizes that the *plaintiff* may not as a matter of right join actions without a common venue.

Under our present venue statutes, apparently these Rules would not authorize a plaintiff, by joining independent claims, to deprive the defendant of his possible objection that one or

¹⁸⁶ Kentucky Rules of Civil Procedure, Tentative Draft, 237.

¹⁸⁷ *Id.*

¹⁸⁸ KRS § 447.151 (1971).

¹⁸⁹ 7 Baldwin's Kentucky Revised Statutes, Rules of Civil Procedure, 54 (1969).

¹⁹⁰ Note, *Joinder of Claims, Counterclaims, and Crossclaims as Affected by Venue Statutes of Kentucky*, 43 KY. L.J. 274, 275-77 (1955).

¹⁹¹ 6 W. CLAY, KENTUCKY PRACTICE 310-311 (1963).

more claims must be asserted in actions brought in a different county.

In 1966, FRCP 18(a), after which KRCP 18.01 was patterned, was amended to eliminate all reference to Rules 19, 20 and 22 and now simply provides:

A party asserting a claim to relief as an original claim, counter-claim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

This change was effected to eliminate confusion caused by *Federal Housing Administration v. Christianson*¹⁹² which had imposed on joinder of claims the restrictions on permissive joinder of persons found in Rule 20.¹⁹³

In 1969 the Court of Appeals of Kentucky amended KRCP 18.01 to read like FRCP 18(a) with the omission of the word "maritime". The sentence pertaining to venue was eliminated. Clay's comment to the amended Rule states in part:¹⁹⁴

The references in the original Rule to Rules 19, 20 and 22 had apparently led to unintended restrictions upon joinder of claims. Joinder may present trial problems but it should not present pleading problems. The amended Rule simply permits unrestricted joinder of claims in a pleading.

What then is the position of the Kentucky Court of Appeals toward the venue of multiple-claim actions? Is it that the venue of each claim must be proper, as was required prior to 1953?¹⁹⁵ Is it, as suggested in the original comment of the Civil Code Committee, that venue as to one claim supports venue as to all other claims? Or does the Court occupy a middle position—that related claims may be prosecuted together if the venue of one of them is proper but that independent claims must each have a proper venue?

As KRCP 18.01 is based on FRCP 18(a) it is pertinent to examine Federal cases which have considered the problem.

¹⁹² 26 F.Supp. 419 (D. Conn. 1939).

¹⁹³ See Committee Note of 1966, 3A MOORE para. 18.01[3], at 1812-1914 (1970).

¹⁹⁴ 6 W. CLAY, KENTUCKY PRACTICE 43 (Supp. 1972).

¹⁹⁵ *Folden v. Shelton*, 226 S.W.2d 531 (Ky. 1950); Comment, 43 Ky. L.J. 274, 275 (1955).

FRCP 18(a) permits free joinder of claims and the Supreme Court has, in several landmark cases dealt with the problem of the multi-claim action where one of the claims lacked a jurisdictional basis in the federal courts. In *Hurn v. Ousler*¹⁹⁶ the Supreme Court held that where there is only one cause of action and jurisdiction is based on a federal question, that is, on the laws or Constitution of the United States, two or more grounds for relief may be urged, even though one or more of the grounds is based on state law and hence could not be sued on independently in Federal Court.¹⁹⁷ In *United Mine Workers v. Gibbs*¹⁹⁸ the Supreme Court rejected the term "single cause of action" and held that it was proper for a federal court to consider a non-federal claim with a federal claim if the claims involved a "common nucleus of operative fact", that is, were so related that the plaintiff would be expected to try the claims in one judicial proceeding.¹⁹⁹ If a nonfederal claim can be adjudicated with a related federal claim under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs* the nonfederal claim should not be required to have proper venue. If an independent *jurisdictional* basis is not required, independent venue certainly should not be required; the venue of the federal claim should suffice for the whole case. This is supported by commentators²⁰⁰ and case law.²⁰¹ Similarly if two related federal claims are joined under FRCP 18(a) the proper venue of one federal claim will support the other.²⁰² If unrelated, however, the treatises²⁰³ and at least one case²⁰⁴ take the position that the venue must be proper as to each claim. Claims are only required to have a loose factual connection to be considered related for jurisdictional or venue purposes.²⁰⁵

The Kentucky Court of Appeals, when faced with the neces-

¹⁹⁶ 289 U.S. 238 (1933).

¹⁹⁷ 3A MOORE para. 18.07 [1-2], at 1921 (1970).

¹⁹⁸ 383 U.S. 715 (1966).

¹⁹⁹ *Id.* at 725.

²⁰⁰ See e.g., 7 MOORE para. 0.140[5], 1334 (1964).

²⁰¹ See e.g., *Carolyn Chenilles, Inc. v. Ostow & Jacobs, Inc.*, 168 F.Supp. 894 (S.D.N.Y. 1958) (proper venue as to patent infringement claims supported venue of state claim of unfair competition).

²⁰² *Ferguson v. Ford Motor Co.*, 77 F.Supp. 425, 436 (S.D.N.Y. 1948).

²⁰³ 3A MOORE para. 18.07[1-1], 1960 (1970); 6 C. WRIGHT and A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1588 at 817 (1971).

²⁰⁴ *Locke Manufacturing Company v. Sabel*, 244 F.Supp. 829 (W.D. Ky. 1965).

²⁰⁵ C. WRIGHT and A. MILLER, *supra* note 203, § 1588 at 1811-12 (1971).

sity of deciding the proper construction of KRCP 18.01, should follow the lead of the federal courts and make the test, as to whether independent venue is required of a claim, one of the relationship to the claim with proper venue. Such a position would be consistent with the Kentucky cases prior to 1953²⁰⁶ which held that relief incidental to the main action could be granted without regard to venue, and would not do violence to the spirit of KRCP 82, which attempts to limit the impact of the Civil Rules on matters of jurisdiction and venue. It would also be consistent with recent cases from other jurisdictions.²⁰⁷

This analysis does not, however, answer all of the venue questions which arise in multi-claim actions. The discussion above assumes that the multiple claims either represent separate causes of action or alternate and equally serious theories of relief for the same cause of action. It further assumes that there is no legislative policy favoring one venue statute over another. The analysis to be complete must take into account the following refinements. The cases seem to hold that where a multi-theory complaint can be said to *primarily* be a certain kind of action then that type of action determines the propriety of the venue. The cases also take into account, in close cases, legislative policy favoring one venue statute over another.

Examples of cases measuring the propriety of venue according to the primary objective of the plaintiff are: *Meredith v. Ingram*²⁰⁸ in which the Kentucky Court held an action for waste by a remainderman to be primarily one for injury to real estate, as the *main theme* of the complaint sounded in tort, even though there was an alternate allegation of unjust enrichment; *Jarvis v. Hamilton*²⁰⁹ in which the Idaho court held an action to be primarily one for an accounting and therefore transitory, even though possession of the partnership real estate (located out of the

²⁰⁶ Crawford v. Crawford, 149 S.W.2d 778 (Ky. 1941); Cox v. Simmenman, 98 S.W.2d 915 (Ky. 1936).

²⁰⁷ Ellsworth v. Layton, 397 P.2d 450 (Ariz. 1965) (three separate causes of action all involving agreements by which plaintiff was to raise cattle on defendant's property; proper venue as to one cause established proper venue for entire action). Twin Lakes Reservoir and Canal Company v. Bond, 399 P.2d 793 (Colo. 1965) (causes of action to quiet title and for breach of contract in failing to procure the release of a mortgage—proper venue for the quiet title action established proper venue for the other claim arising out of the same set of circumstances).

²⁰⁸ 444 S.W.2d 551 (Ky. 1969).

²⁰⁹ 246 P.2d 216 (Idaho 1952).

county) was asked for; and *Beavers v. Rankin*²¹⁰ in which the Montana court held an action for release of an oil and gas lease encumbering real estate to be primarily local even though damages were asked for. The Texas court looked to plaintiff's purpose in *McFarling v. Cavender*²¹¹ and concluded it was to recover insurance premiums and that the plaintiff's insistence that he was also interested in recovering on the policy was ingenuous. Texas law, the court said, required a look at the whole suit to ascertain the primary or dominant purpose of the litigation.²¹² From these authorities, it can be concluded that a court will scrutinize a complaint to determine what the plaintiff's real objective is and rule on a motion to dismiss for improper venue accordingly. In the event plaintiff has two or more genuine claims, however, either claim can establish venue.

It is also possible that there is a legislative or judicial policy favoring one venue statute over another and, if so, this policy must be taken into account. In California, for example, the defendant has a right to insist that transitory actions be tried in the county of his residence and the joining of a local action involving land cannot defeat that right.²¹³ In Missouri, on the other hand, actions involving the title to real estate are to be tried in the county in which the land is located and the joining of a transitory cause of action cannot defeat that right.²¹⁴ California deems it important that a person be able to defend in the county of his residence; Missouri deems it more important that land cases be tried where the land is located.

As discussed above the federal courts hold that proper venue as to one claim will support the venue of the entire action if the claims are factually related. In *Bradford Novelty Co. v. Mannheim*,²¹⁵ however, a federal district court had the opportunity to apply this general principle to an action for related counts of patent infringement and unfair competition. The venue statute for patent infringement limits venue to the district of the defendant's residence or the district in which the infringing acts

²¹⁰ 385 P.2d 640 (Mont. 1963).

²¹¹ 469 S.W.2d 478 (Tex. 1971).

²¹² *Id.* at 480.

²¹³ *All-Cool Aluminum Awning Co. v. Superior Court*, 36 Cal. Rptr. 769 (Dist. Ct. App. 5 1964) (citing cases).

²¹⁴ *Skatoff v. Alfend*, 411 S.W.2d 169 (Mo. 1967).

²¹⁵ 156 F.Supp. 489 (S.D.N.Y. 1957).

occur; in this case venue could not be independently laid in the Southern District of New York. Unfair competition, however, is regulated by the general venue statutes and is proper in any district in which the defendant is doing business; venue as to the unfair competition count was proper in the Southern District of New York. The court held that the intent of Congress was to narrowly fix the place of trial of patent infringement cases and that this intent would be frustrated by pendent the patent claim to the unfair competition claim.²¹⁶ Furthermore, the court argued, the dominant purpose of the suit was one of patent infringement. The court then transferred the whole case to the Eastern District of New York where the venue was proper as to the patent infringement count.

In *Bradford Novelty Company* the court looked both to the dominant or primary purpose of the suit and to the legislative policy expressed in the venue statutes. This is a sound approach. Certainly Kentucky courts have attempted to ascertain the primary objective of the suit in venue problems. What of the test of ascertaining legislative purpose? Are there ascertainable legislative or judicial policies in Kentucky to guide courts in resolving close venue questions? Certainly it is logical to give effect to a venue statute attached to a body of substantive law in the event of conflict with the venue statutes of Chapter 452. Thus KRS § 406.151, permitting a mother to file a paternity suit in the county of her residence should be given effect over KRS § 452.460 or 452.480. Within Chapter 452 itself the statutory pattern gives some guidance. The four statutes of general application, discussed in detail in Part II of this paper, indicate the order in which they, and other statutes in Chapter 452, are to be consulted. KRS § 452.450, for example, excepts actions required to be brought against corporations by the more specific sections of the chapter.²¹⁷ It does not, however, except actions required to be brought under KRS § 452.460. KRS § 452.460, on the other hand, excepts "every other action", indicating actions covered by preceding sections includ-

²¹⁶ *Id.* at 491-92. See also *Swiss Israel Trade Bank v. Mobley*, 319 F.Supp. 374 (S.D. Ga. 1970); strong policy in favor of localizing actions against banks to district where bank is established precluded impleading a bank in another district on theory of ancillary jurisdiction.

²¹⁷ KRS §§ 452.400-452.420 inclusive, KRS §§ 452.430, 452.440, 452.445, 452.455, 452.465 and 452.475.

ing KRS § 452.450. KRS § 452.480 provides for the venue of "an action which is not required by the foregoing provisions of KRS §§ 452.400—452.475 to be brought in some other county. . . ." Moreover, there is some indication that KRS § 452.400 is to be given precedence over the statutes regulating distribution of estates,²¹⁸ and from this it might be concluded that KRS § 452.400 is to be given precedence over other statutes in the chapter.

However, the statutory pattern should not be overly emphasized. For example, the Court does not seem to have respected KRS § 452.400 more than KRS § 452.480. Timbering and quarrying cases have been classified as transitory.²¹⁹ Furthermore, on at least one occasion the Court of Appeals has erroneously ignored the provisions of KRS § 452.450 in favor of 452.480.²²⁰ On the other hand the Court has ignored the relational nature of wrongful death and classified it as an action for "injury to the person", governed by KRS § 452.460 rather than KRS § 452.480.²²¹ An analysis of the cases does not indicate any overriding policy in Kentucky in favor of any criteria for fixing venue, as, for example, exists in California.

In summary a court should, under the present law, determine the propriety of venue in unclear cases by application of the following tests: (1) Does the plaintiff have a primary objective so that his other claims may be considered subsidiary and, if so, what is that objective? (2) Is there any ascertainable legislative or judicial policy, such as a statute attached to the substantive law, indicating where the venue of the action should lie? and (3) If the plaintiff has more than one primary objective so that the plaintiff's complaint may be regarded as stating separate causes of action or separate serious grounds for the same cause, are the claims factually related or not? In applying this last test the court should use the same standards used for determining compulsory counterclaims and matters proper to be raised by cross-claim: does the claim where venue is not independently proper arise out of the *same transaction or occurrence* as does the claim where venue is proper?

²¹⁸ Meredith v. Ingram, 444 S.W.2d 551 (Ky. 1969); Cox v. Simmerman, 98 S.W.2d 915 (Ky. 1936), Annot., 93 A.L.R.2d 1199, 1209, 1211 (1964).

²¹⁹ See text, *supra* note 144.

²²⁰ Holcomb v. Kentucky Union Co., 90 S.W.2d 25 (Ky. 1936).

²²¹ See text, *supra* note 111.

There is a postscript to this analysis. It appears from an examination of the cases²²² that Kentucky courts have resolved close venue questions in favor of the plaintiff. Much of the seeming conflict in decisions may be due to a reluctance to dismiss a plaintiff's case for improper forum. On the other hand if the place of trial is of importance to the defendant, which is assumed by this article and by most venue statutes, it is not fair to give independent weight to the plaintiff's choice of forums. It is fairer to apply the objective tests set out above without regard to the fact that a resolution of improper venue will mean dismissal of plaintiff's case.

The Ohio venue rules, relied on heavily herein as a suggested guide for Kentucky, do not require an elaborate analysis of venue in multiple claims actions. If venue is proper as to one claim venue is proper for the whole action.²²³ The unspoken premise is that the defendant has no particular interest in the location of litigation of particular claims; that if he is in a court on one claim he may as well be in court for all. This premise is unsound, as is aptly demonstrated by the analysis of third-party complaints. The defendant does have an interest in the trial of particular claims in particular forums, that being an interest that the forum be convenient to him and that the judge and jury be at least as fair to him as they are to his opponent. If the venue of one claim is to establish proper venue for the whole action, the statute or code section, for the protection of the defendant, should include a provision for transfer to a more convenient forum. This was suggested in the original note to Kentucky's Rule 18²²⁴ and was part of Professor Miller's proposal to the Ohio legislature preceding the adoption of the Ohio rules of civil procedure.²²⁵ Such a provision was not, however, adopted in Ohio and is not recommended by this article. Instead the proper venue of one claim if it is more than a nominal or make-weight claim, should establish the proper venue for all related claims, with "related" defined

²²² For example *Meredith v. Ingram*, 444 S.W.2d 551 (Ky. 1969) (conflict with KRS § 452.415); *Cox v. Simmerman*, 98 S.W.2d 915 (Ky. 1936) (conflict between KRS §§ 452.400 and 452.420).

²²³ OHIO R. CIV. P. 3(E).

²²⁴ See text, *supra* note 185.

²²⁵ R. Miller, *Implementing Current Theories of Jurisdiction, Venue, and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 148-149, 161-162 (1968).

as "arising out of the same transaction or occurrence." This proposal is expanded in Part IV of this article.

C. *Multiple Defendants*

Improper venue is a personal defense and each defendant has the right to insist that venue be proper as to him.²²⁶ This is true even if the defendant to whom venue is not proper could be classified as a necessary or indispensable party to the action²²⁷ and even if there is no county in which both defendants can be sued (a possible but highly unlikely situation). Part IV recommends that venue continue to be recognized as a legitimate personal defense and that the plaintiff be required to choose a forum where venue is proper as to all.

D. *Counterclaims, Cross-claims, and Third Party Complaints*

1. *Counterclaims*

The plaintiff originally chooses the forum and should be deemed to have waived any objections he has to the venue of matters which can be asserted against him by counterclaim, either mandatory or permissive. The Supreme Court so held in 1932²²⁸ and there seems little doubt but that the Kentucky Court would so hold if presented with the opportunity.²²⁹

2. *Cross-claims*

A cross-claim by a defendant against a co-defendant must arise out of the same transaction or occurrence that is the subject matter of the original complaint or a counterclaim to the complaint.²³⁰ As such it can be considered ancillary to the original complaint with no independent venue requirement.²³¹ The Kentucky Court of Appeals has so held in *Licking River Limestone Co. v. Helton*.²³² In *Helton* the defendant inadvertently waived

²²⁶ *Crume v. Taylor*, 114 S.W.2d 1119 (Ky. 1938); text at note 114 *supra*.

²²⁷ KRCP 19.01 (Persons to be joined if Feasible) provides that, after it is determined that a party should be joined and is in fact joined, if he objects to the venue of the action and his joinder would render the venue improper he shall be dismissed from the action.

²²⁸ *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932).

²²⁹ Note, 43 Ky. L.J. 274, 278-79 (1956); 6 W. CLAY, KENTUCKY PRACTICE, 231 (1963) [hereinafter cited as CLAY].

²³⁰ KRCP 13.07.

²³¹ 3 MOORE para. 13.36 (1968).

²³² 413 S.W.2d 61 (Ky. 1967).

the defense of improper venue to the original action and the Court held it could not then object to the venue of the cross-claim.

3. *Third-Party Complaints*

KRCP 14 permits a defendant to implead a party who is or may be liable to him for all or part of the plaintiff's claim. Can the impleaded party, or, in the nomenclature of the Rules the third-party defendant, raise a defense of improper venue? This question raises more problems than do the questions of counter-claim and cross-claim. The third-party defendant is being brought involuntarily into an action where venue is not proper as to him on any claim. There is an obvious analogy to the case of co-defendants, where it is clear venue must be proper as to both. At the time of the adoption of the Civil Rules in 1953 there was considerable uncertainty on this matter.²³³ The Court of Appeals resolved these doubts in 1967 in *Goodwin Brothers v. Preferred Risk Mutual Insurance Company*²³⁴ holding that the third-party complaint for contribution or indemnity need satisfy no venue requirements. In so holding the Court stressed the need to avoid multiplicity of actions and followed federal cases which had held that a third-party complaint could be considered ancillary to the main action.²³⁵ The Court here considered and rejected the argument that this construction of KRCP 14 violated the spirit and letter of KRCP 82.

While it is clear that there is no venue requirement for the third-party complaint for indemnity or contribution, two other problems remain unanswered. First is the problem of the plaintiff's claim directly against the third-party defendant. The Rules permit a plaintiff to assert a claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the original complaint.²³⁶ Suppose that Wife (W) is a passenger in Husband's (H's) car and both are residents of A county. W is injured in a collision between the car of H and that of X, a resident of B county. The accident takes place in B

²³³ Note, 43 Ky. L.J. 274, 279-283 (1955); 6 CLAY 251 (1963).

²³⁴ 410 S.W.2d 714 (Ky. 1967).

²³⁵ 410 S.W.2d 716. But see *Lemmon Pharmacal Co. v. Richardson* 319 F.Supp. 375 (E.D. Pa. 1970) (third-party complaint could not be filed against a national bank other than in the district prescribed under the Banking Act).

²³⁶ KRCP 14.01.

county. If W wishes to sue H and X jointly she must proceed in B county, the county in which the accident took place and in which, incidentally, one of the defendants lives. Suppose W sues only H and files the action in A county. The venue is proper as to H as that is the county of his residence. H now can file a third-party complaint for contribution against X on the authority of *Goodwin Brothers*.

With the pleadings in this posture W can recover only against H, with H entitled to contribution from X in the event of a determination that X is a joint tort-feasor. But W cannot recover from either H or X in this action on a determination that only X is at fault. This is because W has asserted no claim directly against X and X can only be held liable for sums which H is required to pay W. To guard against this possibility (and the further possibility of losing to X in a later independent action) W will likely file a claim directly against X. Should X then be able to raise the defense of improper venue?

The treatises²³⁷ and most of the cases²³⁸ hold that, for *venue* purposes, the plaintiff's claim against the third-party defendant can be considered ancillary. The same authorities hold, however, that an independent *jurisdictional* base is required.²³⁹ The distinction is made on the theory that circumvention of subject-matter jurisdiction requirements would be made possible by treating the plaintiff's claim as ancillary for jurisdiction. In the example above suppose W and X are residents of the same state and the original basis for federal jurisdiction is diversity between W and H. To permit W to sue X directly after X is brought into the action by H would subvert the statutory requirement of complete diversity between plaintiffs and defendants. Venue on the other hand is a matter of personal convenience to the litigants. The third-party defendant is already in the action, so the argument goes, and it does not seriously inconvenience him to require him to defend the plaintiff's claim as well as the third-party plaintiff's claim.²⁴⁰

²³⁷ C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 1445 at 244 (1971); 3 MOORE para. 14.28[3] at 745 (1968).

²³⁸ *Thompson v. United Artists Theatre Circuit Inc.*, 43 F.R.D. 839 (S.D.N.Y. 1967); *Bonath v. Aetna Freight Lines Inc.*, 33 F.R.D. 260 (W.D. Pa. 1963); *Contra Hadina v. M. A. Henry Co.*, 8 F.R.D. 52 (S.D.N.Y. 1948).

²³⁹ 3 MOORE para. 14.27[1], at 721 (1968).

²⁴⁰ 3 MOORE para. 14.27[1], 722-723; 14.28[3], at 745 (1968).

It seems, however, that if a plaintiff is not to be permitted to circumvent jurisdiction requirements by sharp use of Rule 14 that he should not be able to evade venue requirements either. In the example above if W is permitted to file against X after X has been impleaded by H the result is exactly the same as if W had sued H and X together in the first place. X is now forced to defend W's suit in a county where he could have secured a dismissal for improper venue had he been originally named as a defendant. This is an illogical and unjust result which the Kentucky Court can avoid by restricting the concept of ancillary venue to those matters necessary to fully dispose of W's claim against H and to guard H against the expense and trouble of a separate action for contribution.

The second problem left unanswered by *Goodwin Brothers* is the problem of the affirmative claim by the third-party plaintiff against the third-party defendant. In the example above suppose that H was also injured in the accident. Should he be able to implead X for contribution and join with the contribution claim a claim for his own injuries? It is somewhat startling, in light of the purpose of Rule 14,²⁴¹ to find that the Rules apparently permit the joinder of affirmative claims to the claim for contribution or indemnity. This seems to be the result dictated by KRCp 18.01, which permits free joinder of claims by a party asserting a claim to relief as an "original claim, counterclaim, cross-claim, or third-party claim." Unlike KRCp 13.07,²⁴² governing the assertion of cross-claims, there is nothing in KRCp 14 limiting the kinds of claims which may be asserted against a third party. The treatises take the position that an affirmative claim, even an unrelated affirmative claim, can logically be joined under Rule 18 to the third party complaint for contribution or indemnity.²⁴³ In *Noland Company v. Graver Tank and Manufacturing Company*²⁴⁴ the

²⁴¹ Which is to save the original defendant the expense and delay of trying a separate action for contribution or indemnity. 3 MOORE para. 14.04, at 501-02 (1968).

²⁴² KRCp 13.07 limits matters which can be asserted in the initial cross-claim to matters arising out of the same transaction or occurrence that forms the basis of the original complaint or counterclaim.

²⁴³ 6 WRIGHT & MILLER § 1452, at 287; 3A MOORE para. 18.04[4] at 1876-77 (1970). MOORE apparently further takes the position that unrelated affirmative claims can be asserted by way of cross-claim but this seems to fly in the face of the limiting language of FRCP 13(g) (which is identical to KRCp 13.07).

²⁴⁴ 301 F.2d 43 (4th Cir. 1962).

United States Fourth Circuit Court of Appeals expressly held that an affirmative claim arising out of the same transaction as the original action could be litigated under Rule 14. The court stressed the fact that substantially the same proof would be required as in the main action; it did express the belief that a court should have the discretion to reject an affirmative claim which would unduly complicate the issue. There are no cases to be found holding that *unrelated* claims can be asserted in a third-party complaint, although this is warranted by the wording of Rule 18. The defendant must generally obtain leave of the court to file a third-party complaint²⁴⁵ and it is unlikely that a court would permit the filing of a third-party complaint which contained a totally unrelated claim. It is quite likely, however, that a court would consider an affirmative claim arising out of the same transaction that formed the basis for the plaintiff's suit to be a proper matter for litigation with the original action. Should the impleaded party be permitted to assert the defense of improper venue?

It is submitted that he should for the same reason that he should be able to insist that venue be proper as to any claim of the plaintiff against him. He would have been able to have the affirmative claim dismissed for improper venue had it been filed as an original complaint. The result should not be changed simply because the claim is asserted by way of joinder with a third-party complaint for contribution. In *Schwab v. Erie Lackawana Railroad Company*²⁴⁶ a federal court rejected the argument that an affirmative third-party complaint could be considered ancillary for *jurisdictional* purposes with the pithy remark, "Once the camel (meaning the lawsuit) gets his nose under the tent, we would have to make room for the entire animal, including its pendent fleas." On appeal, however the Third Circuit reversed, holding that the affirmative claim could be considered ancillary to the third-party complaint for contribution and indemnity which was itself ancillary to the main action.²⁴⁷ The appellate court's main concern was judicial economy; it was willing to bend

²⁴⁵ FRCP 14(a) permits the filing of a third-party complaint without leave of court within 10 days of the service of the original answer. KRCF 14 requires leave of court at all times.

²⁴⁶ 48 F.R.D. 442 (W.D. Pa. 1970) *rev'd*, 438 F.2d 62 (3d Cir. 1971); cf. Gerhardt v. Edgar, 251 F.Supp. 678 (W.D. Pa. 1966).

²⁴⁷ Schwab v. Erie Lackawana Railroad Co., 438 F.2d 62 (3d Cir. 1971).

jurisdictional rules accordingly. Undoubtedly the Third Circuit would reach a similar result if the *venue* of the affirmative claim were improper, sacrificing the third-party defendant's personal defense to an overriding goal of judicial economy. It is submitted that the trial court in *Schwab* was right and the appellate court wrong; jurisdictional limitations and personal defenses should not be ignored or circumvented so that all facets of a dispute can be tried in one action. The concepts of ancillary jurisdiction and ancillary venue should be restricted, in the third party context, to those matters necessary for the adjudication of the original complaint and the protection of the original defendant.

Consistent with the recommendation that proper venue be required for each defendant in a multi-defendant action it is recommended that any venue revision preserve to the third-party defendant the right to insist on proper venue of all claims asserted against him other than the original claim for contribution or indemnity.

E. *Dismissals and the Statute of Limitations*

In Kentucky if the venue of an action is improper and the defendant has made a timely objection the court must dismiss the case. There is no provision in the statutes or Rules for a transfer to a court with proper venue except by mutual consent of the parties (which it would be unlikely to obtain).²⁴⁸ This gives rise to two problems, one major and one minor. The minor problem is whether the statute of limitations is tolled by the pendency of an action dismissed for improper venue. The major problem is the fact that a trial court's finding of improper venue is a final and appealable order.

The minor problem is presented by the wording of Kentucky's saving statute. KRS § 413.270 simply provides that if an action is commenced in good faith and ultimately dismissed for lack of *jurisdiction* that the plaintiff has ninety days in which to commence an action in the proper court, even though the statute of

²⁴⁸ KRS § 452.010(1) (1971) provides for transfer by consent of the parties. When venue is improper a court would find it difficult to obtain a consent to transfer under this section because one or the other of the parties would imagine some advantage to be gained by a final order of dismissal. In the days when jurisdiction and venue were confused it was held that a transfer by consent could only be had if the venue (or jurisdiction) was proper initially. *Shadoin v. Sellars*, 4 S.W.2d 717, 720 (Ky. 1928).

limitations has otherwise run. Does "jurisdiction" include venue? Both the Kentucky Court of Appeals and a United States Court of Appeals have held that it does.²⁴⁹ The federal court specifically addressed itself to the confusion between jurisdiction and venue in holding that the saving statute should be broadly construed.²⁵⁰

If there is no proper forum within the state (which is unlikely but possible) the plaintiff may be forced to sue in a state without a saving statute. This problem was met in Ohio by a rule by which an agreement is elicited from the defendant before dismissal to the effect that the date of the commencement of the Ohio action is the date of the commencement of the action in the forum with proper venue.²⁵¹ If the defendant refuses to consent the Ohio rule provides that the court shall hear the action. Such a rule effectively eliminates the injustice which might otherwise occur as a result of a sister state's lack of a saving statute.

The major problem presented by dismissals for improper venue is that the dismissal terminates the litigation. The plaintiff is put to the added trouble and expense (and the attorney is embarrassed) of filing a complaint in another county. The defendant, once bitten, may avoid service of process. On the other hand the plaintiff may decide to appeal the dismissal rather than accepting the decision of the trial court, thus causing a delay in the ultimate litigation on the merits. These factors, plus the fact that courts often are reluctant to create an appealable order by a dismissal at an early stage, may lead courts in close situations to overrule the motion to dismiss. The order overruling is of course interlocutory and not appealable. The distinction between jurisdiction and venue will then frustrate the defendant who seeks a writ of prohibition from the Court of Appeals;²⁵² although it is likely that the Court would issue the writ in the event the trial court showed blatant disregard for the venue statutes. It would be fairer if a court's decision on the motion to dismiss for improper

²⁴⁹ *Shircliff v. Elliott*, 384 F.2d 947 (6th Cir. 1967); *D. & J. Leasing, Inc. v. Hercules Galion Products, Inc.*, 429 S.W.2d 854 (Ky. 1968).

²⁵⁰ 384 F.2d at 950.

²⁵¹ OHIO R. CIV. P. 3(D): Rule 3(D) also contemplates extorted consent to the propriety of venue in the other state. *R. Miller*, supra note 225, at 116, 154.

²⁵² *Warecke v. Richardson*, 468 S.W.2d 795 (Ky. 1971) (writ of prohibition would not lie on behalf of non-residents who were served with process while in the state attending a trial; this was a question of jurisdiction over the person, not the subject matter of the action).

venue were either always appealable or never appealable. Then the trial court would decide the matter "down the middle", for the right of appeal, or lack of such right, would be the same whatever the decision.

What happens when either party can appeal the venue decision? It has been estimated that in Texas, where the defendant can appeal a denial of privilege (the right to have a case tried in the county of his residence) that one out of every eleven cases in the Court of Civil Appeals involves a plea of privilege.²⁵³ This statistic points out an obvious truth; the allowance of interlocutory appeals gives a party a tool to harass and wear down his opponent. This is an evil the Civil Rules were designed to meet and the venue laws should not be changed in such a way that this interest might be frustrated. This leads to the conclusion that the venue decision either way should be nonappealable; that a venue revision should include a simple transfer section for cases where venue is improperly laid. This may at times work an injustice but should result in more equitable venue decisions and fewer wasteful appeals.

F. *Change of Venue*

The Kentucky statutes provide for change of venue in civil cases in limited situations. The statute provides for such a change if the influence of the adversary or the odium attending the applicant or the circumstances or nature of the case prevent the applicant from having a fair trial in the county.²⁵⁴ The applicant must be able to represent that there is something special about the case which prevents him from having a fair trial at all in the county. A review of the cases indicates that this right of transfer is illusory. The matter has consistently been deemed to be within the discretion of the trial court, and the only appellate case in recent years in which a trial court granted a change of venue in a civil action was a wrongful death action by the personal representative of a prisoner beaten by the county attorney while in custody. The grand jury refused to indict the county attorney; the judge then transferred the civil case to a

²⁵³ Leonard v. Maxwell, 365 S.W.2d 340, 346 (Tex. 1963).

²⁵⁴ KRS § 452.010(2) (1971). Procedures for change are set out in KRS § 452.020 to KRS § 452.110 (1971).

surrounding county and the Court of Appeals affirmed.²⁵⁵ Otherwise trial courts have been consistent in overruling the motion for change regardless of the prominence in the community of the plaintiff or his witnesses.²⁵⁶

It is obvious that the legislature did not intend for a court to be able to transfer a case to another county merely because it believed the other county to be more neutral or more convenient to the litigants. And the courts have construed the law so that the plaintiff's choice of forum, if proper, will not be upset except under the most extreme circumstances. The question is whether or not a court should have power to transfer a case whose venue is properly laid to the most convenient forum. This was proposed in Ohio²⁵⁷ but not adopted.²⁵⁸ Although the Court of Appeals of Kentucky should have the power to adopt rules for the transfer of cases for matters of convenience to the court as well as the litigants,²⁵⁹ it is not proposed that the Court of Appeals utilize this power in the near future. Transfer to the most convenient forum is a relatively sophisticated concept²⁶⁰ and might lead to territorial squabbles between the trial judges. In a revision of the venue provisions transfer should initially be restricted, as it now is, to the traditional ground of inability to obtain a fair trial. A review of the cases does suggest, however, that trial courts might be somewhat more liberal in granting changes on that ground.

²⁵⁵ Reynolds v. Coburn, 148 S.W.2d 704 (Ky. 1941).

²⁵⁶ Recent cases in which the trial court overruled the motion for change of venue and the Court of Appeals affirmed include: Miller v. Watts, 436 S.W.2d 515 (Ky. 1969) (plaintiff's attorney had campaigned for county attorney with an advertisement that his practice was largely against insurance companies); South-eastern Greyhound Lines v. Davis, 160 S.W.2d 625 (Ky. 1942) (plaintiff was a former teacher and county attorney and his father was a public official); Smith v. Mathers' Adm'r, 135 S.W.2d 889 (Ky. 1940) (two of the testamentary bequests in an action to set aside a will were for the establishment of a school and hospital in the county); and Leming's Adm'r v. Leachman, 105 S.W. 2d 1043 (Ky. 1937) (defendant was a merchant of high standing; his witnesses were county officials).

²⁵⁷ Miller, *supra* note 225, at 149-150, 159-163.

²⁵⁸ OHIO R. Civ. P. 3 contains no provisions for the transfer of a case on grounds of convenience. OHIO R. Civ. P. 3(C)(4) provides for transfer on the traditional ground of inability to have an impartial trial.

²⁵⁹ Cf. Miller, *supra* note 225, at 160 where it is suggested that the court on its own motion might transfer a case to alleviate calendar congestion.

²⁶⁰ Miller, *supra* note 225, at 149 lists twelve factors to be taken into account in ruling on a motion to transfer to a more convenient forum. Among the factors are: access to proofs; costs; possibility of a view of the premises; motives of plaintiff and defendant; calendar congestion; and the relation of the controversy to the community from which the jury is to be drawn.

IV. THE PATH TO REFORM

A. *The Ohio Experience*

Prior to 1968 civil procedure in Ohio was regulated by statute and supplemented by local rules adopted by the various courts of that state. The Supreme Court of Ohio lacked authority to promulgate rules of procedure. In May, 1968 the voters passed a constitutional amendment giving the Supreme Court of the state general supervisory power to prescribe rules of procedure.²⁶¹ The Supreme Court's authority to prescribe rules of practice and procedure is limited, by the terms of the amendment, to rules which do not abridge, enlarge, or modify substantive rights.²⁶² The procedure to be used in rule formulation is for the Supreme Court to file proposed rules with the general assembly of the state on or before the fifteenth of January each year with the rules to become effective automatically on July 1 unless the assembly passes a concurrent resolution of disapproval.²⁶³ The Supreme Court thus bears the responsibility for rule formulation, with the legislature's role limited to a veto power.

Pursuant to its new authority the Supreme Court forwarded rules of procedure to the 1970 Ohio legislature²⁶⁴ patterned after the Federal Rules of Civil Procedure.²⁶⁵ These rules were not vetoed by the legislature and became effective on July 1, 1970. The Supreme Court went beyond the Federal Rules and promulgated a simple set of rules to govern the venue of civil actions.²⁶⁶ That such rules will be held to be *procedural* and not substantive appears to be a legal certainty as the body which prescribed the rules is the same body which ultimately will decide the constitutionality of the action.²⁶⁷ This statement is not meant to be cynical; it simply reflects the obvious fact that the Supreme Court of Ohio has already decided that it can constitutionally regulate

²⁶¹ For a complete history of the constitutional amendment and its impact on Ohio practice see W. Milligan and J. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968).

²⁶² OHIO CONST. ART. IV, § 5(B).

²⁶³ *Id.*

²⁶⁴ Page's OHIO REVISED CODE, CIVIL RULES EDITION, p. ix (1971).

²⁶⁵ Page's OHIO REVISED CODE, CIVIL RULES VOLUME, p. iii, iv (1971); Milligan and Pohlman, *supra* note 261, at 830.

²⁶⁶ OHIO R. CIV. P. 3(B) to 3(G).

²⁶⁷ Milligan and Pohlman, *supra* note 261, at 832; *cf.* Hanna v. Plummer, 380 U.S. 460, 471 (1965).

venue. Such a decision is in keeping with the new role of the Supreme Court of Ohio as the general superintendent of the court system with authority over record keeping, assignments, and disqualification of judges.²⁶⁸

The venue rule itself borrows heavily from proposals made by Professor Richard Miller of Ohio State University in a 1968 critique of jurisdiction, venue, and service of process in Ohio.²⁶⁹ The drafters essentially followed Miller's proposal to present the plaintiff with a number of alternate forums in a broad-based rule applicable to all actions where venue is not *specifically* established by statute. Under Rule 3(B)²⁷⁰ the plaintiff can sue: (1) where the defendant resides; (2) where the defendant has his principal place of business; (3) where the defendant conducted activity which gave rise to the cause of action; (4) in the county in which the property is located if property is the subject of the

²⁶⁸ Milligan and Pohlman, *supra* note 261, at 822-827.

²⁶⁹ See Miller, *supra* note 225, at 146-162 (1968); staff note to Rule 3, OHIO REV. CODE, CIVIL RULES VOLUME, 15 (1971).

²⁷⁰ "Venue: where proper. Any action may be venued, commenced and decided in any court in any county. When applied to county and municipal courts "county" as used in this rule shall be construed where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

- (1) The county in which the defendant resides;
- (2) The county in which the defendant has his principal place of business;
- (3) A county in which the defendant conducted activity which gave rise to the claim for relief;
- (4) A county in which a public officer maintains his principal office if suit is brought against him in his official capacity;
- (5) A county in which the property, or any part thereof, is situated if the subject of the action is real property or tangible personal property;
- (6) The county in which all or a part of the claim for relief arose; or, if the claim for relief arose upon a river, or other watercourse, or a road, which is the boundary of the state, or of two or more counties, in any county bordering on such river, watercourse, or road, and opposite to the place where the claim for relief arose;
- (7) In actions described in Rule 4.3 (out-of-state service) in the county where plaintiff resides;
- (8) In an action against an executor, administrator, guardian, or trustee, in the county in which he was appointed;
- (9) In actions for divorce, annulment or for alimony in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;
- (10) If there is no available forum in subsections (1) through (9) of this subdivision, in the county in which plaintiff resides; has his principal place of business or regularly and systematically conducts business activity;
- (11) If there is no available forum in subsections (1) through (10) of this subdivision:
 - (a) In a county in which defendant has property or debts owing to him subject to attachment or garnishment;
 - (b) In a county in which defendant has appointed an agent to receive service of process or wherein such agent has been appointed by operation of law."

action; and (5) where all or part of the cause of action arose. In addition public officers sued in their official capacities may be sued where their office is maintained; personal representatives and fiduciaries may be sued in the county of their appointment; persons sued under the long-arm statute (now a court rule) may be served in the county of plaintiff's residence; and actions for divorce, annulment or alimony may be maintained in a county in which the plaintiff has resided for the 90 days immediately preceeding the suit. If these provisions do not yield a proper forum plaintiff may sue in the county of his own residence. If the plaintiff still does not have an available forum he may sue in any county in which the defendant has property to attach or garnishee or in which the defendant has appointed an agent to receive process (or where an agent has been appointed for him by law). The only significant changes from Miller's proposal are to eliminate, as a permitted forum, counties in which the defendant regularly and systematically conducts business and to eliminate completely venue in the county in which the defendant is summoned.²⁷¹

Rule 1(C) provides that the Ohio rules are not applicable to the extent they conflict with specific statutory proceedings.²⁷² In the venue context this means that where the legislature has provided for the place of trial in enacting substantive legislation those provisions are to be followed; where there is no provision for venue within the substantive law Rule 3 controls.²⁷³ The Kentucky rules are similar to those of Ohio in recognizing the power of the legislative branch to provide for special procedures in conjunction with causes of action established or regulated by statute.²⁷⁴ The effect of a broad based venue rule in Kentucky would therefore be the same as in Ohio; that is, specific statutory provisions, such as the provision for sale of realty of a minor,²⁷⁵ would still be followed. Statutory causes of action without an

²⁷¹ See Miller, *supra* note 225, at 147-148.

²⁷² OHIO R. CIV. P. 1(C).

²⁷³ J. McCormac, *Venue—"New" concepts in Ohio*, 39 CEN. L.J. 474, 479-480 (1970).

²⁷⁴ KRCP 1; *Chiquelin v. Linker*, 323 S.W.2d 583 (Ky. 1959) (distress for rent is a special statutory proceeding with procedures fully governed by statute; the Civil Rule provisions for notice and parties are inapplicable).

²⁷⁵ KRS § 389.010(1) (1971).

accompanying venue section would be governed by the venue rule.

There is a simple provision in the Ohio rule for transfer of improperly laid actions to a county with proper venue²⁷⁶ with the power in the court to assess attorney fees against the party who improperly commenced the action.²⁷⁷ While Miller proposed that courts be empowered to transfer cases with proper venue to the most convenient forum,²⁷⁸ the rule limits change of venue to the traditional ground of inability to obtain a fair trial.²⁷⁹ Under the rule, the proper venue of one claim or one defendant, so long as he is not a "nominal" defendant, will establish proper venue for the entire action.²⁸⁰ Miller also proposed, however, that the courts have the power to sever and transfer claims for the convenience of litigants and witnesses.²⁸¹ This was not adopted by the Ohio Court.

Miller proposed,²⁸² and the Ohio Court accepted, rules to protect suitors when no suitable forum existed in Ohio,²⁸³ and

²⁷⁶ "When an action has been commenced in a county other than stated to be proper in subdivision (B) of this rule, upon timely assertion of the defense of improper venue as provided in Rule 12, the court shall transfer the action to a county stated to be proper in subdivision (B) of this rule." OHIO R. CIV. P. 3(C)(1).

²⁷⁷ "When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than that stated to be proper in subdivision (B) of this rule." OHIO R. CIV. P. 3(C)(2).

²⁷⁸ See Miller, *supra* note 225, at 149, 161-162.

²⁷⁹ "Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending." OHIO R. CIV. P. 3(C)(4). The Supreme Court of Ohio felt that more harm than good would result from an attempt to transfer a case to a slightly better forum. McCormac, *supra* note 273 at 484.

²⁸⁰ "In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue therein shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties." OHIO R. CIV. P. 3(E).

²⁸¹ Miller, *supra* note 225, at 150.

²⁸² Miller, *supra* note 225, at 149, 151.

²⁸³ "When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction."

(Continued on next page)

to provide for the filing of notices as to the pendency and status of *in rem* actions affecting real or personal property outside the forum county.²⁸⁴

In summary, venue in Ohio is regulated by court rule rather than statute (although the legislature can override); a number

(Footnote continued from preceding page)

diction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action. If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action." OHIO R. CIV. P. 3(D).

²⁸⁴“(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff must cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file such certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, this subsection also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever such real property is situated wholly or partly in a county other than the county in which the permanent records of such court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in accordance with subsection (2) above, and such judgment is later appealed, vacated or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of this subdivision shall number, index, docket and file it in the records of the receiving court. He shall index the first such certified copy he receives in connection with a particular action in the indices to the records of action, commenced in his own court, but he may number, docket and file it in either the regular records of his own court or in a separate set of records. When he subsequently receives a certified copy in connection with that same action, he need not index it, but he shall docket and file it in the same set of records under the same case number he previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this subdivision shall be filed with or transmitted to the county recorder, rather than the clerk of the court of common pleas, of each county or additional county in which such land is situated." OHIO R. CIV. P. 3(F).

of alternate forums for the litigant are provided in one broadly based rule; improper venue is remedied by transfer rather than dismissal; proper venue as to one defendant or claim renders the venue of the whole action proper; safeguards are provided when it will be necessary to recommence the action outside the state; transfer of actions properly laid is restricted to situations where the defendant is unable to obtain an impartial trial; and there are recording provisions to give notice of actions involving real property out of the county. In addition it is clear that venue rules are not to be confused with *jurisdiction*.²⁸⁵

B. Recommendations for Kentucky

1. Regulation by the Court of Appeals

It is recommended that the Court of Appeals of Kentucky undertake to regulate venue pursuant to the authority in the Court to formulate rules of practice and procedure²⁸⁶ and that the legislature cooperate by repealing the sections of KRS Chapter 452 applicable to the venue of civil actions. Such an undertaking by the Court would of course be a reversal of the opinion of the original Civil Code Committee that venue was a matter of substance and within the exclusive province of the legislature. The assumption of authority is clearly warranted, however, in light of the fact that venue simply is a designation of the place where suits are to be tried. It is no more substantive in the substance-procedure dichotomy than a rule providing for free joinder of claims or for impleader of third parties. It has never been argued that venue is anything but procedural in the federal courts for purposes of application of the *Erie* doctrine²⁸⁷ in diversity cases.²⁸⁸ Furthermore, a unitary approach to the court system, where the highest court is empowered to supervise the lower courts, implies

²⁸⁵ "The provision of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however nothing here shall affect the right to appeal an error of court concerning venue." OHIO R. CIV. P. 3(G).

²⁸⁶ KRS § 447.151. The court may well have a constitutional right to formulate procedural rules. KY. CONST. § 110 provides that the Court "shall have power to issue such writs as may be necessary to give it control of inferior jurisdictions."

²⁸⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁸⁸ Venue is proper in diversity actions in the district where all plaintiffs or all defendants reside or in which the claim arose. 28 U.S.C.A. 1391 (1971 supp.) It has never been seriously argued that the statute must yield to state venue statutes.

authority to regulate where suits are to be tried, for judicial convenience and economy if no other reason. The Court of Appeals presently has extensive supervisory powers by constitution²⁸⁹ and statute²⁹⁰ and it would be consistent with its role as administrator to adopt rules for the bringing and transfer of actions.

This is not to say that venue is not of importance to litigants. It is of extreme importance. But the history of the Federal Rules demonstrates that a court can prescribe rules substantially affecting the rights of litigants, which redound to the benefit of all. There is no reason to suppose that rules of venue formulated by a court will be less fair than statutes passed by a legislature. On the contrary there is every expectation that such rules would be responsive to the needs of bench and bar and would be fair to both plaintiffs and defendants.

The first step in achieving court regulation of venue would be for the court to ask the Rules Committee or a specially appointed Judicial Commission to study the subject and make recommendations prior to the next meeting of the general assembly. While this paper focuses on civil venue, the committee might well be charged with studying the entire subject of administration of litigation. The Court of Appeals would study the committee report and promulgate rules of venue to be effective at a future date; the general assembly would cooperate by repealing the conflicting sections of KRS Chapter 452.²⁹¹ The legislature could retain venue sections connected with special statutory proceedings and even enact legislation to regulate other statutory proceedings which do not presently contain a venue section.²⁹²

²⁸⁹ Ky. CONST. § 110.

²⁹⁰ KRS § 23.045 (1971)—regulation of terms of circuit judges; KRS § 23.055 (1971)—supervision of dockets and appointment of special judges.

²⁹¹ Cooperation by the legislature would avoid conflict with the Court of Appeals which has on occasion asserted its inherent right, as declared in section 110 of the Kentucky Constitution, to supervise the lower courts free from unwarranted legislative interference. *Sidell v. Hill*, 357 S.W.2d 318 (Ky. 1962).

²⁹² For the legislative and judicial branches to divide the regulation of venue seems to violate the constitutional mandate of separation of powers. Ky. CONST. § 28. KRCP 1 clearly provides however, that the Civil Rules will yield to procedural provisions embodied in statutory proceedings. Statutory procedures conflicting with the Rules were upheld in *Chiquelin v. Linker*, 323 S.W.2d 583 (Ky. 1959) and *Dawson v. Hensley*, 423 S.W.2d 911 (Ky. 1968) (although neither case involves the question of separation of powers). In *Dawson* it appears the effective

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2. *Specific Recommendations*

The Court of Appeals, in its role as administrator of lower courts, should strive to make civil litigation speedier, fairer and more economical. The defendant's right to insist on a certain place of trial might be abolished completely in the future, with the place of trial and the supervision of pre-trial proceedings determined by considerations of judicial convenience and economy. The Court should certainly have authority to move against inefficiency and provincial bias on a broad front. The initial court regulation of venue should, however, be conservative, with the emphasis on simplicity and fairness to litigants. The following suggestions are offered to assist in the initial regulation.

a. *The Broad-Based Rule*

To the extent not regulated by specific statutes to the contrary, the proper venue of civil actions should be governed by one broadly based rule. Venue should be proper under such a rule: (1) in the county in which the defendant resides; (2) if *in personam* relief is sought, in the county in which the cause of action, or any part thereof, arose, or in the county in which the defendant conducted activity which gave rise to the claim for relief; and (3) if the action is *in rem* (as opposed to *quasi-in rem*), in the county in which the *res*, or any part thereof, is situated. Actions against non-residents under the long-arm statute would continue to be proper in the county of the plaintiff's residence. *Quasi-in-rem* actions against *non-residents* commenced by seizure of the non-resident's property would continue to be proper in the county in which the property is located.

This rule would reject the plaintiff's residence as a basis for venue (other than in the non-resident situation) on the assumption that plaintiffs through their lawyers on occasion do file harassing lawsuits and that the ability to sue a distant defendant in a plaintiff's home county might encourage spurious litigation.

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date of the statute was after the enactment of the Civil Rules. There are many instances of statutory procedures accompanying substantive rules. Divorce and adoption are obvious examples. It is clear that the Court does not regard the constitutional prohibition against mingling of powers as a serious obstacle to both the legislature and judiciary regulating civil procedure. As long as legislative activity is restricted to procedures (including venue) coupled to substantive laws, no constitutional question should arise.

The rule would, however, always give the prospective plaintiff the right to sue for *in personam* relief in the county or counties where the cause of action arose or the defendant's conduct giving rise to the claim took place—the counties in other words, where the facts occurred. There can, of course, be controversy over where the cause of action took place. The addition of the phrase "where the defendant's conduct giving rise to such claim" is intended to render such controversy meaningless.²⁹³ The effect of the broad-based rule would be to abolish the transitory action (where plaintiff has no option but to go to defendant's county), clear up the uncertainties now presented by the gaps in KRS § 452.460, and do away with the special treatment of trespass to land.

By defining the "residence" of corporations and personal representatives, the rule would also end the confusion and inequities now present in the statutory treatment. A corporation's residence should be defined as the county in which the principal place of business is located. There should be no special treatment of banks, insurance companies, common carriers, and public works contractors. Personal representatives (executors, administrators, guardians, committees and trustees) should be deemed to reside in the county in which they are appointed. The confusion in this area created by the original code and subsequent court actions has been analyzed at length. There seems to be no legitimate reason for treating corporations and personal representatives differently from natural persons. They should have a residence and be amenable to suit there just as natural persons would be. They should further be amenable to suit in the county or counties where the claim arose or the wrongful conduct took place, or if the action is *in rem*, where the *res* is located.

It also seems logical that local governmental units should be treated the same as natural persons and should be *sui juris* not only at the seat of government but where the cause of action arises. Actions against the state are regulated by specific statutory proceedings²⁹⁴ which will not be affected by venue rules promulgated by the court.

²⁹³ Miller, *supra* note 225, at 157.

²⁹⁴ See e.g., KRS Ch. 44 (claims upon the treasury). The hearing in a Board of Claims action is to be held in the county in which the claim accrues.
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In rem actions would be maintainable under the rule where the *res* is located or where the defendant resides. This would close the gap created by the failure of the venue statutes to deal with personal property or status. It would also give plaintiff an optional forum, the county of defendant's residence. A rule should be adopted providing for notifying the clerk of the county in which the property is located of the pendency and status of the action.²⁹⁵ This suggested treatment of *in rem* actions is a middle ground between the proposal of Stevens,²⁹⁶ where venue would be proper only where the *res* is located, and the Ohio rule where venue is proper where the cause of action arises.²⁹⁷ Cases involving status would be proper in the county of defendant's residence or in the county in which the status exists. This would have the effect of permitting a divorce action to be filed in the county of bona fide residence of either husband or wife. If the legislature feels this would prompt an unseemly race to the courthouse, the existing special treatment could be made a part of the substantive statutes on divorce.²⁹⁸

b. Multiple Defendants

The Ohio rule provides that if the venue is proper as to any defendant other than a nominal defendant, the venue of the whole action is proper.²⁹⁹ This follows the proposal of Miller³⁰⁰ and Stevens³⁰¹ and represents an effort to coordinate venue with rules permitting liberal joinder of defendants. It is suggested here, however, that each defendant continue to be able to insist that the venue be proper as to him. This would have the effect of forcing the plaintiff in a multi-defendant action to the county in which the cause of action arose. This is not a bad result. Any unfairness to the plaintiff is outweighed by the protection such a rule would afford to the defendant who would otherwise be

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KRS § 44.084 (1971). This consistent with the proposed broad-based rule.

²⁹⁵ OHIO R. Civ. P. 3(F) is a well-considered and comprehensive *lis pendens* rule. See note 284 *supra*.

²⁹⁶ Stevens, *supra* note 24, at 333.

²⁹⁷ OHIO R. Civ. P. 3(B).

²⁹⁸ By re-numbering KRS § 452.470 (1971), governing venue of actions for divorce and alimony.

²⁹⁹ OHIO R. Civ. P. 3(E).

³⁰⁰ Miller, *supra* note 225, at 150.

³⁰¹ Stevens, *supra* note 24, at 334.

forced to a county with which neither he nor the cause of action has any relation.³⁰² Such a rule would eliminate the two existing situations³⁰³ in which proper venue against one defendant will sustain the venue of the whole action.

It is possible that, with multiple defendants, application of the broad-based venue rule would not yield a proper forum within the state. This would occur if the plaintiff's cause of action arose outside the state and the defendants resided in different counties within the state. This will obviously not occur often. To meet the contingency it is suggested that the Court provide that if proper venue cannot otherwise be laid in any county in the state, that venue based on the residence or wrongful act of one defendant, other than a nominal defendant, establish proper venue as to the other defendants. A challenge that a party is a nominal defendant to establish venue would be required at the commencement of the action, with court resolution of the matter at that time.³⁰⁴

c. *Multiple Claims*

Again a conservative approach is thought best in the initial venue rules. It is proposed that the Court require an independent venue base for independent claims in a complaint, but where the claims arise out of the same transaction or occurrence or series of transactions or occurrences that the proper venue of one claim establish the proper venue of the action. Such a rule would be a simplification of the current court position and would reject the Ohio solution—where there is no requirement, for venue purposes, of factual connection between the claims. The Ohio rule presupposes that if the defendant is in court for one purpose he might as well resolve all of his differences with the plaintiff. The conservative approach taken here is premised on the belief that, at least in jury cases, the place of trial is of supreme importance to the defendant and he should be able to insist on a factual connection between each claim sued on and the county in which suit is maintained (or that he be sued in the county of his residence).

³⁰² It is significant that in the federal system venue based on residence must be proper as to all defendants. 28 U.S.C.A. 1391 (1971 supp.).

³⁰³ Transitory actions and actions against common carriers. See text at note 128 *supra*.

³⁰⁴ See generally Stevens, *supra* note 24, at 330 for an analysis of the reason for requiring court resolution at an early stage of the proceedings.

This approach would still permit trial courts to examine a complaint in search of plaintiff's true cause of action, rejecting accordingly nominal counts or erroneously defined causes. The courts would, however, be bound to accept the true multi-claim complaint and permit venue to be established by any related claim. This would have the most practical significance in the action in which both *in personam* and *in rem* relief are sought. Venue would be proper, under the broad-based rule, both in the county in which the *res* was located and in the county in which the cause of action arose (or wrongful acts occurred). This is as it should be. The only reason for not permitting an action for *in personam* relief involving real or personal property to be filed where the *res* is located is the fear that a prospective plaintiff would move the personal property (a wrecked car for example) to the county of his residence to establish venue. The only reason for not permitting *in rem* actions to be filed in the county where the cause of action accrued or the wrongful acts occurred is the confusion which might be caused by attempting to ascertain the place of accrual of a cause of action in a purely *in rem* action, such as a suit for declaration of rights in a trust. These considerations are not present³⁰⁵ when the case lends itself to both *in personam* and *in rem* relief, as for example in a foreclosure action, and proper venue should be established by either the *in personam* claim or the *in rem* claim.

d. *Transfer of Actions Where Venue is Improper*

The Court should provide for the transfer of actions where venue is improperly laid to a court where venue is proper. The rule could provide for a discretionary assessment of attorney fees. until the time of transfer against the plaintiff and could provide for transfer by the court on its own motion in cases in which the defendant is in default for failure to appear.³⁰⁶ It is clear that a court's decision that venue is *improper* should be interlocutory just as is a decision that venue is *proper*. In neither case should there be a right of appeal prior to adjudication on the merits.

³⁰⁵ Divorce actions where alimony is sought do present problems if the plaintiff is permitted to sue where the cause of action arose or wrongful acts took place. This is another reason for regulating the venue of actions for divorce and alimony as part of the substantive law of divorce.

³⁰⁶ OHIO R. CIV. P. 3(C)(2), 3(C)(3).

e. *Transfer of Actions Where Venue is Proper*

It is suggested that the Court retain for the present the traditional grounds of change of venue: inability to have a fair trial because of the nature of the case, the influence of the adversary, or the odium surrounding the applicant³⁰⁷—but that the Court interpret the grounds more liberally than in the past.³⁰⁸ At some future time the Court undoubtedly should provide for transfer of cases to achieve the fairest and most convenient forum for all. Transfer on grounds of convenience is, however, a complex matter and demands co-operation among the trial courts and a common understanding of the rules of convenience. In Ohio transfer on grounds of convenience was proposed³⁰⁹ but rejected by the Ohio Supreme Court, a move applauded by the author of the staff note who felt that more harm than good would result from attempts to transfer actions to slightly better forums.³¹⁰ In the federal system, where venue can be changed on grounds of convenience³¹¹ (although only to a forum where venue would have been proper in the first place),³¹² it is possible to have the case treated like a hot potato and have it transferred back and forth between districts because of a disagreement between the judges as to the best place for the action.³¹³ When the Kentucky Court of Appeals moves to full and effective coordination of the efforts of the lower courts, it will be time to provide for transfer of all or part of a case on grounds of convenience. Until then it is better to restrict transfer to cases in which the applicant for transfer is unable to obtain a fair trial.

³⁰⁷ KRS § 452.010 (1971).

³⁰⁸ *Supra* note 256 and accompanying text.

³⁰⁹ Miller, *supra* note 225, at 149-150.

³¹⁰ McCormac, *supra* note 273 at 484.

³¹¹ 28 U.S.C.A. 1404(a).

³¹² Hoffman v. Blaski, 363 U.S. 335 (1960).

³¹³ See dissenting opinion of Frankfurter, J. in Hoffman v. Blaski, 363 U.S. 335, 346-7 (1960).