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Kentucky Law Survey: Civil Procedure

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CIVIL PROCEDURE
BY WILLIAM S. COOPER*

INTRODUCTION

There probably is no area of the law which receives less before-the-fact research than the area of civil procedure. The late Commissioner Watson Clay, universally recognized as Kentucky's foremost authority on civil procedure, remarked, "It is a sad reflection upon our profession when we consider that the loss of a law suit may sometimes be attributed in a substantial degree to the failure of the lawyer to know, understand, and comply with the rules of procedure."1 That was in 1959. Now, as we enter the era of greater public awareness of legal malpractice and an era in which practicing attorneys are less hesitant to file suits against their negligent brethren, the time has come when the loss of a case on a mere technicality may be only the beginning of the litigation. It is one thing for a jury to find against your client on the merits and quite another to be dismissed on procedural grounds.

The decisions discussed in this article include both published and unpublished opinions of the Kentucky Supreme Court and Court of Appeals, as well as several opinions from federal courts interpreting Kentucky law. All involve attempts by one of the parties to win his case on grounds having nothing to do with the merits of his opponent's claim for relief. Sad to report, most of these efforts were successful. Since many of these unfortunate results involve judicial interpretation of facts and legal theories, the fault cannot always be laid at the feet of the lawyers. Often, it appears that the appellate court may have stretched the facts to meet the rules and thus unnecessarily denied a litigant his day in court.

The author has arranged the subject headings in the order in which the practicing attorney might expect to encounter the problem areas. After all, if an action is prima facie barred by

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limitations, what difference does it make that the pleadings were improperly drawn?

I. LIMITATIONS

A. Construing the Cause of Action

Powell v. The Winchester Bank\textsuperscript{2} was an action to set aside a deed. The deed was executed while plaintiff was under a disability, but it had been executed more than ten years prior to the bringing of the action. An action based on fraud or mistake must be raised within five years after the cause of action accrues.\textsuperscript{3} Such an action shall not be deemed to have accrued until the fraud or mistake is discovered or should have been discovered,\textsuperscript{4} but in no case shall such an action be commenced after the expiration of ten years from the date the fraud or mistake actually occurred.\textsuperscript{5} In order to circumvent the ten-year statute of limitations, the plaintiff did not even allege fraud or mistake, but brought the case as an action for the recovery of real property, hoping to fall under the fifteen-year limitation prescribed by Kentucky Revised Statutes (KRS) § 413.013. Plaintiff cited the case of Spicer v. Holbrook,\textsuperscript{6} which is precisely on point:

This is not the ordinary equitable action brought to set aside a deed for fraud. This is an action to cancel and declare void a deed executed by a person of unsound mind. While it is a fraud, of course, to obtain a deed from an infant or a person non compos mentis, the deed of such party being void for the want of capacity to bind them, no length of time will give effect to that deed without a subsequent ratification, either actual or constructive, when the disability is removed.\textsuperscript{7}

In Powell, the Court construed Spicer as holding "that a suit by one who was under disability at the time the deed was made was predicated as a fraud upon such person."\textsuperscript{8} Thus construing Powell as an action based on fraud, the Court ap-

\textsuperscript{2} 551 S.W.2d 820 (Ky. App. 1977).
\textsuperscript{3} Ky. Rev. Stat. § 413.102(12)(1972) [hereinafter cited as KRS].
\textsuperscript{4} KRS § 413.130(3) (1972).
\textsuperscript{5} Id.
\textsuperscript{6} 66 S.W. 180 (Ky. 1902).
\textsuperscript{7} Id. at 181.
\textsuperscript{8} 551 S.W.2d at 822.
plied KRS § 413.120(12), the ten-year statute of limitations, as a bar to the action. It is difficult to understand how the Court could place such an interpretation on Spicer in view of the paragraph quoted above, which is precisely to the contrary. In another old case, Kentucky's highest court held that a suit to supply a lost deed was by analogy an action for the recovery of real estate, thus making applicable the fifteen-year statute of limitations. The analogy seems equally applicable to a suit to recover real property by setting aside a deed.

Also analogous is Hoffert v. Miller, which held that the statute of limitations on a suit to set aside a deed is ten years under KRS § 413.160, but that the statute does not begin to run until after the plaintiff reaches the age of majority. There is no good reason why the same rule should not apply to one under the legal disability of unsound mind. The plaintiff in Powell was legally restored to competency in 1967; his action to set aside the deed was filed in 1973, which should have been held to be well within the ten-year limitations period.

B. Accrual of the Cause of Action

In Johns-Manville Products Corp. v. Louisville Trust Co., the plaintiff's decedent had been exposed during his employment with the defendant to large quantities of asbestos-fibre dust until the termination of his employment in October 1967. There was no exposure to the substance after that time until his death in February 1972 from a rare type of lung cancer associated with the inhalation of asbestos particles and dust. His cancer was not diagnosed until August 26, 1971. The suit was filed on August 25, 1972, on a theory of products liability. The Court of Appeals held the action was barred by the one-year statute of limitations, citing Columbus Mining Co. v. Walker. That case is directly in point and the court correctly

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9 Brandenburg v. McGuire, 44 S.W. 96 (Ky. 1898).
10 6 S.W. 447 (Ky. 1888).
11 KRS § 413.160 (1972).
12 ___ S.W.2d at ___ (Ky. App. 1977).
13 KRS § 413.140(1)(b) (Supp. 1976) requires that an action for injuries to persons, cattle or other livestock by railroads or other corporations, with the exception of hospitals licensed pursuant to KRS Chapter 216, be commenced within one year after the cause of action accrued.
14 271 S.W.2d 276 (Ky. 1954).
construed its own role in the judicial framework when it noted: "It is the function of this court to follow the decisions of the highest court of the state and not to attempt to make new policy by overruling those decisions."

The plaintiff had argued that the court should apply the "discovery" rule which is now applied in medical malpractice cases, i.e., that the statute of limitations commences to run upon discovery of the injury. The court noted that as recently as 1972, Kentucky's highest court had held in Caudill v. Arnett that the "discovery" rule was an exception to the general rule and that its application was limited to malpractice cases. However, in Caudill, the fact of injury was known; it was the extent of injury that was discovered later.

The "discovery" rule has its strongest foundation in the United States Supreme Court's decision in Urie v. Thompson. In interpreting the Federal Employers' Liability Act, the Supreme Court held the accrual of the plaintiff's cause of action for contracting silicosis took place only when the results of the exposure manifested themselves to him. Since that time, the "discovery" rule has been applied in one form or another under the laws of California, Connecticut, Missouri, Nebraska, New York, Ohio, Oregon, and Pennsylvania.

There is no good reason why the "discovery" rule should not be adopted in Kentucky. As previously noted, it is already applied in medical malpractice cases. It has long been a part

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15 S.W.2d at ___ (Ky. App. 1977).
17 481 S.W.2d 668 (Ky. 1972).
18 337 U.S. 163 (1949).
25 Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960).
26 Hutchinson v. Semler, 361 F.2d 803 (Or. 1961).
28 Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970).
of our workmen's compensation law, and it is applied, subject to a ten-year limitations period, to actions based on fraud or mistake. There is also a strong analogy to be made between the plaintiff's claim in Johns-Manville and the situation presented in Saylor v. Hall, in which a stone mantle and fireplace were negligently constructed in 1955, but did not collapse and injure the plaintiffs until 1969. It was held in that case the cause of action did not arise until the injury occurred. This writer sees no philosophical or policy-based distinction to be made between a medical malpractice, workmen's compensation, fraud, or defective construction case and a case like Johns-Manville. It is simply unjust to bar an otherwise valid claim on grounds of limitations when there was no way the existence of the cause of action could have been discerned by the claimant before the period of limitations expired.

C. Tolling the Statute of Limitations

In Farris v. Sears, Roebuck & Co., the period of limitations was to expire on November 27, 1975. One of the potential plaintiffs had already commenced an action and on November 26, 1975, other plaintiffs filed and properly served notice that on December 8, 1975, they would move the court to allow them to intervene. An order allowing the intervention was subsequently entered on December 9, 1975. The defendants moved to dismiss on the ground that the action (for malicious prosecution) was not commenced within one year after the cause of action accrued. The federal judge conceded that the "notice" of November 26, 1975, was not sufficient to commence an action, but relied on Jack v. Travelers Insurance Co., another federal case, in overruling the motion to dismiss. The problem is that in the Jack case, the court found that under Michigan law, the motion to intervene was sufficient compliance with the

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29 KRS § 342.316(3) (Supp. 1976).
30 KRS § 413.130(3) (1972).
31 497 S.W.2d 218 (Ky. 1973).
33 KRS § 413.140(1)(c) (Supp. 1976) requires that actions for malicious prosecution, conspiracy, arrest, seduction, criminal conversion or breach of promise of marriage be commenced within one year after the cause of action accrued.
34 See Ky. R. Civ. P. 3.
statute of limitations. That would not suffice in Kentucky, where only the commencement of an action will satisfy the statute and the commencement of an action is defined as "the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."36 Instead, the judge ruled in Farris that the motion to intervene tolled the statute of limitations.

To toll the statute of limitations means to show facts which remove its bar of the action.37 KRS Chapter 413 sets out the exceptions which toll the statute. It is tolled by injunction or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act.38 If the court in which the action is commenced rules that it has no jurisdiction of the action, the statute is tolled for ninety days.39 The statute is tolled during periods of disability40 and during war.41 It is tolled if the plaintiff is confined in the penitentiary42 or, if the plaintiff dies, then the statute of limitations is tolled until one year after the qualification of his personal representative.43 But nowhere do the statutes provide that the statute of limitations is tolled by filing a motion to intervene. The general rule is that unless some ground can be found in the statute for restraining or enlarging the meaning of its words, it must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto.44 It is also an established rule that exceptions to a statute of limitations will not be implied, and if the legislature has not seen fit to except a class of persons from the operation of the statute, the courts will not assume the right to do so.45 Despite all of the above, the Farris result is a just one. The purpose of limitations statutes is to lay to rest stale claims; this operates to the advantage of defendants. Here, however, a suit based on the same facts was already pending

36 Ky. R. Civ. P. 3. This rule has been strictly construed. See e.g., Delong v. Delong, 335 S.W.2d 895 (Ky. 1960).
38 KRS § 413.260 (1972).
39 KRS § 413.270 (1972).
40 KRS § 413.280 (1972).
41 KRS § 413.300 (1972); Seldon v. Preston, 74 Ky. (11 Bush) 191 (1874).
42 KRS § 413.310 (1972).
43 KRS § 413.180 (Supp. 1976).
45 Id. at § 139.
against the defendant and the filing of the notice of motion to intervene apprised the defendants of the intervenors' potential causes of action.

II. Service of Process

Three cases were decided during this term relating to service of process on nonresident motorists.

In Begley v. Kilburn, plaintiff served process on the secretary of state alleging that the defendant was a resident of Florida and listing a Florida address, which had been listed on the police report. The secretary of state's registered letter to the Florida address was returned "unclaimed." Plaintiffs obtained a default judgment, but this was set aside on appeal because the Florida address on the police report was followed by the notation: "(R #2 Bybee, Ky)." The court held that the plaintiffs had the duty of attempting to serve the defendant at the Kentucky address.

In Priddy v. Swimme, a summons was first issued to a Louisville address, but was returned "Moved Out—Address Unknown." An amended complaint then alleged that the defendant had moved out of the state, but recited the same Louisville address. The secretary of state dutifully sent a registered letter to the Louisville address, which was returned "Unclaimed." The subsequent default judgment was reversed on appeal on the grounds that the plaintiff had failed to provide the secretary of state with the correct address of the defendant—in fact, the plaintiff had provided an address which she knew to be incorrect.

In Aetna Insurance Co. v. Kuszynski, a local summons was returned marked "Unable to locate." Plaintiff then amended the complaint and attempted service under the Nonresident Motorists Act, but omitted the defendant's address on the amended complaint. For reasons as yet unclear the secretary of state sent the registered letter to the address of the defendant's father in Louisville, an address where the defendant did not reside. Not surprisingly, this attempted service

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*545 S.W.2d 926 (Ky. 1976).*

*555 S.W.2d 279 (Ky. App. 1977).*

*547 S.W.2d 451 (Ky. 1977) (mem.).*

*KRS §§ 188.010-.070 (1971).*
was also held inadequate to sustain a subsequent judgment.

The Nonresident Motorists Act does not specifically require that the secretary of state be furnished the defendant’s correct address. In fact, the statute states only that the secretary of state “shall immediately mail the copy of the summons and complaint to the defendant at the address given in the complaint.” However, in *Hirsch v. Warren* the then Court of Appeals held that “the only fair and reasonable construction of the statute is that the plaintiff must ascertain and state in the petition the correct address of the defendant.” In the later case of *Odley v. Wilson*, the Court of Appeals cited *Hirsch* for the proposition that “whenever such statute is shown by the record to be sufficiently complied with as to make it reasonably probable that the required process was served upon defendant as directed by the statute, it will be sufficient . . . .” Actually, the *Hirsch* case says no such thing. Instead, it appears to put a strong burden on the plaintiff to ascertain the defendant’s correct address, with the unassailable reasoning that if plaintiff does not actually locate the defendant, he cannot obtain, much less collect, a judgment from him. What *Hirsch* said about “reasonable probability” was that such a statute was constitutional if it contained “a provision making it reasonably probable that the notice will be communicated to the person sued.” The significance of this expansion of *Hirsch* in the *Odley* case is that the Court in *Odley* implied that the “correct address” requirement might be satisfied by a statement as to the “last known address.”

Kentucky’s Supreme Court stated in *Begley v. Kilburn* that “[o]rdinarily a party who seeks to invoke the provisions of the nonresident motorist statute is entitled to rely on the accuracy of the address given to a police officer conducting an

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20 KRS § 188.030 (1971).
21 68 S.W.2d 767 (Ky. 1934).
22 *Id.* at 769. See also Hertz’ You Drive It Yourself Systems, Inc. v. Castle, 317 S.W.2d 177 (Ky. 1958).
23 218 S.W.2d 17 (Ky. 1949).
24 *Id.* at 19 (emphasis in original).
25 68 S.W.2d at 769.
26 *Id.* at 768, citing Wuchter v. Pizzutti, 276 U.S. 13 (1928).
27 218 S.W.2d at 19.
28 545 S.W.2d 927 (Ky. 1976).
investigation of an accident." Of course, this may be neither the correct address nor the last known address. This would seem to be a further retraction of the service requirements of KRS Chapter 188. As for Priddy v. Swimme, plaintiff gave the secretary of state the defendant's last known address, but it was an address where the plaintiff knew the defendant could not be found. It was also a local address and it would seem that the circuit court should not even allow an amended complaint to be filed when service of process is sought under KRS § 188.030 of the Nonresident Motorists Act when the pleading lists a local address for the defendant. The same should be true when no address is listed at all, as was the case in Aetna Insurance Co. v. Kuszynski. By the same logic, it would seem reasonable for the circuit clerk to refuse to issue a summons on the secretary of state when no out-of-state address of the defendant appears in the original complaint.

III. Parties

A. The Real Party in Interest

1. Corporations

In Miller v. Paducah Airport Corp., the plaintiff owned three corporations, Yellow Cab U-Drive-It Co., Inc., National Car Rental Systems, and Yellow Cab. He brought an action challenging the legality of a lease by which the defendant operated an airport. The dispute arose because the defendant would not grant Yellow Cab U-Drive-It Co. space in the terminal to operate a car rental service. Without reaching the merits of the case, the Kentucky Supreme Court found that the corporation, not Miller, was the real party in interest and dismissed the case.

Likewise, in Bailey v. Kentucky Utilities Co., the plaintiff owned a corporation known as Cable Service, Inc. The corporation had a joint use agreement with the defendant, which the defendant cancelled, resulting in the law suit. Although the

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59 Id. at 927.
60 555 S.W.2d 279 (Ky. App. 1977).
61 547 S.W.2d 451 (Ky. 1977) (mer.).
62 551 S.W.2d 241 (Ky. 1977).
63 No. 75-1103 (Ky. Dec. 17, 1976 mem. per curiam).
plaintiff, as president of the corporation, had signed the contract, the Supreme Court dismissed the complaint on the grounds that the corporation was the real party in interest.

It has long been settled that an individual stockholder of a corporation cannot bring an action in his own name or in his own behalf for a wrong committed solely against the corporation. This is true even though the stockholder is the sole or majority stockholder.\(^4\) Kentucky’s law on this is well-established.\(^5\) There are exceptions, notably a stockholder’s derivative action,\(^6\) but none is applicable to either the Miller or Bailey case.

2. Subrogations

It is common practice for insurance companies to settle first-party claims with their own insureds, then subrogate against a third-party tortfeasor.\(^7\) Because of the natural prejudice juries often exhibit against insurance companies, the companies devised the “loan receipt” method of settling with their own insureds. By this fiction, the company only loans the money to the insured who is then required to repay it from proceeds he might obtain in a suit against the third party. This allows the insurance company to finance the suit against the third party but bring it in the name of its insured. This method of litigating subrogation claims has been approved in Kentucky.\(^8\) However, the fiction is tolerated only insofar as the facts surrounding the settlement will support a “loan” theory. Thus, in the 1973 case of \textit{Biven v. Charlie’s Hobby Shop},\(^9\) a “loan receipt” was not allowed when the insurance company making the settlement was not the insurer of the injured party, but rather the insurer of another defendant.\(^10\)


\(^5\) Wenk v. Ruby, 412 S.W.2d 247 (Ky. 1967); Gregory v. Bryan-Hunt Co., 174 S.W.2d 510 (Ky. 1943); Collier v. Deering Campground Ass’n, 66 S.W. 183 (Ky. 1902).

\(^6\) 19 AM. Jur. 2d Corporations § 528 (1965).


\(^8\) Ratcliff v. Smith, 298 S.W.2d 18 (Ky. 1957); State Farm Mut. Auto. Ins. Co. v. Hall, 165 S.W.2d 838 (Ky. 1942).

\(^9\) 500 S.W.2d 597 (Ky. 1973).

\(^10\) Note, however, that the insurance carrier of one joint tortfeasor, after having made settlement with the injured party, is subrogated to its insured’s right to
In Preferred Risk Mutual Insurance Co. v. Faulkner, the plaintiff sued the uninsured motorist, but then settled with his own uninsured motorist carrier. An agreed order was entered in court reciting the settlement with the insurance company and reserving the insurance company’s right of subrogation against the defendant uninsured motorist. On the day of trial, the court sustained the defendant’s motion to substitute the insurance company as party plaintiff, since it was the real party in interest. This was done, despite the fact the insurance company produced a loan receipt executed after the agreed order of dismissal had been entered. This ruling was affirmed on appeal, with the court simply noting that the language of the agreed order was couched in terms of payment and settlement, rather than in terms of a loan. In effect, the court is saying that if the company wishes to avail itself of the loan receipt fiction, it should obtain the loan receipt at the time it pays the money. Viewed under simple contract theory, if the insured had already settled with the insurer, what consideration was there for the subsequent execution of the loan receipt?

B. Indispensable Parties

In City of Ashland v. Kelley, a suit was brought by certain property owners against the city to require the city to make a uniform reassessment of all real estate within the city at its fair cash value. Of course, the plaintiffs’ property was already assessed at its fair cash value, so the suit was really aimed at those citizens whose property was under-assessed. The city’s initial defense was that the cost of reappraisal would be too great. However, on appeal, it developed that the city’s real concern was whether it was entitled to the additional revenue which would be produced by applying the present tax

\[ contribution \text{ from the other joint tortfeasor. Automobile Club Ins. Co. v. Department of Highways, 414 S.W.2d 578 (Ky. 1967); Leitner v. Hawkins, 223 S.W.2d 988 (Ky. 1949).} \]

\[ 553 S.W.2d 296 (Ky. App. 1977). \]

\[ Cf. Howard v. McNeil, 78 S.W. 142 (Ky. 1904)\text{ (promise given by the purchaser, after the making of a contract of sale to pay vendor a sum of money in addition to the consideration recited in the contract, and which was not considered in determining the price, is without consideration).} \]

\[ 555 S.W.2d 821 (Ky. App. 1977) \text{ (discretionary review granted Oct. 14, 1977).} \]
rate to a tax assessment base increased due to net assessment growth derived from a professional appraisal. Stripped to the bare bones, this appears to be a collusive suit designed to ensure that the reassessment and resulting additional income could be realized without danger that the validity of the assessment would be subject to a collateral attack by an aggrieved under-assessed property owner. The circuit court ordered the reassessment. The court of appeals correctly noted that the persons most directly affected by such a ruling, i.e., the under-assessed property owners, were not represented in this suit.

This suit did not begin as a declaratory judgment action, but it became one when the city asked the circuit court to determine whether it could keep monies raised as a result of the reassessment. It was at that point that the circuit court should have joined a representative of the under-assessed property owners. But even if declaratory relief had not been sought, the circuit court could not have ruled on the original cause of action without affecting the interest of the under-assessed property owners. Thus, identifying the error was only a matter of understanding the true nature and purpose of the suit.

IV. JURISDICTION

A. The Long Arm Statute

In Volvo of America Corp. v. Wells, the suit was for breach of warranty and was brought against the foreign manufacturer, its distributor, and a dealer in Huntington, West Virginia. The purchase was made at the dealer’s place of business in West Virginia, but the vehicle was delivered to Paintsville, Kentucky, where the bill of sale was also delivered and where the plaintiff delivered his trade-in along with his bill of sale on that vehicle. The manufacturer and distributor apparently had no business offices in Kentucky and no ownership interest in the dealership that sold the vehicle (although this is not specifically stated in the opinion). Jurisdiction over the manufac-

75 Ky. R. Civ. P. 19.01; cf. Whittaker v. Combs, 253 S.W.2d 400 (Ky. 1952) (judgment in a proceeding for the partition of land not final because all the tenants in common were not parties to the suit).
76 551 S.W.2d 826 (Ky. App. 1977).
turer and distributor was alleged under the Kentucky Long Arm Statute.\textsuperscript{77}

It is not this author's purpose to write a dissertation on the development of \textit{in personam} jurisdiction over non-resident manufacturers.\textsuperscript{78} Suffice it to say, however, that there are three issues to be determined in these cases: (1) Whether the long arm statute enacted by the state legislature confers jurisdiction on the state court under the particular facts of the case \textit{sub judice}; (2) whether the language of the statute itself satisfies the due process requirements of the fourteenth amendment to the United States Constitution; and (3) whether the application of the statute under the particular facts of this case violates the due process rights of this particular defendant.\textsuperscript{79}

The issues will be discussed in the above order, but since some courts have exhibited confusion over which theory applies to which issue, the basic constitutional requirements must always be kept in mind. This leads back to \textit{International Shoe Co. v. Washington},\textsuperscript{80} where the United States Supreme Court held that, in order to satisfy due process requirements, it must

\begin{itemize}
\item \textsuperscript{77} KRS § 454.210(2)(a)(5) (Supp. 1976) provides:

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

\begin{itemize}
\item 5. Causing injury in this commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this commonwealth when the seller \textit{knew} such a person would use, consume or be affected by, the goods in this commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth (emphasis added).
\end{itemize}

\item \textsuperscript{78} For an exhaustive treatment, see Annot., 19 A.L.R.3d 13 (1968).

\item \textsuperscript{79} There is disagreement over which question should be answered first. One view is that the court should decide first what jurisdiction the state has legislated for itself within its permissive area by the enactment of the statute, then decide the constitutional question. Old Westbury Golf & Country Club, Inc. v. Mitchell, 254 N.Y.S.2d 679 (Sup. Ct. 1964), \textit{aff'd}, 262 N.Y.S.2d 438 (App. Div. 1965), \textit{aff'd}, 273 N.Y.S.2d 418, 219 N.E.2d 868 (1966). This view is consistent with the general principle that courts will not pass on the constitutionality of an act of the legislature if the case before the court may be decided without doing so, \textit{e.g.}, by a narrow construction of the act. 16 AM. Jur.2d Constitutional Law § 113 (1964). The other view is that the court should first decide how much power the state had to assert jurisdiction over nonresidents without personal service, then interpret the state law to determine if the case falls within that power. Temco, Inc. v. General Screw Prod., Inc., 261 F. Supp. 793 (M.D. Tenn. 1966).

\item \textsuperscript{80} 326 U.S. 310 (1945).
be shown that the defendant had "certain minimum contacts" within the territory of the forum and that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice." Although this seems broad enough, the Supreme Court has set certain restrictions for determining what constitutes "minimum contacts." In *Hanson v. Denckla*, it was pointed out that what "is essential in each case [is] that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

1. Scope of the Statute

It has been held that a foreign manufacturer subjects itself to local jurisdiction when it introduces its product into interstate commerce under circumstances that make it reasonable to expect that the product may enter the forum state. This is the so-called "stream of commerce" theory first promulgated by the Illinois judiciary in the case of *Gray v. American Radiator & Standard Sanitary Corp.* "Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State."

However, the "stream of commerce" theory is not a substitute for the "minimum contacts" requirement of *International Shoe*. The courts which have adopted the "stream of commerce" theory use it to justify a finding that a particular foreign manufacturer has subjected itself to the local jurisdiction contemplated by the local statute. Since the Kentucky Court of Appeals specifically adopted the "stream of commerce"

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81 *Id.* at 316.
83 *Id.* at 253.
84 Id. at 257.
87 176 N.E.2d at 766.
theory in the Volvo case, the distinction does become important. Most of the jurisdictions which have adopted the theory have done so in tort cases. For example, in *Eyerly Aircraft Co. v. Killian*, a case interpreting Texas law, and the case upon which the Kentucky court relied heavily in deciding the constitutional question, jurisdiction was sought under a statute which confers jurisdiction over a foreign corporation which has committed "any tort in whole or in part in this State." These "tortious act" statutes are constitutional and obviously are broader in scope than KRS § 454.210(2)(a)(5), the breach of warranty section of the Kentucky statute, which applied to the Volvo case. KRS § 454.210(2)(a)(4), the "tortious injury" section of Kentucky's statute, confers jurisdiction for an injury within the state caused by an act or omission outside the state. However, the "breach of warranty" section of the statute limits jurisdiction involving sales outside the state only to those situations where the seller knew that the buyer would "use, consume, or be affected by" the goods in this state.

Virginia has a statute identical to Kentucky's breach of warranty provision except it substitutes "could reasonably expect such person would use, etc." for "knew such person would use, etc." This Virginia statute has been held to confer jurisdiction in cases where products are shipped into Virginia by someone other than the manufacturer, primarily because the manufacturer could "reasonably expect Virginia residents to use and be affected by" the product. Nothing can be gained by hy-

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7551 S.W.2d at 827.
8414 F.2d 591 (5th Cir. 1969).
   A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
   5. Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State . . . .
pothesizing whether the results would have been the same had the Virginia statute required the manufacturer to actually know, rather than just reasonably expect, that his product would be used in that state. It is a matter of statutory interpretation and the Kentucky legislature obviously had a reason for substituting the word “knew” for the words “could reasonably expect.”

Although the court of appeals cited no precedent for adopting the “stream of commerce” theory in subjecting Volvo to KRS § 454.210(2)(a)(5), this interpretation by a Kentucky court had been predicted by a federal court as early as 1969. In Miller v. Trans World Airlines, Inc., suit was brought against a manufacturer of aircraft instruments, which had subsequently been installed by another company in an airplane which crashed at a Kentucky airport. The only event that occurred in Kentucky was the crash. It was held that the manufacturer of the instruments “must have known that buyers of its products, such as General Dynamics, would sell airplanes to airlines which would fly into Kentucky, and consequently must have known that plaintiff’s decedent [an airline passenger] would ‘use, consume or be affected by’ the goods in Kentucky.” Thus, the requirement that the manufacturer “knew” was satisfied by a finding that he “must have known.” (The manufacturer denied actual knowledge.) In Volvo, the court of appeals went even further:

It must be assumed that these defendants-appellants knew or should have known that the vehicles they shipped to this particular dealer in Huntington, West Virginia, would be likely to end up being owned and driven by citizens and residents of the state of Kentucky, the state of Ohio, as well as West Virginia, since Huntington is the commercial center of the tri-state area of these three (3) states.

By interpreting “knew” to mean “must have known” or “should have known” or “assumed to have known,” how close are we to Virginia’s “could reasonably expect”?

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92 Id. at 177.
93 551 S.W.2d at 827-28 (emphasis added).
2. Constitutionality of the Statute

Although the court of appeals relied on *Eyerly Aircraft Co. v. Killian* in finding the statute *prima facie* constitutional, its reliance on that case was probably ill-founded. As pointed out above, *Killian* involved the constitutionality of Texas' "tortious act" statute. Reliance would have been better placed upon the cases interpreting the Virginia statute, since it is identical to Kentucky's in recognizing jurisdiction only "if [the foreign defendant] also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth." In interpreting the Virginia statute, a federal court noted that "the use of the International Shoe due process words 'regularly,' 'persistent,' and 'substantial,' place this provision well within the permissible limits of due process as set down by the Supreme Court." Certainly, this statute is more restrictive than the "tortious act" statutes, so if the latter are constitutional, *a fortiori*, the former must also be constitutional.

3. Constitutionality of the Application of the Statute to these Defendants

Having determined that the statute meets the constitutional test of requiring "minimum contacts," the next question is whether the particular defendant has sufficient "minimum contacts" to satisfy the requirement. It first should be pointed out that the alleged "contact" upon which jurisdiction is to be based need not be immediately related to the cause of action presently before the court. In *Eyerley Aircraft Company v. Killian*, the defective product in question had not been shipped directly to Texas, but had found its way through the "stream of commerce" to Texas, where the injury occurred. Although this would have satisfied the requirements of Texas' "tortious act" statute, it presumably would have been insuffi-

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*414 F.2d 591 (5th Cir. 1969).*


*Id.*

*414 F.2d 591 (5th Cir. 1969).*
cient to satisfy the "minimum contacts" requirements of *International Shoe* and *Hanson*. Thus, the court had to find other contacts, and it found that the manufacturer had shipped at least two other products to Texas in the past and had shipped spare parts to Texas addresses, which parts presumably were used in repairing its products.

The Kentucky Court of Appeals failed to address specifically this aspect of the constitutional question in *Volvo*; however, the court did discuss Volvo's "contacts" in deciding whether the requirements of the statute were met.

[T]he record shows that Volvo advertises in the state of Kentucky. Also, Volvo states in its driver's manual that its dealers are authorized to service Volvos anywhere in the country, including dealerships in Kentucky. . . . Although there was no direct evidence in the record, it must be assumed that Volvo derived substantial profits from the sale of Volvo automobiles in the state of Kentucky.103

In a case containing a virtually identical fact situation, the Sixth Circuit Court of Appeals addressed itself directly to the "minimum contacts" requirement. In *Velandra v. Regie Nationale Des Usines Renault*,104 the manufacturer of foreign automobiles and its United States importer were held not subject to *in personam* jurisdiction in Michigan even though there were Renault dealers in Michigan doing a substantial business and a warranty was delivered at the time of sale (to which warranty the manufacturer was a party). The vehicle was purchased by the plaintiffs in Ohio, but the cause of action arose in Michigan. The manufacturer was the sole owner of stock of both the importer and the Illinois distributor, whose region included Michigan. The Sixth Circuit stated:

In determining whether minimum contacts exist on the basis of the presence of sale or a product within a state, the extent of the contact is related to a number of factors, including the number and value of sales within the state, their ratio to the total market for like or similar products within the state, the quantity or value of the defendants' production, the percentage of the total output sold within the state, as well as the

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103 551 S.W.2d at 828.
104 336 F.2d 292 (6th Cir. 1964).
nature of the product, particularly with reference to whether it is inherently dangerous or not. Obviously the manufacturer of a product that has a significant market within a state has more contact with that state than one whose product only has a minimal market. Likewise, a manufacturer whose total product or a large percentage of whose product is sold within a state has a more significant contact with that state than would be the case where only casual sales were made within the state or only a small portion of the manufacturer's production was sold within the state. Finally, the nature of the product may well have a bearing upon the issue of minimum contact, with a lesser volume of inherently dangerous products constituting a more significant contact with the state than would a larger volume of products offering little or no hazard to the inhabitants of the state. A careful and discriminating analysis of the nature and quality of the defendants' contacts with the foreign state must be made in each case.\textsuperscript{165}

It was held in \textit{Renault} that evidence that showed there were three Renault dealers in Detroit, one of whose gross sales of Renault automobiles exceeded $100,000, together with the evidence concerning the warranties being delivered with the automobiles, was \textit{not} sufficient evidence of "minimum contacts." Yet, there was more evidence of Michigan contacts in that case than evidence of Kentucky contacts in the \textit{Volvo} case.

Interestingly, \textit{Renault} conspicuously has not been followed even by district courts within the same circuit. In \textit{Stewart v. Bus and Car Co.},\textsuperscript{166} a district court in Ohio, in interpreting a statute\textsuperscript{167} identical to the Virginia statute previously discussed,\textsuperscript{168} held there was jurisdiction even though the defective bus was not sold in Ohio, since the injury occurred there and the defendant had sold two other buses in Ohio. (Note the facts on this issue are virtually identical to those in \textit{Eyerly Aircraft Company v. Killian}.\textsuperscript{169}) In trying to distinguish the \textit{Renault} case, the court noted that "this Court views the sale of a commercial passenger bus into Ohio as markedly different from the

\textsuperscript{165} \textit{Id.} at 297-98.
\textsuperscript{166} 293 F. Supp. 577 (N.D. Ohio 1968).
\textsuperscript{169} 414 F.2d 591 (5th Cir. 1969).
sale of a small automobile"\textsuperscript{110} because a bus is more likely to carry Ohio passengers, and a bus is more expensive than an automobile. In \textit{Miller v. Trans World Airlines, Inc.}\textsuperscript{111}, a Kentucky district court judge made no effort whatsoever to distinguish \textit{Renault} but merely cited \textit{Stewart} as drawing the appropriate distinctions. One is left to wonder why the \textit{Stewart} and \textit{Miller} cases were not appealed.

Although no further appeal was taken in \textit{Volvo}, it would be dangerous to assume that mere evidence showing a foreign corporation advertises within the state and authorizes dealers to service its product within the state is now sufficient to satisfy the "minimum contacts" requirement. This is a constitutional question and a close reading of \textit{International Shoe} and \textit{Hanson v. Denckla}\textsuperscript{112} would indicate that something more is required in the way of "minimum contacts" than was proven in \textit{Volvo}. However, one is forced to admit that \textit{Miller v. Trans World Airlines, Inc.}\textsuperscript{113} was a broader application of the statute than \textit{Volvo}, so it is reasonable to expect that \textit{Volvo} does not represent the outer limits to which Kentucky's courts will attempt to stretch the "long arm" of this particular statute.

Liberal interpretation of the long arm statute was also required in \textit{Johnson v. Smith}\textsuperscript{114} and \textit{Conley v. Sousa}.\textsuperscript{115} In each case, the defendant was a resident of the state of Kentucky at the time of the alleged tort, but had left the state and was therefore a nonresident at the time suit was filed. The cases required interpretation of the "tortious injury" provision of the long arm statute.\textsuperscript{116}

In \textit{Johnson}, the defendant ingeniously pointed out that KRS § 188.070, part of the Nonresident Motorists Act, specifically allows jurisdiction to be taken by a Kentucky court under that Act when the defendant was a resident at the time of the accident, but thereafter became a nonresident; whereas KRS

\textsuperscript{112} 387 U.S. 253 (1968).
\textsuperscript{114} 551 S.W.2d 834 (Ky. App. 1977).
\textsuperscript{115} 554 S.W.2d 87 (Ky. 1977).
\textsuperscript{116} KRS § 454.210(2)(a)(3) (Supp. 1976) provides: "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a claim arising from the person's . . . [c]ausing tortious injury by an act or omission in this commonwealth." (emphasis added).
§ 454.210 contains no such language. This, it was argued, indicates an intent on the part of the legislature to limit the application of KRS § 454.210 to those persons who were nonresidents at the time of the alleged tortious act. The court of appeals emphasized that KRS § 454.210 relates to a claim arising from the tortious act and that the determining factor was whether the person was a nonresident at the time the claim was asserted in court.

Faced with the same problem, the Supreme Court in Conley reached the same result with different reasoning. The Court emphasized in that case that the purpose of the long arm statute is to provide jurisdiction over nonresidents, regardless of whether the nonresidency occurred before or after the tortious act. In both cases, jurisdiction was upheld.

B. Diversity of Citizenship

In Saylor v. General Motors Corp. a products liability case, the plaintiff sued both the resident dealer and the nonresident manufacturer. The dealer was subsequently granted a summary judgment and the manufacturer forthwith filed a petition for removal to federal district court pursuant to 28 U.S.C. § 1446(b). The manufacturer argued (1) the dismissal of the resident defendant from the case created diversity of citizenship, or (2) the initial action against the resident defendant constituted collusive joinder.

In resolving the first question, the district judge had to decide whether the 1949 Amendment to 28 U.S.C. § 1446(b) did away with the voluntary-involuntary test which had been set forth by the United States Supreme Court in American Car and Foundry Co. v. Kettelhake. In a decision which was both

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118 If the case stated by the initial pleading is not removable, a Petition for Removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.
119 236 U.S. 311 (1915). Under the voluntary-involuntary test "[i]f ... [the] plaintiff states a non-removable case in his initial complaint, involuntary changes will not make the case removable; they must have been brought about by the voluntary act of the plaintiff." 1A Moore's Federal Practice ¶ 0.168 [3.-5] at 487 (2d ed. 1974).
well-reasoned and amply supported by authority, the court ruled that the voluntary-involuntary test was still applicable. Thus, since the summary judgment granted to the resident defendant was not a voluntary act on the part of the plaintiff (although there was some indication his objection thereto was less than strenuous), the dismissal of the resident defendant did not make the case removable. As pointed out in the court's opinion, the reason for the voluntary-involuntary test is that in case of an involuntary dismissal of one party to a multi-party action, the dismissal may be interlocutory (as was the case here) and therefore not final and appealable until a final disposition is made of the claim against all other parties.129

As for the claim of collusive joinder, it is well settled that the test is not whether the local defendant was added to defeat removal, but whether a legitimate cause of action against the local defendant is stated under applicable state law.121 Whether the cause of action is legitimate or a fabrication is purely and simply a question of examining the pleadings and the local law.122 The motive of the plaintiff in suing the local defendant is irrelevant in determining jurisdiction.123 Obviously, a dealer who sells a defective product can be held liable under Kentucky law,124 so the claim of collusive joinder was rejected and the case remanded to the state court.

V. PLEADING

A. The Complaint

In Skaggs v. Vaughn,125 plaintiff filed suit on January 21, 1974, seeking to set aside a deed dated November 29, 1968. The

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129 See Ky. R. Civ. P. 54.02.
135 550 S.W.2d 574 (Ky. App. 1977).
complaint alleged fraud, mistake and undue influence. Summary judgment was granted to the defendant grantees of the deed and plaintiff appealed. KRS § 413.120(12) provides that an action for relief or damages on the grounds of fraud or mistake must be filed within five years after the cause of action accrued. On the other hand, KRS § 413.130(3) provides that such an action shall not be deemed to have accrued until the discovery of the fraud or mistake, but that the action shall be commenced within ten years of the time the fraud or mistake occurred. This ten-year limitation has been held to be absolute, regardless of the date of discovery. 126

As stated above, Skaggs' complaint alleged fraud, mistake and undue influence, thus apparently satisfying the requirement of Civil Rule (CR) 9.02 that averments of fraud or mistake be stated with particularity. The defendants pleaded limitations, thus satisfying the requirements of CR 8.03 that affirmative defenses be set forth in a pleading to a preceding pleading. However, the court sustained a dismissal of the complaint for failure of the plaintiff to plead that the fraud or mistake was not discovered within the five-year period and that it could not have been discovered sooner by the exercise of reasonable diligence.

In Boone v. Gonzalez, 127 plaintiff filed suit on January 18, 1972, seeking a divorce from John H. Boone, whom she had married on October 3, 1966. On September 8, 1972, she filed an amended complaint alleging that the marriage was bigamous. On April 13, 1973, she amended again, seeking damages for fraudulent misrepresentation of Boone's marital status. It was undenied that the marriage was bigamous. Boone's answer to the second amended complaint did not specifically allege limitations, but included a motion to dismiss on the basis of limitations. 128 Plaintiff's attorney made an oral offer to amend

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125 550 S.W.2d 571 (Ky. App. 1977).
126 Plaintiff claimed on appeal that defendant waived limitations by failing to plead it affirmatively as a defense. See Ky. R. Civ. P. 8.03. Of course, the complaint on its face showed that the action was barred by limitations, so the defense was properly raised by a motion to dismiss.Rather v. Allen County War Memorial Hospital, 429 S.W.2d 860 (Ky. 1968). In view of the degree of the technicality imposed by the court on the plaintiffs in these cases, we note in passing that Civil Rule (CR) 12.02 requires that such a motion "shall be made before pleading if a further pleading is
prior to the trial court's ruling on the motion to dismiss, but the trial court overruled the motion, thus making the amendment unnecessary. Defendant appealed from a judgment in favor of the plaintiff.

In both *Skaggs* and *Boone*, more than five years had elapsed from the date of the alleged fraud. However, neither complaint alleged that the fraud was not discovered or could not have been discovered by the exercise of ordinary care within the five-year period, which would invoke the saving provisions of KRS § 413.130(3). In both appeals (which were rendered the same day and written by the same judge), the court of appeals relied on the case of *Justice v. Graham* in ruling that the complaints should have been dismissed. However, *Justice* was decided before the adoption of the new civil rules, which now provide only for "notice" pleading.

If our rules require only "notice" pleading and if a complaint shows *prima facie* that the basic statute of limitations has run on the cause of action, then (unless saved by another statute) the defendant should have notice that the plaintiff is relying on the saving statute, because otherwise the plaintiff's claim is barred. The civil rules provide that limitations must be specifically pleaded as an affirmative defense. Nowhere do the civil rules provide that grounds for the avoidance of that defense must be affirmatively pleaded. Resurrection and application of this ancient and hoary rule of pleading can only serve to thwart in this instance the intent of the new rules. The result in both cases was disastrous. The *Boone* case was reversed with order to dismiss the complaint, but without prejudice, because of the oral motion to amend which had been made at the time the motion to dismiss was overruled. If this oral motion had not been placed in the record, then plaintiff would have been for-

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129 246 S.W.2d 135 (Ky. 1952).

130 See Ky. R. Civ. P. 8.01. This point was raised in the *Skaggs* case, but the court noted that the old rule had been reiterated in Madison County v. Arnett, 360 S.W.2d 208, 210 (Ky. 1962). In that case, the plaintiff, perhaps in an abundance of caution, had pleaded the requirements of KRS § 413.130(3) by way of amended complaint, so the necessity for a specific pleading was not actually raised in the case and the reiteration of the old rule was only dictum.

131 Ky. R. Civ. P. 8.03.
ever barred, since the court of appeals' opinion dismissing her original complaint was rendered more than ten years after the cause of action originally arose. Still, she loses her judgment because of this technicality and must try her case again from the beginning. Skaggs was even less fortunate. By failing to offer to amend, his claim was lost.

In *Hill v. Atherton*, the action was one for medical malpractice and the complaint averred general negligence in the performance of a vasectomy. The answer was in the form of a general denial. All of the evidence indicated the surgery was performed in conformance with the applicable standards of care, and summary judgment was granted in favor of the defendant. On appeal, the plaintiff claimed there was a genuine issue of fact on the question of lack of informed consent. In affirming the summary judgment, the Supreme Court tersely noted: "Hill's argument that a general charge of negligence against Dr. Atherton included the issue of lack of informed consent has no merit. The issue of lack of informed consent was not presented to the trial court. Issues not raised in the trial court are not preserved for appellate review." 

Since the appeal was from a summary judgment and not a directed verdict, it must be presumed that the court was talking about the sufficiency of the complaint, not the sufficiency of the evidence. As recently as 1974, Kentucky's highest court had held in *Roberson v. Lampton* that when a genuine issue on a material fact is properly joined by the pleadings, a trial is the only battleground and that a litigant cannot be forced to a premature disclosure of evidence by motion for summary judgment. This principle was reiterated by the Kentucky Supreme Court as recently as May 20, 1977 (seven months after deciding *Hill*) in *Harlow v. Harlow*.

The nature of a claim of lack of informed consent was addressed at length in *Holton v. Pfingst*. After a long analysis of the problem, the then Court of Appeals (now Supreme Court) of Kentucky reached the conclusion that the issue

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132 No. 73-1094 (Ky. Oct. 29, 1976 mem. per. curiam).
133 Id.
134 516 S.W.2d 838 (Ky. 1974).
135 Id. at 839-40, quoting Payne v. Chenault, 343 S.W.2d 129, 132 (Ky. 1961).
136 551 S.W.2d 230 (Ky. 1977).
137 534 S.W.2d 786 (Ky. 1974).
should be viewed as one of simple negligence. "[W]e are persua-
ded that the prevailing view to the effect that the action,
regardless of its form, is in reality one for negligence in failing
to conform to a proper professional standard is the soundest
approach."138

Though there is some authority to the effect that unusual
allegations should be pleaded with specificity so that the de-
defendant will be given "at least an intimation of the issues it will
be forced to meet and answer"139 if the failure to furnish suffi-
cient information to permit a patient to exercise informed con-
sent is viewed simply as a matter of negligence, it would seem
that a general averment of negligent treatment is sufficient to
state a cause of action.140 The issue may very well have been
an appropriate one for a motion for more definite statement,141
but it appears no such motion was made. Clearly, this case
should not have been dismissed on a motion for summary judg-
ment. Just as clearly, if our appellate courts are going to write
new law which overrules existing precedent, they should do so
in published opinions, not unpublished memorandum opinions
which serve no notice to members of the practicing bar.

B. Motion for a More Definite Statement

In Reisert v. Apple Valley Resort, Inc.,142 defendants filed
a motion for a more definite statement and the motion was
sustained. Most of the defects of which the defendants com-
plained143 appear to be matters concerning which the defendant

138 Id. at 788.
139 Id. at 788.
140 Department of Highways v. Kennard, 342 S.W.2d 531, 532 (Ky. 1961).
141 Cf. Cincinnati, Newport & Covington Transp. Co. v. Fischer, 357 S.W.2d 870
(Ky. 1962) (technical pleading not required, only necessary to give defendant notice
and identify the claim; specific facts in plaintiff's complaint not sufficient to narrow
plaintiff's allegation of general negligence).
142 See Ky. R. Crv. P. 12.05. See notes 148-151 and accompanying text infra for a
further discussion of the proper application of this rule.
143 1. The plaintiffs alleged that Otto F. Knop is the successor in inter-
est of the defendant corporation, but they did not state what is a successor
in interest.
2. The plaintiffs did not specify the agents who made the certain induce-
ments except for William F. Clarkson, III.
3. The plaintiffs failed to file or state with particularity the written repre-
sentations which caused the inducements.
4. The plaintiffs did not allege who holds their monies, the amount thereof
probably had more knowledge than the plaintiff, or matters of evidence which should normally be the subject of discovery. However, the grant or denial of such a motion is largely within the discretion of the trial judge and in this case, the judge did grant the plaintiffs forty-four days in which to comply with the order. It appears that during the forty-four-day period, plaintiffs served several notices to take depositions of the defendants and after the expiration of the period, they served requests for production of documents pursuant to CR 34.01 and requests for admissions pursuant to CR 36.01. However, when the action was finally dismissed, eighty-one days after the order was entered, no discovery evidence had been filed. Worse, neither had an amended complaint been filed pursuant to the court’s order. Nor did the plaintiffs file a motion for an extension of time in which to comply with the court’s order.

Perhaps plaintiffs could have avoided dismissal by asking for an extension of time within which to comply, but that is not the point. The motion for a more definite statement should not have been granted in the first place. When Kentucky adopted the new civil rules, it adopted “notice” pleading.

The purpose of [CR 8.01] is to assign to pleadings the function of giving notice and formulating true issues without the requirement that they detail every fact which in the past may have been necessary to constitute a formal ‘cause of action’ or a defense. The common law concept of pleading to an issue is completely abandoned.

or the terms and conditions of the deposit.
5. The plaintiffs did not file the contract or state with particularity its terms and conditions.
6. Although the plaintiffs alleged that they have performed all conditions of the contract required to be performed by them, they have not filed the contract or stated with particularity its terms and conditions.
7. The plaintiffs have not stated with particularity any of the facts constituting fraud, bad faith or illegality.
8. The plaintiffs have not alleged the terms and conditions of the commitments which the defendants refused to honor.

144 See Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759 (Ky. 1940).
146 Alvey v. Kern, 354 S.W.2d 516 (Ky. 1962).
147 6 CLAY, KENTUCKY PRACTICE 131, Civil Rule 8.01, Comment 2 (3d ed. 1974).
The only purpose of CR 12.05, the motion for a more definite statement, is to clear up vagueness or ambiguity so as to allow the opposing party to formulate intelligently a responsive pleading. It is not to be used to nullify the purpose of CR 8.01. The complaint in this case, even as summarized by the court of appeals, was sufficient to put anyone on notice of the nature and grounds of the claim for relief. More than that is not required, and a dismissal of this complaint on grounds of failure to make a more definite statement was a particularly harsh result that amounts to a throwback to the tradition of evidence pleading which existed prior to the adoption of our present rules. This is particularly obvious in this case where the plaintiffs’ frantic attempts to obtain discovery of the information sought in the motion for a more definite statement indicate that the specifics sought by the defendants were peculiarly within their own knowledge.

C. The Answer

In Hankins v. Cooper, a complaint was filed and summons issued with the address for the defendants listed as West Point, Hardin County, Kentucky. It was subsequently learned that defendants lived in Shepherdsville, Bullitt County, Kentucky and they were served with an alias summons on January 22, 1976. On February 10, 1976, an unsigned answer and counterclaim were filed pro se by the defendants. This answer was not served on plaintiff’s attorney, but on March 11, 1976, the circuit clerk advised plaintiff’s attorney that the document had

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145 The complaint alleged that plaintiffs:
   had contracted with Apple Valley to purchase a condominium, that Clarkson, the president and a director of Apple Valley, in his capacity as agent, represented that the plaintiffs could receive the return of their deposit after inspecting the condominium unit and that after the inspection, the defendant wrongfully, fraudulently and in bad faith refused to return the deposit. The plaintiffs requested the rescission of all transaction between the plaintiffs and the defendants, the refund of all monies paid by plaintiff to defendants with interest and exemplary damages.
146 See Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759 (Ky. 1940); 6 Clay, Kentucky Practice 214, Civil Rule 12.05, Comment 2 (3d ed. 1974).
147 551 S.W.2d 584 (Ky. App. 1977).
been filed. Plaintiff was subsequently granted a default judgment, although no written notice of the application for default was sent to the defendant as required by CR 55.01. The case was appealed on the circuit court's refusal to set aside the default. The primary issue on appeal was whether the unsigned "answer" constituted an appearance in the action which would entitle the defendants to the three-day notice requirement required by CR 55.01. The court of appeals held it did.

The court relied on *Smith v. Gadd,* wherein the following test was established: "In construing the word 'appeared' in CR 55.01, we are of the opinion that it means the defendant has voluntarily taken a step in the main action that shows or from which it may be inferred that he has the intention of making some defense." On the other hand, CR 11 provides that "if a pleading is not signed . . . it may be striken as sham and false and the action may proceed as though the pleading had not been filed." However, this does not mean that failure to sign a pleading is grounds for dismissal. As was pointed out by Commissioner Clay in *Commonwealth v. Utley,* the rule also provides the remedy—a motion to strike on grounds that the pleading is sham and false. This preliminary remedy must be obtained before proceeding as though the pleading had not been filed. Thus, although the unsigned answer was voidable, it could not be ignored for purposes of the notice requirement of CR 55.01 so long as it remained in the record.

D. Compulsory Counterclaims

In *Powell v. The Winchester Bank,* the issue was whether the plaintiff was estopped from bringing a suit to set aside a deed by which he conveyed property to his father while under a decree of incompetency. The father had subsequently transferred the property to others, who were purchasers without notice. The estoppel allegedly arose due to plaintiff's fail-

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13 280 S.W.2d 495 (Ky. 1955).
14 Id. at 498.
15 350 S.W.2d 698 (Ky. 1961).
16 551 S.W.2d 820 (Ky. App. 1977).
17 See notes 2-11 and accompanying text supra for a discussion of the issue of limitations in this case.
ure to assert this cause of action in a previous suit. After the father's death, a suit was brought by the executor seeking an interpretation of the will of the decedent. By this time, plaintiff had been legally restored to competency and was named as a party to that suit, as were the other heirs. In that suit, plaintiff was held to be the lifetime beneficiary of a trust, with the principal to be distributed to the remaindermen upon his death. Following this judgment, plaintiff then filed suit to set aside the deed executed by him in favor of his father during his period of incompetency. On this set of facts, the court of appeals ruled that under CR 12.02, he should have pleaded the deed contest as a defense to the suit to construe the will and was therefore barred by the principle of collateral estoppel from asserting it in this subsequent suit.

CR 12.02, which requires "every defense, in law or fact, to a claim for relief in any pleading" to be asserted in a responsive pleading, does not appear to be applicable here. A cause of action to declare a deed null and void does not have the "ring" of defense to an action to construe a will. If it was required to be asserted, then it should have been categorized as a compulsory counterclaim under CR 13.01. A suit to construe a will is in the nature of a declaratory judgment and there is authority to the effect that the compulsory counterclaim rule applies in declaratory actions. The problem then becomes whether a deed contest "arises out of the transaction or occurrence that is the subject matter" of the earlier suit to construe the will.

In Pipeliners Local Union No. 798 v. Ellerd, the Tenth Circuit Court of Appeals adopted the following test for determining whether two actions arise out of the same transaction or occurrence: (1) Are the issues of fact and law raised by the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on the defendant's claim if not asserted? (3) Will substantially the same evidence support or

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158 KRS § 418.040 (1972).
160 KY. R. CIV. P. 13.01.
161 503 F.2d 1193 (10th Cir. 1974).
162 Under the doctrine of res judicata, a judgment on the merits in a prior suit.
refute plaintiff’s claim as well as defendant’s counterclaim? (4) Is there any logical relationship between the two claims?\textsuperscript{160} The court noted that the “logical relation” factor is the most controlling.

In declaring Powell’s suit barred by collateral estoppel, the Kentucky Court of Appeals relied on \textit{Newman v. Newman}\textsuperscript{164} and \textit{Hays v. Sturgill}\textsuperscript{165} for the controlling rule:

The rule is elementary that when a matter is in litigation, parties are required to bring forward their whole case; and ‘the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.’\textsuperscript{166}

\textit{Newman} was a case in which a subsequent suit for adverse possession was held not barred by a previous judgment on a suit to construe a deed to the same land, but apparently only because the adverse possession had not ripened at the time of the first suit. However, in \textit{Hays}, it was held that a subsequent suit to have a deed annulled on the ground of mental incapacity of the grantor was not barred by a previous judgment construing the deed with respect to the title it conveyed. Since the court in \textit{Powell} relied on the rule in \textit{Hays}, why is \textit{Hays} not controlling? Is a judgment construing a deed not more closely related to a suit to set aside the same deed than a judgment construing a will would be to a suit to set aside a deed, even though the proceeds from the sale are a part of the estate?

Because the executor of an estate administers only personal property, there is some authority for the proposition that in an action in equity for the construction of a will, questions involving the same parties or their privies bars a second suit based on the same cause of action, whereas under the doctrine of collateral estoppel, such judgment precludes litigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. \textit{Cream Top Creamery v. Dean Milk Co.}, 383 F.2d 358, 362 (6th Cir. 1967).\textsuperscript{162} 503 F.2d at 1198, \textit{citing} 6 \textit{WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE}, § 1410, at 42 (1971).\textsuperscript{163}

\textit{Powell v. The Winchester Bank}, 551 S.W.2d 820, 822-23 (Ky. App. 1977) (emphasis in original).\textsuperscript{164} 451 S.W.2d 417 (Ky. 1970).\textsuperscript{165} 193 S.W.2d 648 (Ky. 1946).\textsuperscript{166}
relating to the legal title to estates in land may not be raised.\textsuperscript{167} If such were the rule, then the suit to set aside the deed would not be even a permissive counterclaim,\textsuperscript{168} much less a compulsory counterclaim which would give rise to collateral estoppel. This may explain the court’s determination to characterize the suit as an action in fraud rather than an action for the recovery of real property.\textsuperscript{169}

The rationale of the Powell decision is that the plaintiff’s father had long since sold the property in question and the funds from this sale were a part of the estate in the hands of the executor some six years later when suit was filed to construe the will. The result of that suit was that the plaintiff was found to have a life estate in the form of a trust, to which he would be entitled to the income, but the principal would ultimately go to the remaindermen. Stripped to the bare bones, the suit to set aside the deed was nothing more than an attempt by the plaintiff to obtain an absolute interest in so much of the principal of the trust as it would take to reimburse him for his interest in the real estate; thus his interest in the estate’s funds would increase to the detriment of the remaindermen. Viewed in this manner, the case may well be seen as one appropriate for the application of CR 13.01 and the doctrine of collateral estoppel.

VI. DISCOVERY

In Nowicke v. Central Bank and Trust Co.,\textsuperscript{170} a default judgment was entered against the appellant because of his failure on two occasions to appear for discovery depositions, first pursuant to a notice served by appellee, then pursuant to an agreed order.\textsuperscript{171} The defendant alleged illness as the cause of his failure to appear on both occasions, but he filed neither an affidavit nor a medical statement in support of these claims.

The purpose of the liberal discovery procedures contained in the civil rules reflects the philosophy that the purpose of pleadings is to give notice, not detailed allegations of facts, and

\textsuperscript{167} See 80 Am. Jur.2d Wills § 1501, n. 11 (1975).
\textsuperscript{168} Ky. R. Civ. P. 13.02.
\textsuperscript{169} See notes 2-11 and accompanying text supra for a discussion of this point.
\textsuperscript{170} 551 S.W.2d 809 (Ky. App. 1977).
\textsuperscript{171} Ky. R. Civ. P. 37.04(1); 37.02(2)(C).
the development of facts should be accomplished through the
discovery procedures provided in Rules 26 through 37.\textsuperscript{172} CR
30.01 provides for the taking of the deposition of a party, and
no subpoena is required to compel his attendance, since the
notice to take a deposition is sufficient for that purpose.\textsuperscript{173}

Certainly, granting a default judgment as a penalty for
failing to appear for a deposition seems harsh.\textsuperscript{174} However, a
flagrant disregard of discovery requirements would justify such
result.\textsuperscript{175} There was no counterpart to CR 30.01 under the civil
code and a subpoena was required to compel a deposition by a
party. In one case under code practice, the defendants were
held in contempt of court for failing to testify by deposition
pursuant to a subpoena.\textsuperscript{176} Nowicke is the first case under the
new rules where a default judgment was entered for failure to
submit to depositions, but default judgments have been sus-
tained where a party failed to answer interrogatories\textsuperscript{177} and
where a party failed to produce records pursuant to a subpoena
duces tecum.\textsuperscript{178} The only other case involving failure of a party
to appear for deposition which has been decided since the
adoption of the civil rules is Armstrong v. Biggs.\textsuperscript{179} In that case,
the Court of Appeals overruled a default judgment where only
three days’ notice was given by plaintiffs of their intention to
take depositions in Paducah, Kentucky, of three defendants
who lived in other states. This was held not to be “reasonable
notice,” and certainly no one could quarrel with that ruling.
However, in Armstrong, the defendants did file what amounted
to a motion for a protective order\textsuperscript{180} accompanied by a support-
ing affidavit.

The circumstances surrounding the defendant’s failure to
appear at two scheduled depositions in the Nowicke case
hardly seem to qualify as a “flagrant disregard of discovery

\textsuperscript{172} 6 Clay, Kentucky Practice 231, Civil Rule 26.02, Comment 3 (3d ed. 1974).
\textsuperscript{173} Armstrong v. Biggs, 275 S.W.2d 60, 62 (Ky. 1955).
\textsuperscript{174} Societe Internationale v. Rogers, 357 U.S. 197 (1958).
\textsuperscript{175} In re Professional Hockey Antitrust Litigation, 63 F.R.D. 641 (1974).
\textsuperscript{176} Kindt v. Murphy, 227 S.W.2d 895 (1950).
\textsuperscript{177} Ky. R. Civ. P. 33.01; Benjamin v. Near East Rug Co., 535 S.W.2d 848 (Ky.
1976); Naive v. Jones, 353 S.W.2d 365 (Ky. 1961).
\textsuperscript{178} McHargue v. Perkins, 295 S.W.2d 566 (Ky. 1956). See Ky. R. Civ. P. 34.01.
\textsuperscript{179} 275 S.W.2d 60 (Ky. 1955).
\textsuperscript{180} Ky. R. Civ. P. 26.03.
requirements.” The first deposition was scheduled on January 24, 1974, and the second one on February 26, 1974. The default judgment was entered on February 27, 1974. Although appellant might have avoided this predicament had he filed an affidavit or a medical statement in support of his assertions of illness, the swiftness with which the default was obtained indicates he hardly had time to support his assertion before the ax fell. Armstrong v. Biggs had held that a party’s statements explaining the reasons for his failure to comply with an order of discovery must be accepted as true in the absence of evidence to the contrary. Of course, the explanations in Armstrong were presented by affidavit, and a bare unverified assertion generally is thought to be insufficient. In Nowicke, however, the court did not rely on the unverified nature of the appellant’s claims of illness, but sustained the trial court’s findings on the basis of a “pattern of contumacy.” It was said that this pattern was established by the fact that it took a year after suit was filed to locate and serve appellant with process (though the court’s opinion contains no allegation that he was deliberately avoiding service and, if there was such evidence, that appellee availed himself of the appropriate remedy) and that appellant’s original attorney had filed a motion to withdraw accompanied by an affidavit stating that he had received little cooperation from the appellant. The court also stated that appellant had refused to be responsive (although this motion was filed six days after the default judgment was entered). However, appellant did have ample opportunity to file affidavits in support of his motion to set aside the default judgment and it is presumed he failed to file them even at that late date although this fact is not stated in the court’s opinion.

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182 275 S.W.2d 60 (Ky. 1955).
183 Cf., Department of Highways v. Ginsburg, 516 S.W.2d 868, 870 (Ky. 1974) (statements made by appellant, in a motion for a new trial, that the trial court committed prejudicial error by refusing to permit a juror to be challenged for cause after it was disclosed on voir dire that she had been a defendant in a recent condemnation suit involving the same project; Court of Appeals refused to consider such allegations because they were not supported by an affidavit).
184 551 S.W.2d at 811.
185 In such a situation “the clerk shall . . . make an order on the complaint warning the party to appear and defend the action within 50 days.” Ky. R. Civ. P. 4.05.
186 See Ky. R. Civ. P. 69.03.
VII. Trial

A. The Right to Trial by Jury

In *Whitfield v. Cornelius*, the action was to recover on a promissory note and the counterclaim was for money wrongfully taken. The defendant's demand for a jury trial was denied and this was held on appeal to be reversible error.

The result should not have been unexpected. An action on a promissory note is an action on a debt and is triable by jury if proper demand is made. So is an action for conversion of money. While it has been held in some cases that certain issues, though legal in nature, are too complicated for consideration by a jury, it was noted in *Whitfield* that the trial court had no basis for such a finding in this case (and, in fact, did not even pretend to state a basis). The court of appeals pointed out that the trial court's assertion "that it is 'impractical for a jury intelligently to try the case' is not sufficient." While there are some legal scholars who question the competency of a jury to try any issue, one suspects that the individual litigant, given a choice, would rather trust his fate to a jury of his peers than to the lawyers and judges—and the law clearly protects his choice in that regard.

B. Motion for a Directed Verdict

In *Barnett v. Stewart Lumber Co.*, the action was for the balance due on the purchase of a saw mill. Appellant was brought in by a third-party complaint, claiming he had contracted with defendant for the purchase of his interest in the saw mill and thereby had assumed the debt owing to the plain-

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188 Brock v. Farmer, 291 S.W.2d 531 (Ky. 1955).
189 Shatz v. American Surety Co. of N.Y., 295 S.W.2d 809 (Ky. 1955).
190 See, e.g., Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493, 500 (Ky. 1975); McGuire v. Hammond, 405 S.W.2d 191 (Ky. 1966); see also Ky. R. Civ. P. 39.01.
191 554 S.W.2d at 871. But see Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493 (Ky. 1975) wherein the Supreme Court made virtually the same observation in a case of a type which traditionally had been triable by jury.
193 U.S. Const. amend. VII; Ky. Const. § 7; Ky. R. Civ. P. 38.01.
194 547 S.W.2d 788 (Ky. App. 1977).
195 See Ky. R. Civ. P. 14.01.
tiff. Although the opinion does not quote from the answer to the third-party complaint, it can be assumed that this allegation was denied, since the case went to trial on that issue. In fact, the court directed a verdict on the contract in favor of the original plaintiff against the original defendant and then directed a verdict in favor of the defendant/third-party plaintiff against the appellant. Finally, the trial court "directed a verdict as a matter of law on the agreement between [the original defendant] and the appellants to pay the debt owing the [original plaintiff in favor of the original defendant]." This portion of the opinion is quoted verbatim because there is some indication elsewhere in the opinion that the trial court actually may not have directed a verdict against this particular appellant on that issue, but rather against his brother, who had also appealed on another issue.

On appeal, it was claimed that the trial court erred in failing to sustain appellant's motion for a directed verdict on the grounds that he had nothing to do with the transaction for purchase of the saw mill from the original defendant. The court of appeals summarily dismissed this argument, holding that he did not allege this fact as ground for a directed verdict when he made his motion at the trial level.

CR 50.01 specifically states, "A motion for a directed verdict shall state the specific grounds therefor." It has been held that the purpose of the rule "is to apprise fairly the trial judge as to the movant's position and also to afford opposing counsel an opportunity to argue each ground before the judge makes his ruling." However, where both the judge and opposing counsel obviously know the grounds relied on in the motion, the purpose of the rule has been met and there would seem to be no need to reiterate these grounds with the chance of running afoul of CR 50.01. Where the primary issue raised in the pleadings is the presence or absence of a valid contract between the parties, it is unduly harsh to hold that an appellant has failed to preserve an alleged error for review by failing to apprise the trial court in his motion for a directed verdict that his grounds therefor are that he was not a party to the agreement.

1547 S.W.2d at 789.
157 Gulf Oil Corp. v. Vance, 431 S.W.2d 864 (Ky. 1968).
158 Hercules Powder Co. v. Hicks, 453 S.W.2d 583 (Ky. 1970).
This is particularly so in this case where the trial court ruled on the basis of somebody's argument that the appellant, as a matter of law, was a party to the agreement!

C. Repeating Testimony After Jury Deliberations Have Begun

In Holcomb v. City of Louisville, the jury returned to the courtroom during deliberations and advised the court that it could not reach a verdict unless certain testimony was reread. Unfortunately, neither the court reporter nor her notes or tapes could be located. The trial judge directed the jury to resume deliberations "as if he had denied the request but subject to the fact that he might reconsider if it became feasible to do so," i.e., if the court reporter reappeared. A Kentucky statute seems to make such a rereading mandatory upon the request of the jury, and on appeal it was held to be reversible error to force the jury to continue deliberation without the requested information. The statute provides that:

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel.

The court of appeals cited Little v. Whitehouse as authority for reversing the Holcomb case. In Little, the jury had requested permission to take a doctor's deposition into the jury room. This clearly is not allowed. The ruling on appeal in Little was that in such a circumstance, the trial judge should have asked the jury whether there was disagreement regarding the doctor's testimony and should have informed them that parts of the deposition could be reread to them to the extent necessary to resolve the disagreement. The Holcomb court

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190 S.W.2d ____ (Ky. App. 1977).
191 KRS § 29.304 (1971).
192 Id. (emphasis added).
193 384 S.W.2d 503 (Ky. 1964).
195 384 S.W.2d 503, 504 (Ky. 1964).

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also cited *Smith v. Wright,* but that case dealt with the re-reading of certain testimony where there was disagreement between the attorneys during closing arguments.

Authority from other jurisdictions is scarce and what can be found is conflicting. The closest case is the California case of *Asplund v. Driskell,* which contained virtually the same facts as *Holcomb* regarding the disappearance of the court reporter, but the jury took the judge off the hook by electing to abandon its request for the rereading of the testimony. However, it has been held in Oklahoma criminal cases that a statute substantially similar to Kentucky's is not mandatory in its language and that it is within the discretion of the trial court whether requested testimony is to be reread after deliberations have begun. The interpretation given these statutes seems to depend on whether the mandatory predicate "shall be given" pertains to "the information required" or "in the presence of, or after notice to, the parties or their counsel" or both. The interpretation given by the Kentucky court that the "information required" shall be given appears more logical than the Oklahoma interpretation. In long or complicated cases, it is unreasonable to expect the jury to remember or to be in agreement among themselves on all of the testimony heard during the trial. If the jury feels it cannot properly decide the case without refreshing its recollection on crucial testimony, then the principles of justice and fairness would seem to demand that it be reread to them.

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203 512 S.W.2d 943 (Ky. 1974).
205 This statute actually employs the language "must be given" instead of the Kentucky language "shall be given."
207 The court in Jones v. State, 456 P.2d 610 (Okla. 1969) gave the following interpretation of the Oklahoma statute:

We interpret the mandatory aspect of 22 O.S.A. § 894 to be that which provides for the return of the jury to the courtroom, and for the notification of the parties to the trial that the jury is being returned for additional information or instruction. The termination (sic) of whether or not the jury's request is required lies within the judicial discretion of the trial judge.

*Id.* at 612.
A. Finality of the Order

In Johnson v. Smith, plaintiff brought his suit against three defendants and an order was entered on May 23, 1975, dismissing as to one defendant for lack of jurisdiction. The original order recited that it was a “final and appealable order,” but these words were deleted in a modified order pursuant to a motion timely filed. The order became final on May 21, 1976, when the case was settled between the plaintiff and the other two defendants. When the plaintiff then appealed the granting of the summary judgment, it was claimed the appeal was not timely filed. This argument was summarily dismissed by the court of appeals:

CR 54.02 states that where there are multiple parties involved in a suit and an order is entered granting a final judgment as to one or more but less than all the parties, the judgment must recite that it is final and that there is no just reason for delay. If the order does not recite this then it is not final and appealable and is therefore subject to modification at any time before entry of the judgment adjudicating all the claims.

The reader may think this ruling is so elementary as not to be worthy of comment. Certainly, there are numerous cases holding that an order entered in a multiple party or multiple claims suit is not final and appealable unless the CR 54.02 recitals are contained in the order. Further, the order must contain both recitals; a statement that the order is “final” without the accompanying statement that “there is no just reason for delay,” will not suffice to make the order appealable. Although it has been held that the mere inclusion of the CR 54.02 recitals will not make an order final and appealable when the order prima facie indicates that it was not intended

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210 551 S.W.2d 834 (Ky. App. 1977).
211 See note 114 and accompanying text supra for a discussion of this aspect of the case.
212 551 S.W.2d at 835 (emphasis added).
213 See, e.g., Department of Highways v. General Refractories Corp., 453 S.W.2d 531 (Ky. 1969); Linkous v. Darch, 299 S.W.2d 120 (Ky. 1957).
214 Peters v. Board of Educ., 378 S.W.2d 638 (Ky. 1964).
to be a final adjudication of the rights of the parties,\textsuperscript{215} it would seem to be well settled that no order in a multiple parties or multiple claims suit is appealable without strict compliance with CR 54.02. If so, then why is the issue so often raised? The case discussed next provides the answer.

In \textit{Cerwin v. Taub},\textsuperscript{216} suit was brought to foreclose a mortgage on the Mayflower Hotel in Louisville. A restaurant tenant of the hotel was also a party and receivers were appointed for both the hotel and the tenant. A default was taken against the mortgagor and the appellants were the successful bidders at the sale of the mortgaged property. Upon their failure to comply with the terms of the sale, an order was entered on November 17, 1972, which provided in pertinent part that the confirmation of the first sale would be set aside and the property resold “for the account of and at the risk of the original purchasers.”\textsuperscript{217} The only bidder at the subsequent sale was the plaintiff mortgagor and the purchase price was $245,000 less than appellants’ successful bid at the first sale. The second sale was confirmed without objection on August 10, 1973. Neither the order of November 17, 1972, nor the order of confirmation of August 10, 1973, contained the recital that the order was final and that there was no just reason for delay.\textsuperscript{218} It was not until July 23, 1976, that the order was entered declaring “that the November 20, 1972, order was a final order within the meaning of CR 54.01 at the time of its entry and that this July 23, 1976, order was a final order, appealable and that there was no just reason for delay in its entry.”\textsuperscript{219} On appeal, it was held that the November 20, 1972, order was final and appealable and that, therefore, the 1976 appeal was not timely filed.

CR 54.01 provides that an order or judgment is final and appealable only when it adjudicates all the rights of all the parties in an action or proceeding, or when it is a judgment made final under CR 54.02. As discussed earlier, an order entered in a multiple claims or multiple parties action does not become final and appealable unless it contains the CR 54.02

\textsuperscript{215} Hale \textit{v. Deaton}, 528 S.W.2d 719 (Ky. 1975).
\textsuperscript{216} 552 S.W.2d 675 (Ky. App. 1977).
\textsuperscript{217} Id. at 677.
\textsuperscript{218} These recitals are required by Ky. R. Civ. P. 54.02(1).
\textsuperscript{219} 552 S.W.2d at 677.
recitals; without the recitals the order is merely interlocutory and no appeal can be taken until a subsequent order is entered finally disposing of all claims.

To reach the ultimate result in Cerwin, the court of appeals first had to find that the receivers for the hotel and the tenant restaurant owners were not parties to the suit when the November 20, 1972, order was entered. In doing so, it cited two old cases in which a receiver was described as “an indifferent person between the parties; an officer of the court appointed on behalf of all parties . . . the creature, and arm, of the court.” However, those were cases in which the issue was whether the plaintiff should be liable for the fees of the receiver to the extent there were insufficient assets in the receivership to pay for them. In fact, a more likely interpretation of those two cases is that the receivers are separate parties and, therefore, payment of their fees is not the responsibility of other parties. Certainly, one must question the rationale that the appointment of a receiver for a party somehow transforms that party into a “nonparty.” Professor Moore recognized the confusion that Federal Rule 54(b) (which is identical to CR 54.02) would cause in cases involving receiverships. He drew a distinction between a plenary action brought against a receiver and a receivership action. He wrote that in a plenary action, there is no special problem because “if it involves multiple claims or parties, then amended 54(b) applies.” There is no indication that he would consider a party for whom a receiver has been appointed in such a case to be a “nonparty.” In a receivership action in which a receiver is appointed, Professor Moore did see problems.

[T]he amended Rule will be applicable to many, probably most, receivership proceedings for these will usually involve multiple claims for relief, as well as multiple parties; some final orders will probably deal with collateral matters and their appealability will not be affected by the amended Rule, but what is a collateral matter proves troublesome at times; apart from adjudications dealing with collateral matters, some adjudications will certainly involve a ‘claim for relief’.

220 Id. at 678, citing Atlantic Trust Co. v. Chapman, 208 U.S. 360 (1908), and Crump & Field v. First National Bank of Pikeville, 17 S.W.2d 436 (Ky. 1929).
221 6 Moore’s Federal Practice §54.39 at 661 (2d ed. 1976).
or will fully dispose of the interest of one or more but fewer than all the parties, and, absent a certificate by the district court, such an adjudication will lack finality under the amended Rule until all of the action has been adjudicated.\textsuperscript{222}

\textit{Cerwin} was obviously a plenary action and it should make no difference that the defendants were placed in receivership after the action was filed rather than before. The bankruptcy of the defendants did not make them nonparties. At best, it only meant that some, but not necessarily all, of the claims against them were uncollectable.

By finding the receivers to be nonparties, the court did not reach the question whether the order for payment of the deficiency could be interpreted as a collateral matter and thus subject to the "collateral order doctrine" enunciated by the United States Supreme Court in \textit{Cohen v. Beneficial Industrial Loan Corp.}\textsuperscript{223} On the other hand, since the order of November 20, 1972, was entered on motion of the original plaintiff "to resell the property for the account of and at the risk of the appellants,"\textsuperscript{224} a reasonable argument could be made that the request constituted a separate claim for relief by the plaintiff and thus was not subject to the \textit{Cohen} rule.\textsuperscript{225}

Another issue in \textit{Cerwin} was whether there were multiple claims. As previously stated, the bankruptcy of the defendants did not extinguish all the claims against them; it merely made some of them uncollectable. Further, if the claim for the deficiency is viewed as a separate claim from the original suit in foreclosure filed against the hotel and tenant, then there are both multiple parties and multiple claims. Appellant raised the point that the claims of other lienholders, which were filed against the receivers, created a multiple claims situation. The court pointed out that these lienholders were not parties to the

\textsuperscript{222} Id. at 662-63.

\textsuperscript{223} 337 U.S. 541 (1949). The collateral order doctrine excepts from the final judgment rule orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." \textit{Id.} at 546.

\textsuperscript{224} 552 S.W.2d at 677.

\textsuperscript{225} Cf. United Bonding Ins. Co. v. Stein, 410 F.2d 483 (3d Cir. 1969) (order granting partial summary judgment instructing indemnitors to deposit a sum of money as collateral in favor of a surety on a performance bond held not to fall under the collateral order doctrine because it was one of the claims for relief sought in the action).
action and their claims merely awaited apportionment from the ultimate proceeds of the sale; thus they were not claims within the meaning of CR 54.02.\textsuperscript{226} Although the court cited no authority for this proposition, there seems to be some support for it in \textit{Webster County Soil Conservation District v. Shelton},\textsuperscript{227} where the question of the amount of an attorney's fee was held open and it was argued that this created a CR 54.02 multiple claims situation. The Kentucky Court of Appeals held that the attorney was not a party and had not made a motion for a fee as of the date of the judgment, so there was no multiple claims situation. To the contrary, however, is the old case of \textit{Harris v. Tuttle},\textsuperscript{228} where an appeal from an order of sale was held premature because the order established the priority of some liens, but not all, and therefore did not finally determine the manner of distribution. The "other creditors" referred to in that case were apparently in the same position before the Court as were the lienholders in \textit{Cerwin}.

The reader's attention is also called to the case of \textit{Calvert Fire Insurance Co. v. Stafford},\textsuperscript{229} where an order adjudicating the rights of the plaintiff as to one defendant was held to be final and appealable even though there were other defendants. The plaintiff's complaint had failed to state a claim for relief against the other defendants, but only joined them as parties demanding that they be required to assert whatever interests or claims they might have, and they asserted none. The result caused no undue hardship in that case because the issue was whether the appeal was premature, not whether it was too late.

Assuming the court was correct when it found in \textit{Cerwin v. Taub}\textsuperscript{230} that there were no multiple parties and no multiple claims, was it also correct in finding that the order of November 20, 1972, was a final order under CR 54.01? The court cited \textit{Elam v. Acme Well Drilling Co.}\textsuperscript{231} and \textit{Sickmeier v. Merchants & Mechanics Loan & Building Association of Newport}\textsuperscript{232} to support its holding that the order directing the resale and pay-

\textsuperscript{224} 552 S.W.2d at 678.
\textsuperscript{225} 437 S.W.2d 934 (Ky. 1969).
\textsuperscript{226} 62 S.W. 729 (Ky. 1901).
\textsuperscript{227} 437 S.W.2d 176 (Ky. 1969).
\textsuperscript{228} 552 S.W.2d 675 (Ky. App. 1977).
\textsuperscript{229} 111 S.W.2d 468 (Ky. 1967).
\textsuperscript{230} 163 S.W.2d 475 (Ky. 1942).
ment by appellant of the deficiency, if any, was the final order contemplated by CR 54.01. Actually, *Elam* involved an order for satisfaction of judgment by a surety who had posted a bond at the outset of an action to prevent attachment. *Sickmeier* is more on point and, indeed, indicates that the order of sale in that case was final and appealable. It should be noted, however, that an order confirming the sale was subsequently entered and the appeal was filed within the time allowed, regardless of which order was really the "final" one. There are other cases not mentioned in the opinion which hold that an order of sale, which also directs the distribution of proceeds, is a final and appealable order. However, it was held in *Harris v. Tuttle* that an order of sale is not final where it contains no provision for distribution of the proceeds. Since the claims of outstanding lienholders had not been resolved and since the proceeds of the sale would be subject to those liens, the order did not provide for final distribution and thus was not final and appealable.

Directly contrary to the point of view expressed in *Cerwin* is the federal position as set forth by the United States Supreme Court in 1876 in *Butterfield v. Usher*:

> The decree [ordering resale] . . . simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has often been held, is not final.

> . . . .

> We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at a proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

This rule was restated and specifically followed by the Seventh Circuit Court of Appeals as recently as 1975 in *Levin*

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233 Newsom v. Johnson, 255 S.W.2d 33 (Ky. 1953); Hearn v. Lander, 74 Ky. (11 Bush) 669 (1876).

234 62 S.W. 729 (Ky. 1901).

235 91 U.S. 246 (1876).

236 *Id.* at 248-49.
That court pointed out that another reason for the *Butterfield* rule is that the previous bidder might also be the successful bidder at a second sale. That was an unlikely result in *Cerwin*, but the same reasoning would apply to the possibility that the second sale would result in no deficiency at all and, therefore, no appeal would be needed. Though not specifically citing *Butterfield*, the Kentucky Court of Appeals had seemed to adopt the *Butterfield* rule in the 1951 case of *Massey v. Fischer*. There it was held that the final act which consummates a judicial sale is the order of confirmation, and an appeal taken from an order overruling exceptions to the commissioner's report of sale was dismissed as premature. The only way to reconcile *Massey* with *Sickmeier* is to view the language in *Sickmeier* as dicta. Of course, since *Massey* is a more recent case, its holding should be viewed as the applicable precedent.

As if all of the above is not confusing enough, Kentucky's highest court held in another case decided prior to *Massey* that "it is a settled rule in this State that a judgment decreeing a sale and the order confirming the report of sale are separate and distinct adjudications and that the latter may be separately appealed from and set aside." Does that mean that both orders are final and appealable?

Of course, whether the "final" order in *Cerwin* was the order of sale or the order confirming the report of sale was a moot issue, since a timely appeal was taken from neither order. However, for the court of appeals to declare the order of sale as the final order in this case is to put an unreasonable burden on other parties in the same position as the appellant in *Cerwin*. Until the report of sale has been confirmed, the party liable for the deficiency does not know whether he has been harmed. An appeal from the order of November 20, 1972, would have had to have been filed before the sale even took place. Further, under the *Butterfield* rule, implicitly adopted by Ken-

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237 513 F.2d 94 (7th Cir. 1975).
238 243 S.W.2d 889 (Ky. 1951).
240 *Id. at 612*.
ucky in *Massey v. Fischer,* the appellant in *Cerwin* could well have expected an appeal from the order of resale to be summarily dismissed as premature.

The law books are replete with cases involving dismissal of premature appeals. Many or most of those cases are not cases in which the lawyer just had a "hankering" to file an appeal; they were cases in which the lawyer was afraid not to appeal because he did not know whether the case was final and appealable and would rather file the appeal and be dismissed to return another day than take a chance on being finally dismissed for filing too late. The court of appeals has not helped the confusion in this situation. By finding that: (1) certain original parties became "nonparties" when placed in receivership, (2) a motion to enter an order requiring payment of a deficiency did not assert a separate claim, (3) claims of other lienholders to the proceeds of sale did not constitute separate claims, and (4) an appeal should be taken from an order of sale instead of an order confirming the report of sale, the court of appeals has ensured that it will continue to be inundated with unnecessary appeals. Lawyers are understandably more interested in protecting their malpractice insurance carriers than in worrying about whether an appeal might be premature and thus detrimental to judicial economy.

The court of appeals had an easier time with *Cobb v. Carpenter.* In that case, the appellants not only failed to appeal from the order of sale, but also failed to appeal from either the order filing the report of sale or the order of final distribution of proceeds. Instead, they filed a motion for an extension of time under CR 73.02(1)(b) and then appealed

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243 S.W.2d 889 (Ky. 1951).

24 See 2 Ky. Digest, Appeal and Error, keys 79 (1) and (2), and 80 (1) through (6).

245 553 S.W.2d 290 (Ky. App. 1977).

246 Under Ky. R. Civ. P. 73.02(1)(a) the time period in which the notice of appeal must be filed is 20 days (30 days before July 1, 1976) following the date on which the judgment or order appealed from was entered. However, Ky. R. Civ. P. 73.02(1)(b) provides:

Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court in any action may extend the time for appeal not exceeding 10 days from the expiration of the original time herein prescribed.
from the court’s denial of that motion. The motion was not made within the then required thirty days of the last possible appealable order, i.e. the order of final distribution. As the court noted, the appeal was filed “within 30 days of an order, but one that is not a final order under CR 54.01 and therefore, not appealable.”\textsuperscript{246} Certainly, no one could seriously argue with this conclusion.\textsuperscript{247}

B. \textit{Sufficiency of Notice of Appeal}

Prior to July 1, 1976, CR 73.03 provided in pertinent part as follows: “The notice of appeal shall specify the parties taking the appeal, and shall designate the judgment or part thereof appealed from.” As amended effective July 1, 1976, CR 73.03 now provides: “The notice of appeal shall specify all the appellants and all the appellees; ‘et al.’ and ‘etc.’ are not proper designations of parties.” In \textit{Yocom v. Franklin County Fiscal Court},\textsuperscript{248} the court of appeals noted that the first readable copies of the amendments were contained in the August 10, 1976, advance sheets to the Southwestern Reporter and that seminars on the new amendments were not conducted until October 1976. Citing the exception contained in CR 86(2) dealing with situations in which an injustice would result from application of the new rules to a pending action, the court gave the members of the bar until January 1, 1977, to review and familiarize themselves with the new amendments to the rules. Thereafter, strict compliance would be required. As of July 1, 1977, the court has issued the following interpretations of the amendment:

(1) When the caption to the notice of appeal specified the defendants as “Franklin County Fiscal Court, et al.,” it was held to be a sufficient designation since the other defendants were the county judge and the magistrates and they were all sued in their official, rather than individual, capacities.\textsuperscript{249}

\textsuperscript{246} 553 S.W.2d at 293.
\textsuperscript{247} Ky. R. Cw. P. 73.02(1)(a); Rose Bowl Lanes, Inc. v. City of Louisville, 373 S.W.2d 157 (Ky. 1963); cf., Frantz, Inc. v. Blue Grass Hams, Inc., 520 S.W.2d 313 (Ky. 1975) (order denying motion for judgment notwithstanding the verdict not a final order and not appealable); cf. also Hawks v. Wilbert, 355 S.W.2d 255 (Ky. 1961) (order denying motion for new trial not a final order and not appealable).
\textsuperscript{248} 545 S.W.2d 296 (Ky. App. 1976).
\textsuperscript{249} Yocom v. Franklin County Fiscal Court, 545 S.W.2d 296, 297 (Ky. App. 1976).
A designation of the appellees as "Southeast Jefferson-Southwest Shelby Water District, et al." was not sufficient to take an appeal against the subscribers to the water district, who had been joined as a class as indispensable parties, or the chairman of the water district, who had also been named an original party defendant.\textsuperscript{250}

(3) Where the caption identified all parties to the action, but designated them "plaintiff" and "defendants," the body of the notice of appeal (stating that the defendants (named) were taking the appeal without stating who was the appellee) was sufficient to designate the appellee; since the plaintiff was the only other party involved in the action except the appellants, she must have been the appellee.\textsuperscript{251}

(4) Even where the body of the notice of appeal did not designate who the appellees were and where two other parties could so qualify, the notice of appeal still was sufficient to take an appeal against both other parties since both were specifically named in the caption, even though they were not designated in the caption as "appellees."\textsuperscript{252}

(5) Where the body of the notice of appeal did not specify who the appellees were, and where the caption to the notice listed one party other than the appellant, but designated the others by use of the designation "et al.," the notice was sufficient to take an appeal against the party specifically named in the caption, but was insufficient to take an appeal against any other parties.\textsuperscript{253}

It was noted by the court that the notice of appeal is sufficient if it is possible to determine who is entitled to prosecute a cross-appeal under CR 74.\textsuperscript{254} It was also noted that Form 22 of the Appendix to the Rules of Civil Procedure does not require that the appellees be specifically named in the body of the notice of appeal. CR 84 indicates that use of these forms is sufficient compliance with the rule. Thus it would seem that the court is going to be as liberal as possible in interpreting this


\textsuperscript{251} Schulz v. Chadwell, 548 S.W.2d 181 (Ky. App. 1977).

\textsuperscript{252} O'Brien v. Peterson, 548 S.W.2d 181, 183 (Ky. App. 1977).

\textsuperscript{253} Pearlman v. Liberty Nat. Bank & Trust Co. of Louisville, 548 S.W.2d 181, 183, 184 (Ky. App. 1977).

\textsuperscript{254} Yocom v. Franklin County Fiscal Court, 545 S.W.2d 296, 297 (Ky. App. 1977).
new rule, but if an appeal against a particular party is desired, specific mention of that party's name somewhere in the notice of appeal should be sufficient for compliance with the new rule.

C. Designation of the Record

In Beaver v. Beaver,255 appellant failed to file his designation of record within ten days of the filing of the notice of appeal, as required by CR 75.01. A motion to dismiss the appeal for failure to designate the record was filed in the trial court forty-eight days after the filing of the notice of appeal. On the same date, appellant belatedly filed his designation of record. The motion to dismiss the appeal was overruled by the trial court.

Strict compliance with CR 75.01 has been required in the past.256 However, it has been held that a court may grant an enlargement of the time for filing a designation of record under CR 6.02 even though the motion for enlargement is made after the expiration of the required ten days.257 The motion for enlargement must precede an appropriate motion to dismiss.258 Yet, no motion for enlargement was made in the Beaver case, so the motion to dismiss should have been sustained.

However, the designation of record is not a jurisdictional matter259 and therefore is not appropriate for review on the court's own motion. The rule is for the benefit of the appellee and may be waived.260 Although the appellee in Beaver filed a timely motion to dismiss in circuit court, it was held on appeal that her failure to file a separate appeal from this order, or to file a separate motion to dismiss before the court of appeals, constituted a waiver of her right to rely on this error. There is authority to support this ruling.261 This author strongly agrees that appeals should be decided on their merits whenever possible and that the court should avoid dismissing cases on the grounds of failure to follow procedural technicalities. However,

255 551 S.W.2d 23 (Ky. App. 1977).
256 Timmons v. Allen, 449 S.W.2d 27 (Ky. 1969).
257 Montfort v. Archer, 447 S.W.2d 143 (Ky. 1970).
258 Id.
261 Pipelines, Inc. v. Muhlenburg County Water Dist., 465 S.W.2d 927 (Ky. 1971).
is the court not merely turning the technicality against the party who would otherwise be entitled to assert it by requiring her either to (1) file the same motion twice in the same record, or (2) take a separate appeal from an order denying her motion to dismiss the opposing party's appeal in the same case? So much for judicial economy.

D. The Record on Appeal

In light of the liberal approach to the rules taken by the court of appeals in Beaver, consider the plight of the appellant in Department of Transportation v. Greer Brothers & Young, Inc. The appellant obtained an extension of time in which to file the record on appeal, but the circuit clerk failed to note the order on the civil docket. Thus, the order had no effect. However, the failure of the clerk to note the order on the civil docket was discovered on the fifty-eighth day after the filing of the notice of appeal, which was two days before the expiration of time for filing the record on appeal. Instead of merely requesting the clerk to correct the error and note the entry of the order on the civil docket, appellant inexplicably filed a motion requesting the trial court to enter an order nunc pro tunc requiring the clerk to note the order on the civil docket as of the date it was first delivered to the clerk's office. Incredibly, this motion was overruled and the order overruling the motion for entry nunc pro tunc was entered after the time for filing the record on appeal had expired! A motion to dismiss for failure to file the record timely was filed by the appellee after the motion for entry nunc pro tunc was filed, but before the order overruling the motion was entered.

One can only wonder why appellant did not simply direct the clerk to correct the error, since the error was discovered before the time for filing the record on appeal had expired. For

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262 548 S.W.2d 167 (Ky. App. 1977).
263 Ky. R. Civ. P. 58; Murrell v. City of Hurstbourne Acres, 401 S.W.2d 60 (Ky. 1966).
264 Ky. R. Civ. P. 73.08 requires the record on appeal to be filed with the appellate court within 60 days after the filing of the notice of appeal.
265 The court had delayed entering the order overruling the appellant's motion so that appellant might apply to the court of appeals for appropriate relief. Appellant must have wondered to what relief he was entitled, since CR 73.08 vests with the trial court the discretion to extend the time for filing the record on appeal.
that matter, no direction was necessary, since the clerk should have noted the order on the civil docket as soon as the previous failure to do so had been brought to his attention.\footnote{266} There is some authority for the proposition that it is the litigant’s duty to insure that the clerk performs the ministerial functions necessary to the proper prosecution of the litigant’s case,\footnote{267} but what more can a litigant do than call the error to the clerk’s attention? The author declines to speculate on the trial judge’s reasons for refusing to sustain the motion to enter the order \textit{nunc pro tunc}, but it would appear under this set of facts to be an obvious abuse of the discretion granted him under CR 73.08. After all, he already had previously granted the motion for extension of time in the same case. Certainly, there is nothing in the record to indicate that appellant would not have been able to file the record on appeal within the time limit, as enlarged.

However, the appeal was not taken from the order overruling the motion for an order \textit{nunc pro tunc} and the court of appeals designated that as a final appealable order under CR 54.01. The court likened the motion for an order \textit{nunc pro tunc} to a motion to set aside a judgment under CR 60.02.\footnote{268} Thus, the case was before the court only on the issue of whether the record on appeal was timely filed—and it obviously was not.

E. \textit{Damages on Appeal}

In \textit{Cobb v. Carpenter},\footnote{269} appellants’ land was sold pursuant to a court order for purposes of satisfying unpaid property taxes. Appellants managed to hold on to their property during the pendency of the appeal, although there was some question whether a supersedeas bond had been issued. The court of appeals noted in its opinion that “the reading of the entire record would indicate to this court the appeal may be one of delay only,”\footnote{270} since the land included a 6,000 pound tobacco base. On appeal, the court assessed as damages not only the costs of the appeal, but also the fair and reasonable

\footnote{266} See Putnam v. Fanning, 495 S.W.2d 175 (Ky. 1973).
\footnote{267} Jackson v. Jones, 336 S.W.2d 565 (Ky. 1960).
\footnote{268} See White v. Hardin County Bd. of Educ., 307 S.W.2d 754 (Ky. 1957).
\footnote{269} 553 S.W.2d 290 (Ky. App. 1977).
\footnote{270} Id. at 293.
rent of the property during the time the appellees were kept out of possession. The court stated it was assuming a supersedeas bond had been filed. However, it went further: "If it is true that a supersedeas bond has not been executed, then the cost and damages above are to be deducted from the amount presently held by the circuit clerk for distribution to the appellants." This imposition of damages on appeal even in the absence of a supersedeas bond is totally without precedent in this jurisdiction. KRS § 21.130 had provided for a ten percent penalty on affirmance of a money judgment. This statute had been held mandatory and the imposition of the penalty was not discretionary. However, that statute was repealed in a bill passed by the General Assembly on March 23, 1976, and replaced by KRS § 26A.010.

The notice of appeal in Cobb v. Carpenter was filed on May 25, 1976, two days after the effective date of repeal of KRS § 21.130. Section (1) of the new statute, KRS § 26A.010, precludes the assessment of any damages on appeal in this case,

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271 See Ky. R. Civ. P. 73.04(3); Moss v. Smith, 361 S.W.2d 511 (Ky. 1962).
272 553 S.W.2d at 293.
273 There are other jurisdictions which do allow a reviewing court to assess a penalty or damages on a finding that the appeal was taken frivolously or for the purpose of hindering or delaying justice. See 5 Am. Jur.2d, Appeal and Error § 1024 (1962) and cases cited therein.
274 Preece v. Burns' Adm'r, 87 S.W.2d 375 (Ky. 1935).
276 KRS § 26A.010 (1976) provides:
(1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by section 115 of the Constitution of Kentucky.
(2) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten per cent (10%) on the amount stayed shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after having been docketed in an appellate court.
(3) Similar damages of ten per cent (10%) shall be imposed when a petition for writ of certiorari, petition for rehearing, or other petition which stays collection of a judgment for the payment of money is denied by an appellate court under circumstances not constituting a first appeal under subsection (1) of this section.
(4) No additional penalty shall be imposed upon a party as a consequence of a review subsequent to a petition or a second appeal.
(5) Damages imposed under subsections (2) or (3) of this section shall not be payable and shall be void if the decision of the trial court awarding the payment of money is ultimately reversed.
regardless of the court's opinion concerning the motives of the appellants. If no supersedeas bond had been filed, then appellees' remedy was to execute on the judgment. If there was a supersedeas, the court's ruling was directly contrary to the statute.

CONCLUSION

Commissioner Clay believed in strict compliance with the procedural rules because proper use of the rules fosters expediency and judicial economy. He was amazed that lawyers ignore the rule book and "sometimes seem to assume that once in court, the settled processes of law and a sympathetic judge will take care of their cases for them." As the cases discussed in this article show, the ultimate result cannot always be anticipated by consultation with the rule book. Certainly, while no attorney should rely on a "sympathetic judge" to keep his case in court, neither should he have to fear that his otherwise meritorious claim will be thrown out of court by a narrow and sometimes convoluted construction of the rules and laws of procedure. A far more important policy than the policy of expediency and judicial economy is the policy that every litigant shall have his day in court. The rules should be construed with this policy in mind.

379 Id. at 162.