before the injunction issued. So it seems that the United States Supreme Court does not narrowly interpret its decision in the *Meadowmoor* case.

While the standard of how much violence is necessary should be that set out in the *Meadowmoor* case—namely, was it coercive— the fact that the court refused to hear the *Crosby* case would seem to indicate that there is no standard at all. The mere finding of violence associated with the picketing is evidently enough to justify the issuance of an injunction to stop all further picketing.

Mr. Justice Frankfurter blandly told the defendant in the *Meadowmoor* case that it might ask the Illinois court to modify or vacate the injunction when the violence no longer had any intimidating effect.[16] This is some concession to the union in that case, but what about the union in the *Crosby* case? There had been no findings that future peaceful picketing would be coercive. Can the defendant go to court and demand that the injunction be vacated on the ground that there never was such a finding? This question is left unanswered by the decisions thus far. R. C. C.

PLEADING AND PROCEDURE

Appeal—Notice of Appeal—Sufficiency and Amendment of Notice

In an action in equity a decree was entered January 3, 1940. A motion for new trial, filed the same day, was overruled February 9, the entry fixing the amount of bond to be furnished by plaintiff-appellant upon appeal on questions of law and fact. Within twenty days thereafter plaintiff-appellant gave "notice of her intention to Appeal to the Court of Appeals from a final order made in the Court of Common Pleas in the above entitled cause on the 9th day of February, 1940. . . ." The Court of Appeals *on its own motion* dismissed the appeal because the notice of appeal was defective in that it specified the order overruling the motion for new trial, which is not a final order, instead of the prior appealable decree. An application for rehearing and a motion for leave to amend the notice were denied on the ground that the Court of Appeals has no authority to permit such amendment. This decision was reaffirmed on a second application for rehearing. From an entry dismissing the appeal and denying the application for rehearing and for leave to amend, a motion to certify was granted. *Held*, (By the Court) that, since the court of appeals has power to make

[16] 85 L.Ed. 566, 61 Sup. Ct. 510 (1941).

such amendment under Ohio Gen. Code, Sec. 12223-5, it was error to refuse the amendment and dismiss the appeal. Judgment reversed and cause remanded. *Mosey v. Hiestand*, 138 Ohio St. 249, 34 N.E. (2d) 210 (1941).

Since "no step required to be taken subsequent to" the filing of a "written notice of appeal . . . with the lower court, tribunal, officer or commission," when the "appeal shall be deemed perfected," "shall be deemed to be jurisdictional," a notice of appeal which has been carefully drawn up is the condition precedent for the appellant to have his case heard on the merits in the court of appeals.[1]

"The notice of appeal shall designate the order, judgment, or decree appealed from and whether the appeal shall be on questions of law or questions of law and fact. In said notice the party appealing shall be designated the appellant, and the adverse party, the appellee, and the style of the case shall be the same as in the court of origin. The failure to designate the type of hearing upon appeal shall not be jurisdictional and the notice of appeal may be amended by the appellate court in the furtherance of justice for good cause shown."[2]

The Rules of the Supreme Court of Ohio have added requirements to those of Ohio Gen. Code, Sec. 12223-5 "in all appeals to this Court."[3]

Aside from the admitted purpose of the New Appellate Procedure Act,[4] of which these sections are a part, "to minimize procedural difficulties and thereby facilitate the presentation of far more important questions to courts of review,[5] Ohio Gen. Code, Sec. 10214 enjoins the court that the "provisions of part third and all proceedings under it, [the Remedial Part, including procedure on appeal] shall be liberally construed, *in order to promote its object, and assist the parties in obtain-*

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[1] Ohio Gen. Code, Sec. 12223-4.

[2] Ohio Gen. Code, Sec. 12223-5. *Cf.* Reibold v. Evans, 65 Ohio App. 123, 29 N.E. (2d) 369 (1940) (appeal on both law and law and fact).

[3] Rules of the Supreme Court of Ohio (1940) Rule II, Sec. 1. (A) "the appellant shall, . . ., state in his notice of appeal, filed in the Court of Appeals, whether the appeal is taken to this Court:

(a) in a case involving a constitutional question,
(b) in a case originating in the Court of Appeals,
(c) on condition that a motion to certify be allowed by this Court,
(d) in a felony case on condition that leave to appeal be granted by this Court, or
(e) in a misdemeanor case on condition that a motion to certify be allowed by this Court.

If the appellant claims a constitutional question and also intends to file a motion to certify or motion for leave he shall mention both in his notice of appeal."

[4] 116 Ohio Laws 104 (1935), Ohio Gen. Code, Sec. 12223-1 to 12223-49.

[5] *See* Cullen v. Schmit, 137 Ohio St. 479, 482, 30 N.E. (2d) 994, 996 (1940); *cf.* Couk v. The Ocean Accident & Guarantee Corp. Ltd., 138 Ohio St. 110, 115, 33 N.E. (2d) 9, 12 (1941). "The legislative purpose throughout the act was obviously to liberalize procedure upon appeals and to prevent technicalities from being fatal to substantive rights."

ing justice. The rule of the common law, that statutes in derogation thereof must be strictly construed has no application to such part," . . ."[6] (italics supplied.) Unfortunately many of the courts of appeals have taken a strict view of the requirements of the notice of appeal and of their authority and discretion to permit amendment thereof.

Sufficiency of Notice of Appeal. At the outset of operation under the Act a notice of appeal on questions of law and fact was held insufficient to perfect an appeal on questions of law alone.[7] in spite of Sec. 12223-5 reading that the "failure to designate the type of hearing upon appeal shall not be jurisdictional." But the Supreme Court held that such notice fulfills the jurisdictional requirement and that an appeal on questions of law and fact, where an appeal on questions of law only can be perfected and where no bond is filed under Ohio Gen. Code, Sec. 12223-6, will stand under Ohio Gen. Code, Sec. 12223-22,[8] for appeal on questions of law alone.[9] A notice of appeal on questions of law is not sufficient to perfect an appeal on questions of law and fact, for Ohio Gen. Code, Sec. 12223-6 reads that "no appeal shall be effective as an appeal upon questions of law and fact . . . unless . . . bond be filed at the time the notice of appeal is required to be filed."[10] This rule would seem to apply even though the action is appealable on questions of law and fact and a bond is properly filed.[11] The courts of appeal are not in accord as to whether a notice of appeal not directed by date to any judgment or final order meets the statutory require-

[6] Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 33 N.E. (2d) 9 (1941).

[7] Sommers v. DeRan, 53 Ohio App. 87, 4 N.E. (2d) 267 (1936); *In re* Estate of Arrasmith, 54 Ohio App. 391; 7 N.E. (2d) 826 (1936); Hall v. Hall, 55 Ohio App. 67, 8 N.E. (2d) 582 (1936); Phillips v. Industrial Commission, 57 Ohio App. 10, 11 N.E. (2d) 265 (1936); Stevely v. Stoll, 57 Ohio App. 401, 14 N.E. (2d) 419 (1937); State v. Rickman, 23 Ohio L. Abs. 207 (1936); Linton v. Williams, 23 Ohio L. Abs. 340 (1936); *cf.* Holmes v. Prudential Insurance Co., 30 Ohio L. Abs. 358 (1939).

[8] Ohio Gen. Code, Sec. 12223-22. "(2) Whenever an appeal on questions of law and fact is taken in a case in which it is determined by the appellate court that the appellant is not permitted to retry the facts, the appeal shall not be dismissed, but it shall stand for hearing on appeal on questions of law." *Cf.* Ohio Gen. Code, Sec. 11564.

[9] Loos v. The Wheeling & Lake Erie Ry. Co., 134 Ohio St. 321; 16 N.E. (2d) 467 (1938); Bennett v. Bennett, 134 Ohio St. 330; 16 N.E. (2d) 474 (1938); Bettman v. Northern Insurance Co., 134 Ohio St. 341, 16 N.E. (2d) 472 (1938); Kirk v. Birkenbach, 22 Ohio L. Abs. 569 (1937); Sackett v. McClure, 29 Ohio L. Abs. 560 (1939); Krause v. Henry, 30 Ohio L. Abs. 386 (1939). *But cf.* Cramer v. Cramer, 63 Ohio App. 358, 26 N.E. (2d) 785 (1938). *See* Stevens, *Observations on the Appellate Procedure Act* (1939) 12 Ohio Bar 491, 492-494.

[10] *Cf.* Stevely v. Stoll, 57 Ohio App. 401; 14 N.E. (2d) 419 (1937); Laufer v. City of Cincinnati, 57 Ohio App. 447, 14 N.E. (2d) 1023 (1937); Luchtenberg v. Cooper Investment Co., 23 Ohio L. Abs. 389 (1936); *see* fn. 7, *supra.*

[11] *Cf.* The Jacques Co. v. Squire, 135 Ohio St. 599; 21 N.E. (2d) 989 (1939) (power to amend, but whether discretion abused in refusal not decided because no bill of exceptions); Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 115, 33 N.E. (2d) 9, 12 (1941).

ments,[12] even though Ohio Gen. Code, Sec. 12223-5 does not require that the date of entry of such "order, judgment, or decree appealed from" be specified in such notice.[13] But the Supreme Court has held that a notice—"defendants hereby give notice of appeal"—is not defective where it is incorporated in the journal entry overruling a motion for new trial.[14] The courts of appeal, however, are in agreement that a notice specifying the date of the entry overruling a motion for new trial as the entry from which appeal is taken, is defective because it specifically mentions an order which is not a final order and hence not appealable,[15] even where such notice further includes "such other matters as are appealable in this cause.[16] The Supreme Court in this situation would probably likewise hold that such notice is insufficient.[17]

Amendment of Notice of Appeal. But dismissing the appeal does not follow from holding a notice of appeal defective, since a reviewing court has authority to permit an amendment to a defective notice by virtue of Ohio Gen. Code, Sec. 12223-5.—"The failure to designate the type of hearing upon an appeal shall not be jurisdictional and the notice of appeal may be amended by the appellate court in the furtherance of justice for good cause shown." The provision giving power to amend connected in the same sentence with the provision on designating the type of hearing upon appeal *prima facie* leads to the conclusion that authority exists to amend only where there is a "failure to designate the type of hearing upon appeal."[18] But such interpretation defeats justice and does not carry out the legislative intent, especially when the Supreme Court has held that the change of an appeal on questions

[12] Compare State v. Rickman, 23 Ohio L. Abs. 207 (1936); Kline v. Green, 25 Ohio L. Abs. 240 (1937), with Routzahn v. Routzahn, 26 Ohio L. Abs. 667 (1938); State v. Griffith, 27 Ohio L. Abs. 54 (1938). *Cf.* Bellman v. Dayton & Xenia Ry Co., 22 Ohio L. Abs. 133 (1936) (petition in error held not sufficient because filed in wrong court).

[13] Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 33 N.E. (2d) 9 (1941).

[14] Capital Loan & Savings Co. v. Biery, 134 Ohio St. 333, 16 N.E. (2d) 450 (1938).

[15] Williams v. Braun, 65 Ohio App. 451, 30 N.E. (2d) 363 (1940); Mahaffey v. Stine, 28 Ohio L. Abs. 361 (1938); Anderson v. Local Union, No. 413, 29 Ohio L. Abs. 364 (1939); Hauck v. Hauck, 29 Ohio L. Abs. 575 (1939); Covington Building & Loan Ass'n. v. Yost, 31 Ohio L. Abs. 672 (1940); Davish v. Arn, 32 Ohio L. Abs. 646 (1940); *cf.* Cultice v. DeMaro Realty Co., 29 Ohio L. Abs. 566 (1939).

[16] Unkle v. Unkle, 66 Ohio App. 364, 34 N.E. (2d) 71 (1940). To hold otherwise "would require a reviewing court to examine every record, page by page and from end to end, searching for final judgments which the appellant's counsel, either because they do not exist or through lack of legal ability or lack of interest in his case, could not or would not discover."

[17] Mosey v. Hiestand, 138 Ohio St. 249, 34 N.E. (2d) 210 (1941) (error to refuse amendment shows amendment needed).

[18] *See* fn. 15, *supra*. *Contra*: Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 33 N.E. (2d) 9 (1941).

of law and fact to questions of law only is mandatory and no amendment is necessary.[19] Such construction would make the authority to amend meaningless, except in the law-to-law-and-fact case, if no such power exists in other situations, as the courts of appeals have been holding. But since August 10, 1938, the Supreme Court has indicated a broader view as to the amendment power of the court of appeals in this field—"where, for some technical reason, the appeal would be defective. In such case the reviewing court would have discretion to permit an amendment for good cause shown."[20]

Finally the Supreme Court in *Couk v. The Ocean Accident & Guarantee Corp., Ltd.*,[21] held that, where the notice of appeal designated as the date of entry of the judgment from which the appeal was taken one day before its actual entry, the court of appeals under Sec. 12223-5 has power to permit amendment of the notice to correct such error. With authority settled, the question of the scope of discretion of the court to allow amendment "in the furtherance of justice for good cause shown" still remained. Whether the Supreme Court would reverse a refusal to allow an amendment was not decided, because in the *Couk* case the Court merely affirmed the action of the Court of Appeals permitting an amendment. Although the *Couk* case was certified as being in conflict with *Cultice v. DeMaro Realty Co.*,[22] which did refuse the amendment, the certified case being affirmed, Bettman, J. expressly distinguished the cases where "a notice of appeal referring, by date or otherwise, to an order which was not a final order" had been heretofore held neither sufficient nor amendable.[23] *Schultz v. Killmer*,[24] decided along with the *Mosey* case, reversed on the authority of the *Couk* case a refusal to allow an amendment of a notice of appeal designating as the date of the judgment from which the appeal was taken a date when no entry had been made, long prior even to the jury verdict. Here the error was admittedly a clerical one, solely the fault of counsel for appellant. Consequently "for good cause shown" does not require that the mistake in the notice be excusable or unavoidable. Since the notice of appeal in the *Mosey* case designated the entry overruling a motion for new trial as that order from which appeal was being perfected, the Supreme Court, reversing here also on the authority

[19] *See* fn. 9, *supra.*

[20] *See* Loos v. The Wheeling & Lake Erie Ry. Co., 134 Ohio St. 321, 327, 16 N.E. (2d) 467, 470 (1938); *cf.* Bennett v. Bennett, 134 Ohio St. 330, 16 N.E. (2d) 474 (1938) (amendment "not prerequisite" to change appeal from law and fact to law); The Jacques Co. v. Squire, 135 Ohio St. 599, 21 N.E. (2d) 989 (1939) (Section 12223-5 "authorizes the Court of Appeals to permit an amendment").

[21] 138 Ohio St. 110, 33 N.E. (2d) 9 (1941).

[22] 29 Ohio L. Abs. 566 (1939). This is the "judgment of the Court of Appeals Clark county 'on questions of procedure pertaining to notice of appeal'" referred to.

[23] *See* fn. 15, *supra*

[24] 138 Ohio St. 249, 34 N.E. (2d) 210 (1941).

of the *Couk* case, was not only holding that the Court of Appeals had abused its discretion, but was expressly overruling the line of cases represented by *Mahaffey v. Stine.*[25] The standard by which to determine whether discretion has or has not been abused in permitting or refusing amendment of the notice is whether the appellee has been so misled by a defective notice of appeal that he is "prejudiced or taken by surprise." "The purpose of such a notice is to apprise the opposite party of the taking of an appeal."[26] "If this is done beyond danger of reasonable misunderstanding, the purpose of the notice of appeal is accomplished."[27] Any court of appeals refusing an amendment of the notice when such standard is satisfied is expressing the art of jurisprudence "in the refinements of procedural technique required," penalizing clients for mistakes of their counsel,[28] and making a mockery of justice. It would be far better for the courts of appeals not to alienate the public from the bench and bar by deciding, on procedural technicalities, instead of on their merits wherever possible[29] until after many miscarriages of justice the Supreme Court, finally presented with the question, reversing adopts the view more liberal and closer "to absolute justice." The record of the Supreme Court, especially in procedural matters, would indicate that the courts of appeals would probably be much more often affirmed if they took such views.[30] R. J. W.

[25] *See* fn. 15, *supra.* The fact that the entry overruling the motion for new trial in the *Mosey* case fixed the amount of bond for appeal on questions of law and fact should have rendered such entry a sufficient notice of appeal without any other notice under Capital Loan & Savings Co. v. Biery, 134 Ohio St. 333, 16 N.E. (2d) 450 (1938).

[26] *See* Capital Loan & Savings Co. v. Biery, 134 Ohio St. 333, 339, 16 N.E. (2d) 450, 453 (1938) (only one judgment and one court from which and to which appeal could be taken). *But cf.* Malone v. Industrial Commission, 66 Ohio App. 505 N.E. (2d) (1941). The function of the assignment of error should not be incorporated into the standard by which to test the sufficiency and amendability of the notice of appeal. See Rules of Practice of the Courts of Appeals of Ohio (1936) Rule VII.

[27] Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 116, 33 N.E. (2d) 9, 12 (1941) (since but one judgment appellee could not have been misled). This is the rule in other jurisdictions. Woods v. Kern County Mutual Building and Loan Association, 34 Cal. App. (2d) 468, 93 P. (2d) 837 (1939); Bedke v. Bedke, 57 Idaho 443, 65 P. (2d) 1029 (1937); Nelson v. The City of Osawatomie, 148 Kan. 118, 79 P. (2d) 857 (1938); Thiess v. Rapaport, 57 Nev. 434, 66 P. (2d) 1000 (1937); Rosenberg v. General Realty Service, Inc., 259 N.Y. 123, 181 N.E. 71 (1932); Obenberger v. Obenberger, 200 Wis. 318, 228 N.W. 492 (1930). Rule 73 (b) of the New Federal Rules of Civil Procedure providing:—"NOTICE OF APPEAL. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken . . . "—has been liberally treated by the Circuit Courts of Appeals. *Cf.* Crump v. Hill, 104 F. (2d) 36, (C.C.A 5th, 1939); Martin v. Clarke, 105 F. (2d) 685 (C.C.A. 7th, 1939). *See* 3 MOORE'S, FEDERAL PRACTICE (1938) 3394-95.

[28] *See* Brief for Plaintiff-Appellant, p. 18 in the *Mosey* case.

[29] Title Guarantee and Trust Company v. Lester, 216 Cal. 372, 14 P. (2d) 297 (1932).

[30] Judgments of the courts of appeals were reversed and the causes remanded in the following cases:—Loos v. The Wheeling & Lake Erie Ry. Co., 134 Ohio St. 321, 16 N.E. (2d) 467 (1938); Bennett v. Bennett, 134 Ohio St. 330, 16 N.E. (2d) 474 (1938);