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A Survey of Civil Procedure in Tennessee - 1977

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A SURVEY OF CIVIL PROCEDURE IN TENNESSEE—1977

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I. INTRODUCTION

The decision of the United States Supreme Court in *Shaffer v. Heitner*[1] is an obvious and appropriate point of entry into this survey of developments in 1977 in Tennessee civil procedure.[2] After avoiding judicial jurisdiction questions for nearly two decades,[3] the Court in *Shaffer* held that the exercise of judicial jurisdiction traditionally justified by the mere presence of property within the forum must now be evaluated according to the due process standard of reasonableness initially embraced in *International Shoe Co. v. Washington.*[4] While the precise impact *Shaffer* will have in this area of the law remains somewhat uncertain, "it is quite clear that the consequences will be many and substantial."[5] In addition to the obvious significance of the decision itself, *Shaffer* is also an appropriate point of entry into this survey because selection of a proper forum lies at the threshold of the litigation process.

II. SELECTING A PROPER FORUM

A. *Jurisdiction over the Person or His Property*

Shaffer involved a shareholder's derivative action brought in Delaware by a nonresident owner of one share of stock in the Greyhound Corporation, incorporated in Delaware with its prin-

1. 433 U.S. 186 (1977).

2. This survey encompasses state and federal decisions concerning Tennessee procedure reported in the National Reporter System during the calendar year 1977. *Shaffer* is also included because it is a federal constitutional decision binding on all the states.

3. Prior to *Shaffer*, the Court's latest decisions in the area were McGee v. International Life Ins. Co., 355 U.S. 220 (1957), and Hanson v. Denckla, 357 U.S. 235 (1958).

4. 326 U.S. 310 (1945).

5. W. REESE & M. ROSENBERG, CONFLICT OF LAWS: CASES AND MATERIALS xix (7th ed. 1978).

cipal place of business in Arizona. The defendants included twenty-eight present and former officers and directors of Greyhound and a wholly-owned subsidiary, which along with Greyhound was also a defendant. Plaintiff alleged that as a result of a breach of their duties owing to the corporation, the individual defendants caused Greyhound to be subjected to substantial antitrust damages and a large fine for criminal contempt. To obtain jurisdiction over the individual defendants, shares of common stock belonging to nineteen of the defendants and options belonging to two others were seized pursuant to a Delaware sequestration statute.[6] Seizure was effected by placing stop-transfer orders or their equivalents on the books of Greyhound, none of the certificates representing the seized property being physically present in Delaware. Defendants were notified of institution of plaintiff's lawsuit by certified mail and publication. Those defendants whose shares and options had been seized appeared specially and sought dismissal of the action on the ground that under *International Shoe* they did not have the requisite contacts with Delaware to sustain the assertion of jurisdiction by that state's courts.[7] The chancery court and supreme court of Delaware rejected defendants' jurisdictional challenge;[8] on appeal, the United States Supreme Court reversed.

After a lengthy discussion of the evolution of the law of in personam jurisdiction from the physical presence rule of *Pennoyer v. Neff*[9] through the reasonableness standard of *International Shoe*,[10] the Court noted the absence of a corresponding evolution of the law of in rem jurisdiction,[11] which the Court defined to include both strict in rem actions as well as quasi-in-rem actions.[12] The Court's case for applying the minimum con-

6. DEL. CODE ANN. tit. 10, § 366 (1974).

7. Defendants also argued that the sequestration statute was inconsistent with the due process line of analysis initially enunciated in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See also* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). The Supreme Court in *Shaffer* did not reach this procedural due process issue.

8. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976), *rev'd sub nom.*, Shaffer v. Heitner, 433 U.S. 186 (1977).

9. 95 U.S. 714 (1877).

10. 433 U.S. at 196-205.

11. *Id.* at 205-06.

12. *Id.* at 199 n.17.

tacts standard of *International Shoe* to in rem actions was based on the fact that the traditional distinction between in rem and in personam actions is not airtight. Jurisdiction in rem is, in reality, jurisdiction over the interests of people, and its assertion affects their interests in important ways.[13] Recognition of this fact led the Court to conclude that the jurisdictional standards of *International Shoe* and its offspring must be satisfied in order to exercise jurisdiction in rem.[14]

The Court was careful to point out, in what must be considered conscious dictum, that not all assertions of jurisdiction based solely on the presence of property within a state would violate due process:

> [T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.[15]

On the other hand, in quasi-in-rem actions like *Harris v. Balk*[16] and *Shaffer*, in which the property that supplies the basis of the court's adjudicatory authority is completely unrelated to plaintiff's claim for relief,[17] "the presence of the property alone [will]

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13. *Id.* at 207 & n.22.

14. *Id.* at 207, 212.

15. *Id.* at 207-08 (footnotes omitted); *see* Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 955-66 (1960) [hereinafter cited as *Developments*].

16. 198 U.S. 215 (1905).

17. 433 U.S. at 208-09.

not support the State's jurisdiction."[18]

The Court rejected the traditional justification for quasi-in-rem jurisdiction—that a debtor should not be able to avoid payment of his obligations by removing his assets to a jurisdiction where he is not subject to an in personam action—maintaining that this rationale "does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations."[19] Moreover, if the justification for attaching the defendant's property is simply to assure satisfaction of the judgment, this purpose requires only that the assets be seized pending a judgment, not that the underlying controversy be litigated in the forum in which attachment is accomplished. "[A] State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."[20] Besides, the Court continued, in light of the full faith and credit clause, which makes a valid in personam judgment of one state enforceable in others, there is little to justify the assumption that a debtor can avoid his obligations simply by removing his property to a jurisdiction in which his creditor cannot obtain personal jurisdiction over him.[21]

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[22]

The Court also rejected the arguments that permitting in rem jurisdiction assures the plaintiff a forum and avoids the uncertainty inherent in *International Shoe*'s rather vague tests of "minimum contacts"[23] and "fair play and substantial justice."[24] "This case," the Court responded, "does not raise, and we therefore do not consider, the question whether the presence of a defen-

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18. *Id.* at 209.
19. *Id.* at 210.
20. *Id.* (footnote omitted).
21. *Id.*
22. *Id.* at 210 n.36.
23. 326 U.S. at 316.
24. *Id.*

dant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[25] The Court was of the opinion that in most cases the *International Shoe* tests can be easily applied,[26] and that the price of not applying the *International Shoe* standards to in rem actions is simply too great. The history of permitting states to exercise jurisdiction based solely upon the presence of property, the Court concluded, did not require a different result.[27]

Applying the *International Shoe* tests to the facts of *Shaffer*, the Court held that jurisdiction could not be sustained. The seized shares of stock and options were not the subject matter of the litigation, nor was the underlying claim of breach of duty to the corporation related to the seized property.[28] In addition, the Court noted that it was not alleged or argued that defendants whose property had been seized had "ever set foot in Delaware," nor had any "act" related to the underlying claim "taken place in Delaware."[29] With regard to the argument that Delaware had an interest in asserting judicial jurisdiction over defendants because they were officers and directors of a Delaware corporation, the Court stated that "[t]his argument is undercut by the failure of the Delaware Legislature to assert the state interest appellees find so compelling. Delaware law bases jurisdiction not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State."[30] Moreover, even if Delaware had such an interest, the Court found it insufficient to demonstrate that Delaware was a fair forum. Delaware law may be applicable but that fact standing alone did not justify adjudication of the

25. 433 U.S. at 211 n.37. It has been suggested that *Shaffer* could have upheld the assertion of jurisdiction on this rationale. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 162 (1977).

26. 433 U.S. at 211.

27. *Id.* at 211-12.

28. *Id.* at 213.

29. *Id.* Given the fact that *International Shoe*, the principal case upon which the majority relied in *Shaffer*, repudiated the physical presence rule of *Pennoyer*, it is difficult to understand the relevance of the fact that defendants never set foot in Delaware. Also, the intangible nature of defendants' breach of their duties to the corporation makes it somewhat unrealistic to speak of "where" the cause of action arose. In a realistic sense, the location of the cause of action is indeterminable. *See The Supreme Court, 1976 Term*, *supra* note 25, at 162.

30. 433 U.S. at 214.

action in Delaware.[31] Finally, the Court rejected the idea that defendants impliedly consented to suit in Delaware. Unlike other states, Delaware did not by statute treat acceptance of a directorship as consent to jurisdiction, and thus defendants had "no reason to expect to be haled before a Delaware court."[32] Also, it was unreasonable to suggest that "anyone" buying securities in a Delaware corporation impliedly consents to subject himself to jurisdiction in Delaware on "any" cause of action.[33] Whatever else due process may mean, the Court concluded that it is clear that a state may not make binding a judgment against individuals who, like the defendants in *Shaffer*, "had nothing to do with . ... Delaware."[34]

In separate concurring opinions, Justices Powell[35] and Stevens[36] stated that perhaps quasi-in-rem jurisdiction based on real property would be constitutional. Justice Stevens also stressed that fair warning of amenability to suit should be considered an essential element of due process.[37] Justice Brennan concurred in the entire majority opinion of the Court[38] except that portion holding that officers and directors are not amenable to suit in the state of incorporation.[39]

Justice Brennan's partial dissent was prompted by his belief that it was not necessary to reach the question of whether the minimum contacts standard of *International Shoe* was satisfied. In his opinion it was sufficient to hold only that the asserted basis

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31. *Id.* at 215.

32. *Id.* at 216. In an earlier portion of its opinion, the Court stated that nothing in Hanson v. Denckla, 357 U.S. 235 (1958), was inconsistent with the essential meaning of *International Shoe*. In *Hanson* the Supreme Court stated that restrictions on state court jurisdiction "are a consequence of territorial limitations on the power of the respective states." *Id.* at 251. Thus, *Hanson* could be viewed as at least a partial return to the territorialist theory of Pennoyer v. Neff, 95 U.S. 714 (1877). However, the Court in *Shaffer* explained that the language in *Hanson* quoted above "simply makes the point that the States are defined by their geographical territory." 433 U.S. at 204 n.20. This explanation is irrefutable, if somewhat disingenuous.

33. 433 U.S. at 216 (citing Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 785 (1973)).

34. *Id.*

35. *Id.* at 217 (Powell, J., concurring).

36. *Id.* at 219 (Stevens, J., concurring).

37. *Id.* at 217-19 (Stevens, J., concurring).

38. *Id.* at 219-20 (Brennan, J., concurring in part & dissenting in part).

39. *Id.* at 220-28 (Brennan, J., concurring in part & dissenting in part).

of jurisdiction—mere presence of the stock within Delaware—did not provide the requisite minimum contacts among the parties, the forum state, and the litigation.[40] Since the majority did rule on the minimum contacts question, however, Justice Brennan expressed his conviction that "as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State."[41]

Some of the legal literature that has emerged since *Shaffer* has found Justice Brennan's dissent persuasive,[42] and the majority opinion itself left open the possibility that the outcome might have been different if Delaware had enacted a statute treating acceptance of a directorship as consent to jurisdiction[43] —something that came to pass within days after announcement of the decision in *Shaffer*.[44] It seems premature, therefore, to administer last rites to the assertion of judicial jurisdiction over directors and officers by the state of incorporation, but it is far from clear what precise sin, if any, the Court might identify as the source of its condemnation in *Shaffer*. *International Shoe*, the cornerstone on which the Court built its *Shaffer* opinion, recognized that implied consent is simply a legal fiction that can justify the assertion of jurisdiction only if the minimum contacts test is otherwise satisfied.[45] As one commentator has observed, "[i]f expression of interest by the state were a determinative factor, a state might bootstrap itself into jurisdiction simply by enacting a statute expressing its interest."[46] On the other hand, there appears to be no vice in the absence of a statute expressly authorizing the assertion of judicial jurisdiction, unless the Court is prepared to hold that the Constitution requires the bases of adjudicatory authority to be prescribed by statute, not by adjudication or, alternatively, that the Constitution would prohibit the retroactive application of a statute authorizing the assertion of juris-

40. *Id.* at 220-22 (Brennan, J., concurring in part & dissenting in part).

41. *Id.* at 222 (Brennan, J., concurring in part & dissenting in part).

42. *E.g.*, Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L.J. 1, 20-23 (1977); Comment, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner*, 63 IOWA L. REV. 504, 523-25 (1977); 45 TENN. L. REV. 501, 510-13 (1978).

43. 433 U.S. at 216.

44. *See* DEL. CODE tit. 10, § 3114 (Supp. 1977).

45. 326 U.S. at 318.

46. Comment, *supra* note 42, at 519.

diction over directors and officers of a domestic corporation.[47] Delaware's recent enactment of a consent statute may afford the Court an opportunity to clarify this portion of its opinion sooner than it imagined.

It does seem reasonably clear, however, that jurisdiction based solely on the presence of property within the forum is constitutionally impermissible, even if judgment were limited to the value of the property that provided the basis of jurisdiction. Delaware law did not permit defendants in *Shaffer* to enter a limited appearance,[48] and they were therefore faced with the difficult choice of either appearing and thereby submitting to personal jurisdiction or defaulting and losing the seized property. The Court could have held that limited appearances in cases like *Shaffer* are required by due process.[49] Instead, it concluded that "[t]he fairness of subjecting a defendant to state court jurisdiction does not depend on the size of the claim being litigated,"[50] but rather is a function of the relationship among the defendant, the forum, and the litigation.[51]

Perhaps paradoxically, limited appearances may play a more important role in post-*Shaffer* adjudication. For example, if, as suggested by the Court,[52] property is attached as security for a judgment being sought in another forum in which the litigation can be maintained consistently with the standard of *International Shoe*, the forum attaching the property would apparently not be able to assert personal jurisdiction based solely on the defendant's appearance to contest the attachment.[53] Similarly, limited appearances may be constitutionally compelled in cases in which the forum adjudicates the interests of nonresidents based on a foreign transaction concerning property located within the forum.[54] In this situation the justifications identified by the

47. *But see* McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957).

48. *See* Sands v. Lefcourt Realty Corp., 117 A.2d 365 (Del. 1955).

49. *See* Leathers, *supra* note 42, at 11.

50. 433 U.S. at 207 n.23.

51. *Id.* at 204, 207, 209.

52. *Id.* at 210.

53. In this respect the holding in *Shaffer* increases the expense of collecting on a judgment, "[a]nd there can be no assurance that some debtors may not again remove their assets, making it difficult for creditors to rediscover them before other-state personal judgments can be secured." R. LEFLAR, AMERICAN CONFLICTS LAW § 24, at 43 (3d ed. 1977).

54. *See, e.g.*, Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189

Supreme Court[55] for the assertion of judicial jurisdiction by the forum over property within its borders—that is, the interests in assuring the marketability of property and in providing a procedure for the peaceful resolution of disputes about possession—may mark the limits of the forum's adjudicatory authority.

Although *Shaffer* holds the mere presence of a defendant's property insufficient to support judicial jurisdiction over claims unrelated to that property, other relationships between the defendant and the forum may permit the adjudication of claims arising out of facts unrelated to the forum. For example, as noted in one commentary, "a defendant who is domiciled or who resides within the forum is likely to have an extensive network of contacts sufficient to support jurisdiction over *any* claim asserted against him."[56] In the case of a corporation, it would seem constitutionally permissible to subject a corporation to suit on any claim in a forum in which it either maintains its principal place of business or is engaged in systematic and continuous business activities. In addition, nothing in *Shaffer* would appear to proscribe the assertion of jurisdiction by a forum in which the defendant expressed a willingness to be sued, regardless of the relationship between the forum and the underlying claim.[57] On the other hand, since the mere presence of the defendant's property is insufficient to support jurisdiction, the mere presence of the defendant's person (and perhaps the mere incorporation within a state) would also seem insufficient to permit adjudication of claims unrelated to the defendant's activities within the forum.

Similarly, although *Shaffer* stressed the critical importance of the relationship among the defendant, the forum, and the litigation, the Court was not prepared to state that "the particularized rules governing adjudications of status"—which often depend on the plaintiff's relationship to the forum—"are inconsis-

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Miss. 73, 191 So. 94 (1939). *Shaffer* does not expressly preclude actions related to intangible property located within the forum, but it offers no guidance on locating intangibles consistent with due process. *See The Supreme Court, 1976 Term*, *supra* note 25, at 160.

55. 433 U.S. at 208. The Court made clear, however, that this list of the interests of the state in which property is located is not necessarily complete. *Id.* at 208 n.28.

56. *The Supreme Court, 1976 Term*, *supra* note 25, at 160 (emphasis in original).

57. *Id.*

tent with the standard of fairness."[58] The most obvious example is jurisdiction over divorce, which may be granted by a state that is the domicile of the plaintiff alone.[59] It seems likely that this jurisdictional rule will survive *Shaffer* and at least one court has so held.[60] As Justice Traynor argued:

> [A] court could reason that even a defendant who had no contacts whatever with the forum state would not be gravely affected by a decree enabling the plaintiff to remarry, since there would be no way of compelling the plaintiff to cohabit with defendant and no effective way of preventing the plaintiff from cohabiting with anyone else. Moreover, divorce proceedings are not for the most part adversary except in name. In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. Finally, the dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.[61]

The unique factors of divorce litigation stressed by Justice Traynor suggest that recognition of the authority of the state of a plaintiff's domicile to grant a divorce is unlikely to have an immediate or significant impact on other types of litigation, which generally express a jurisdictional bias in favor of the defendant. It is not too early, however, to begin thinking seriously about the contemporary legitimacy of this traditional jurisdictional bias.[62]

A different kind of question concerning judicial jurisdiction was raised in the Tennessee Supreme Court during the survey period, although whether the court's opinion was directed to that question is somewhat unclear. In *Donaldson v. Donaldson*[63] a husband brought a damage action against his nonresident wife for an

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58. 433 U.S. at 208 n.30.

59. *See* Williams v. North Carolina, 317 U.S. 287 (1942).

60. *In re* Marriage of Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

61. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 661 (1959).

62. *See generally* Seidelson, *Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221 (1970); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-28, 1167-73 (1966).

63. 557 S.W.2d 60 (Tenn. 1977).

alleged "abuse of court process."[64] Plaintiff alleged that he suffered injury as a result of "the malicious, willful, and intentional"[65] institution against him of two actions, both in Arizona and both "providing for the identical remedy of 'imprisonment that is criminal [in] nature.' "[66] One action was brought under the Uniform Reciprocal Enforcement of Support Act, and the other sought to have plaintiff held in contempt, apparently because plaintiff failed to make support payments as previously ordered by an Arizona court. Defendant appeared specially to contest her amenability to suit under that portion of the Tennessee long-arm statute subjecting nonresidents to suit on any claim for relief arising from "any tortious act or omission within this state . . . ."[67] Defendant also sought dismissal on the ground that the complaint failed to state a claim for relief. The trial court dismissed for want of judicial jurisdiction, and the supreme court affirmed.

The court began its opinion by citing *Hanvy v. Crosman Arms Co.*[68] for the proposition that the long-arm statute "has been held to confer jurisdiction over nonresident tortfeasors in situations where the alleged tortious conduct took place outside the state but the resulting injury occurred within the state."[69] The court, however, disagreed with plaintiff's contention that the complaint adequately stated a claim for relief. Only two actions are available for misuse of the legal process: abuse of process and malicious prosecution. Abuse of process lies only if the legal process is utilized for a wrongful purpose, and plaintiff's complaint contained no allegation "or even intimation . . . that the [defendant] employed legal process to obtain an end that the process was not intended to effect."[70] This assertion of the court seems debatable in view of plaintiff's allegation of malice, a matter that may be pleaded generally.[71] Malicious prosecution, on the other hand, requires proof that the legal proceedings terminated in favor of the plaintiff, and again the court found plaintiff's

64. *Id.* at 61.
65. *Id.*
66. *Id.* (quoting from plaintiff's complaint).
67. TENN. CODE ANN. § 20-235 (Cum. Supp. 1978).
68. 225 Tenn. 262, 466 S.W.2d 214 (1971), *cited in* Donaldson v. Donaldson, 557 S.W.2d at 61.
69. 557 S.W.2d at 61.
70. *Id.* at 62.
71. *See* TENN. R. CIV. P. 9.02.

complaint fatally defective because it contained no allegation that either of the two Arizona suits were resolved in plaintiff's favor.[72] Finding "no duty on the part of the court to create a claim the pleader does not spell out in his complaint,"[73] and citing two federal cases concerning a trial court's authority to dismiss a pleading on its own motion for failure to state a claim upon which relief can be granted,[74] the Tennessee Supreme Court affirmed the trial court's dismissal.

Donaldson may have decided nothing more than that plaintiff failed to allege either directly or inferentially every material element of either abuse of process or malicious prosecution. It seems odd, however, to pass on the sufficiency of a plaintiff's complaint prior to a determination of whether the defendant is amenable to suit. Alternatively, *Donaldson* may have held that because plaintiff failed to allege a claim for relief, defendant had not committed any tortious act or omission within Tennessee upon which to predicate the assertion of personal jurisdiction. The effect of such a holding is to equate the circumstances permitting the assertion of personal jurisdiction under the long-arm statute with the substantive validity of plaintiff's claim for relief. Such an equation of the merits and the scope of jurisdiction has been wisely rejected by other courts,[75] since, as Justice Traynor noted, it might encourage "a defendant [to] take a default judgment and resist subsequent enforcement in his own state by collateral attack for lack of jurisdiction, thus compelling plaintiff to litigate the merits there."[76]

Perhaps the court in *Donaldson* failed to see any practical difference between affirming a dismissal because a defendant was not amenable to suit and affirming a dismissal because a plaintiff failed to state a claim for relief. The res judicata consequences of these bases for dismissal are not necessarily identical, however. A dismissal for want of personal jurisdiction is not an adjudication on the merits and therefore does not preclude a subsequent

72. 557 S.W.2d at 62.

73. *Id.*

74. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Clinton Community Hosp. Corp. v. Southern Md. Medical Center, 374 F. Supp. 450 (D. Mo. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975).

75. *E.g.*, Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 680-82 (1957).

76. Traynor, *supra* note 61, at 659.

action,[77] while a dismissal for failure to state a claim for relief, although the matter is not entirely free from doubt, may well bar a subsequent action.[78] Despite the seeming oddity of such a holding, it may be best to construe *Donaldson* as simply a determination that plaintiff failed to state a claim for relief, leaving wholly unresolved the further question whether plaintiff might amend his complaint to cure the defects detailed by the court.[79]

The only other development in the area of Tennessee judicial jurisdiction was an amendment to the Tennessee Code permitting any person to appoint any other person as trustee of a personal or corporate trust regardless of the residence of the proposed trustee.[80] The amendment also provides that

> all such trustees . . . who are not residents of the state of Tennessee shall be subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from any trust within this state for which such nonresident person is acting as trustee in the manner described in [Tennessee Code Annotated sections] 20-235—20-240. Any nonresident who becomes a trustee or fiduciary for a Tennessee resident shall appoint the secretary of state as an agent for service of process.[81]

While the provision for in-state service on the secretary of state is a nod toward the now moribund jurisdictional theory of *Pennoyer v. Neff*,[82] nothing in *Shaffer v. Heitner*[83] would seem to cause the constitutionality of this amendment to be called into question since nonresident trustees are amenable to suit only on claims arising from trusts within this state.

B. Jurisdiction over the Subject Matter

In addition to jurisdiction over the person of the defendant or his interest in property, an action may be adjudicated in a particular court only if that court has jurisdiction over the type of case involved and is a proper venue for the action, and if no

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77. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 48.1 (Tent. Draft No. 1, 1973).

78. *Id.* § 48, Comment d.

79. *See generally* Phillips, *Civil Procedure and Evidence—Tennessee Survey 1970*, 38 TENN. L. REV. 127, 141-43 (1971).

80. TENN. CODE ANN. § 35-610 (Cum. Supp. 1978).

81. *Id.*

82. 95 U.S. 714 (1877).

83. 433 U.S. 186 (1977); *see* text accompanying notes 4-62 *supra*.

statute or doctrine exists under which the court, otherwise qualified to proceed, may or must dismiss the action. Each of these areas will be discussed successively.

During the survey period the developments in the area of subject-matter jurisdiction were entirely statutory and, with one or two exceptions, relatively insignificant. Most notably, the circuit and chancery courts of Davidson County have been given "original jurisdiction to enter judgments against the state founded upon any express or implied contract or breach thereof with the state."[84] Such actions, previously brought before the Tennessee Board of Claims, are to be tried before the court without a jury,[85] and "no action [may] be maintained based on any contract or any act of any state officer which the officer is not authorized to make or do by the laws of this state."[86]

Juvenile courts in counties with a population of 600,000 or more may now exercise jurisdiction concurrent with circuit courts in actions under the Uniform Reciprocal Enforcement of Support Act.[87] The jurisdiction of justices of the peace and courts of general sessions has been increased from $3,000 to $5,000 in all civil cases except in equity causes, in which the jurisdictional competence was raised from $250 to $1,500.[88] Finally, chancery courts may now transfer to circuit court or, alternatively, hear and determine "upon the principles of a court of law" actions "for unliquidated damages for injuries to person or character, and . . . for unliquidated damages for injuries to property not resulting from a breach of oral or written contract."[89]

C. *Venue*

The importance of distinguishing the concepts of jurisdiction over the subject matter and jurisdiction over the person of the defendant from the concept of venue in determining the validity of a prior adjudication is reflected in the opinion of the Tennessee Supreme Court in *Kane v. Kane*.[90] The case involved the all-too-common problem of senselessly repetitive child custody litigation

84. TENN. CODE ANN. § 23-3601 (Cum. Supp. 1978).
85. *Id.*
86. *Id.*
87. *Id.* § 36-902(4).
88. *Id.* § 19-301.
89. *Id.* § 16-602.
90. 547 S.W.2d 559 (Tenn. 1977).

by a divorced couple. The parties had been divorced in 1964 in Robertson County, even though at that time they were residents of Davidson County and had separated there. The divorcing court originally awarded custody of the couple's daughter to the mother, but seven years later it modified the decree and awarded custody to the father. To regain custody the mother brought an action raising in the divorcing court the same issues that had been litigated in the modification action. Dissatisfied with the divorcing court's decree in her action to regain custody, the mother brought yet another action, this time in Davidson County. The Davidson County court declined plaintiff's invitation to second-guess the Robertson County court, and the state supreme court affirmed.

Apparently plaintiff recognized the well-established rule in Tennessee that the divorcing court possesses exclusive jurisdiction over custody matters until a child reaches majority.[91] However, plaintiff sought to avoid application of this rule by relying on that portion of the Tennessee Code specifying "the county where the parties reside at the time of their separation, or in which the defendant resides, if a resident of the state"[92] as the proper venue for a divorce action. Because the parties did not reside in Robertson County at the time of their separation or divorce, plaintiff argued that the Robertson County court never acquired jurisdiction and that its decrees were therefore void and open to collateral attack.

The supreme court rejected plaintiff's argument for two reasons. First, the venue provision relied upon by plaintiff provides that "[a]ny divorce granted prior to May 4, 1967 will not be deemed void solely on the ground that the parties to the divorce action were residents of a county or counties other than the county in which said divorce decree was entered."[93] Thus, even if plaintiff were correct in her argument that the Robertson County court was without jurisdiction, the statute precluded a collateral attack on its decree.[94] Moreover, the supreme court also rejected plaintiff's argument that jurisdiction and venue are synonymous. "Venue," the court stated, "is the personal privilege of a defendant to be sued in particular counties; it may be waived and is

91. *See, e.g.*, Sutton v. Sutton, 220 Tenn. 410, 417 S.W.2d 786 (1967).
92. TENN. CODE ANN. § 36-804 (1977).
93. *Id.*
94. 547 S.W.2d at 560.

waived by a defendant who defends upon the merits without first interposing an objection to improper venue."[95] Jurisdiction, on the other hand, is of two types: jurisdiction over the subject matter, which is conferred by the constitution and statutes, and jurisdiction over the person, which "is acquired by service of process."[96] The statute relied upon by plaintiff, the court continued, "merely deals with venue of divorce actions . . . [and] nothing in this record . . . indicate[s] that the defendant in the original divorce suit objected to the bringing of the action in Robertson County; thus, the right of venue was waived."[97] Also, there was no "suggestion that the defendant was not served with process, hence no lack of jurisdiction of the person is shown."[98] Since the Robertson County court that granted the divorce was statutorily empowered to entertain suits for divorce and award custody, subject-matter jurisdiction was also present.[99] The decrees of the Robertson County court were therefore valid, and "the jurisdiction of that court over the custody of the child of these parents continues to be exclusive, under the circumstances shown in this case."[100]

The court's holding that a judgment is valid even if rendered by a court without proper venue for the action is consistent with the prevailing rule that a judgment is valid if rendered by a court with subject-matter jurisdiction and jurisdiction over the person of the defendant (or his property), as long as the defendant is given reasonable notice of the action and a reasonable opportunity to be heard.[101] The court's treatment of jurisdiction over the person as being the equivalent of service of process, however, confuses two distinct concepts. Service of process is a method by which a defendant is notified of the pendency of an action. "If the defendant is not notified of the proceedings, he has no opportunity to defend himself, and he is deprived of his property or liberty without due process."[102] Jurisdiction over the person of the

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See* 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978).
102. R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 511 (2d ed. 1975).

defendant, on the other hand, refers to the due process problem of locating the place of trial and the reach of a jurisdiction's long-arm statute. As *Shaffer v. Heitner*[103] makes clear, notice to the defendant cannot by itself confer jurisdiction over the person. There, defendants clearly had notice of the derivative action brought against them in Delaware, even though the Court held that the assertion of jurisdiction by Delaware violated the due process clause.[104] Amenability of the defendant to suit instead depends upon the minimum contacts standard of *International Shoe* and the applicable long-arm statute.

As my colleague Professor Cohen points out in his recent survey of Tennessee family law,[105] the court's holding in *Kane* can be criticized for freezing the place of trial at what may prove to be an inconvenient forum. Although the court's attempt to curtail needlessly repetitive litigation is understandable, this objective might be as effectively realized by application of normal res judicata principles as long as the legal and factual circumstances remain constant.[106]

A different sort of venue problem was involved in *Romines v. K & S Engineering & Contracting Co.*,[107] which arose out of an automobile accident in Rutherford County. Plaintiffs commenced a damage action in Knox County against three corporate defendants. One of the defendants was a Delaware corporation that maintained an agent for service of process in Knox County, and the other two defendants were apparently domestic corporations with places of business outside Knox County. Service of process was effected on the Delaware corporation in Knox County with counterpart process being served on the two domestic corporations at their places of business in Wilson and Lawrence Counties. At some point before trial, a motion for summary judgment filed by the foreign corporation was granted. Motions to dismiss filed by the other two defendants were then granted on the ground of improper venue. The issue, as defined by the state supreme court, was: "When properly attacked by motion, can

103. 433 U.S. 186 (1977).

104. *See* text accompanying notes 4-34 *supra*.

105. Cohen, *A Critical Survey of Developments in Tennessee Family Law, 1976-77*, 45 TENN. L. REV. 427, 455 (1978).

106. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41, Comment c (Tent. Draft No. 1, 1973).

107. 556 S.W.2d 85 (Tenn. 1977).

counterpart service of process be sustained where the only resident defendant was dismissed by the trial judge in ruling on motions filed preliminary to trial?"[108] The court held that it cannot.

By statute the proper venue for transitory civil actions is the county in which the cause of action arose or in which the defendant resides or is found.[109] In actions involving multiple defendants residing in different counties, "original" process is served on the defendants residing or found in the county where the action is commenced, and "counterpart" process, which "may be sent to another county as in local action[s],"[110] is served on the other defendants residing outside the county in which the action is pending.

In an apparent effort to thwart evasion of the statutory restrictions on venue, the Tennessee Supreme Court has held on numerous occasions prior to *Romines* that venue cannot be fixed in an otherwise improper forum by serving a fictitious or immaterial defendant with counterpart process issuing against the defendants who are the persons against whom the plaintiff's claim for relief in fact lies.[111] The supreme court followed this well-established law in *Romines* though in language that blurs the line drawn in *Kane* between venue and jurisdiction.

> Where a transitory action is filed in a county other than the one where the cause of action arose, if service of original process is on a party that is not a real and material defendant, venue does not lie in the county where the action was commenced and the trial court is not able to acquire jurisdiction over the person of defendants summoned by counterpart process, in the face of a motion to dismiss the action for lack of venue.[112]

Thus the crucial question was whether the Delaware corporate defendant was "a real and material defendant so as to locate venue and legitimate the service of counterpart process on the other defendants."[113]

Plaintiff argued that because the action was filed with the

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108. *Id.* at 85-86.

109. TENN. CODE ANN. § 20-401 (Cum. Supp. 1978).

110. *Id. See generally* Comment, *Venue Alternatives in Transitory Actions: Legislative Amendment*, 39 TENN. L. REV. 118 (1971).

111. *See, e.g.*, Achy v. Holland, 76 Tenn. 510 (1881).

112. 556 S.W.2d at 86.

113. *Id.*

good faith belief that "plaintiff had a cause of action against [the Delaware corporation] . . . and not with the fraudulent intention of depriving the nonresident defendants of their right to be sued in their own county or in the county where the cause of action arose,"[114] it followed that the Delaware corporate defendant was a real and material defendant. The supreme court disagreed. "[I]rrespective of the motive of a plaintiff in bringing an action against a resident defendant," the court held, "if the action cannot survive motions made preliminary to trial, the resident defendant is not a real and material defendant for the purpose of locating venue or the acquisition of jurisdiction over nonresident defendants by counterpart process."[115]

The court's rejection of plaintiff's proffered test for determining whether a party is a real and material defendant seems sound since that test would entail a difficult and uncertain factual inquiry into a matter in which certainty and ease of application of the law to be applied are of paramount importance. On the other hand, some uncertainty lingers after *Romines* since the opinion does not specify precisely when a defendant must move to dismiss for lack of venue. By virtue of rule 12 of the Tennessee Rules of Civil Procedure, a defendant generally must object to improper venue either in a pre-answer motion or in his answer itself. If he does not, an objection to venue is considered waived.[116] However, at the time of service of the plaintiff's complaint and prior to dismissal of the resident defendant, a nonresident defendant cannot ascertain whether venue is improper. It seems unlikely, therefore, that he would object to venue either prior to answering or in his answer. As a consequence, it may be only fair to permit a nonresident defendant to move to dismiss for improper venue within a specified time after the resident defendant is dismissed from the action, even if he has previously moved under rule 12 or answered without interposing an objection to venue. This result is consistent with the spirit of rule 12.07, which permits a defendant to include in his answer rule 12 defenses and objections not previously available, even though they were not raised in a pre-answer rule 12 motion. Yet, to eliminate the expense and inconvenience of requiring a plaintiff to recommence his action, it would seem most desirable in the context of cases

114. *Id.*
115. *Id.*
116. TENN. R. CIV. P. 12.07-.08.

like *Romines* to deny a defendant's motion to dismiss and, instead, to transfer the action to an appropriate venue.

D. Refusal to Take Jurisdiction

Although discretionary refusals to take jurisdiction have become increasingly important as the scope of jurisdiction over the defendant has expanded, they remain relatively rare. One situation in which courts have refused to exercise their authority to adjudicate involves suits that fall under the heading of "internal affairs" of foreign corporations.[117] If the discussion of the federal district court in *McLouth Steel Corp. v. Jewell Coal & Coke Co.*[118] is an accurate reflection of Tennessee law, the internal affairs doctrine is simply an aspect of the broader doctrine of forum non conveniens and is of dwindling importance.

McLouth was a diversity action by a minority shareholder, a Michigan corporation, to compel the payment of dividends. Defendants were two Virginia corporations and their directors, who were citizens of Tennessee. The corporate defendants were engaged in manufacturing and mining operations primarily in Virginia, but their executive and sales offices were in Tennessee. The refusal to declare dividends occurred at meetings of the board of directors of defendant corporations in Tennessee. Defendants sought discretionary dismissal on the ground that the action involved the internal affairs of a foreign corporation. The United States District Court for the Eastern District of Tennessee refused to dismiss the action.

The district court recognized that there is authority for the proposition that federal courts are not required by the *Erie* doctrine[119] to follow state decisions concerning forum non conveniens.[120] Nevertheless, the federal district court perceived little difference between Tennessee law[121] and the approach of the United States Supreme Court in the classic case of *Koster v. (American) Lumbermen's Mutual Casualty Co.*[122] In that case the Supreme Court treated the internal affairs doctrine not as an invariably

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117. *See* R. LEFLAR, *supra* note 53, § 255.

118. 432 F. Supp. 10 (E.D. Tenn. 1976).

119. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

120. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.317[2] (2d ed. 1978).

121. The district court relied upon the unpublished opinion in Brown v. Greer, No. 146-Knox (Tenn. Sup. Ct. Feb. 19, 1974).

122. 330 U.S. 518 (1947).

applicable rule of law but rather as an aspect of the flexible and discretionary doctrine of forum non conveniens.

> There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice.[123]

The district court stated dismissal under *Koster* is appropriate only "on a showing of 'much harassment' by a defendant and [a showing that] the forum chosen 'would not ordinarily be thought a suitable one to decide the controversy' "[124] and concluded that "under the facts and circumstances of this case . . . the Eastern District of Tennessee is [not] so unsuitable as a forum to warrant invocation of this rather extreme doctrine."[125] Although the district court did not delineate the factors making it a convenient forum, the presence of the directors and other evidence in Tennessee certainly support the court's refusal to dismiss. Moreover, the soundness of the court's approach to the internal affairs doctrine should commend itself to the Tennessee courts.

E. Giving Notice of the Action

In order to satisfy the dictates of procedural due process, the applicable statute or rule of court must establish a reasonable method of notifying the defendant of the institution of an action against him, and he must be given a reasonable opportunity to be heard.[126] It is also generally held that the described method of

123. *Id.* at 527-28.
124. 432 F. Supp. at 15 (quoting 330 U.S. at 532).
125. *Id.*
126. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S.

notification must be followed even though the method of notification actually utilized comports with procedural due process.[127] Only one of the cases decided during the survey period purported to involve procedural due process; the remaining cases involved disparate problems regarding the prescribed method of notification.

Solida v. Ledford,[128] the one due process case, was a diversity action in which plaintiff sought recovery for personal injuries allegedly suffered as a result of a vehicular collision. One of the defendants, the operator of a vehicle involved in the collision, appeared specially and moved to quash service or, alternatively, to dismiss on the ground of insufficiency of service of process. The initial summons had been returned "Not to be Found." Thereafter plaintiff filed an amended complaint, and an alias summons was issued for service on the Tennessee secretary of state pursuant to the nonresident motorist provisions of the Tennessee Code.[129] Those provisions require the secretary of state to forward a certified copy of the summons to the defendant by registered return-receipt mail.[130] The Code also requires "the return-receipt signed by, or duly in behalf of, the defendant"[131] to be sent to the clerk of the court in which the action was brought. The return-receipt filed in *Solida* bore the notation "Addressee Unknown." Defendant argued that, because there was no return-receipt signed by him, service was constitutionally infirm as well as defective under the Tennessee Code. Plaintiffs contended, on the other hand, that as long as service is made on the secretary of state who in turn mails a copy of the summons to the defendant, service is valid, and a return-receipt signed by the defendant is not required. The United States District Court for the Western District of Tennessee granted defendant's motion to quash service "because the Court believes due process requires, and the statutory scheme contemplates, evidence of service through notice by mail upon a defendant or his agent as a minimum."[132]

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306 (1950); 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 69 (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 5 (Tent. Draft No. 5, 1978).

127. *See, e.g.*, Wuchter v. Pizzutti, 276 U.S. 13 (1928).

128. 75 F.R.D. 529 (W.D. Tenn. 1977).

129. TENN. CODE ANN. §§ 20-224 to 227 (1955 & Cum. Supp. 1978).

130. *Id.* § 20-226 (Cum. Supp. 1978).

131. *Id.* § 20-227 (1955).

132. 75 F.R.D. at 531.

The district court's holding that the nonresident motorist statute requires evidence of actual service on the defendant may have been correct though a recent amendment to another section of the Code[133] that was in effect when *Solida* was decided suggests otherwise. The court's further holding that due process was not satisfied, however, seems clearly wrong. In the first place, it is by no means certain that due process requires actual service. Professor Hazard has taken the position that it does not:

> Can a valid judgment for compensatory relief be granted [if a reasonable effort is made to deliver notice but notice is in fact not delivered to the defendant]? This depends on whether the condition of rendering a valid judgment under the Due Process Clause is defined as the giving of notice or the making a reasonable effort to give notice. If the former, then the plaintiff is helpless to obtain compensation . . . unless he can actually deliver notice to the defendant. The Supreme Court has never gone beyond holding that due process requires a reasonable opportunity to be heard and that reasonable effort to give notice of the hearing sufficiently affords that opportunity. But the Supreme Court has never passed on the precise question raised, although many lower courts have. The problem has arisen recurrently under the automobile "long-arm" statutes. Most courts have ducked the issue by reading—sometimes by straining to read—the local state statute to require actual notice. Those courts that have faced the issue all appear to have held that failure of actual delivery of notice does not preclude valid judgment, so long as a reasonable and technically punctilious effort has been made, *i.e.*, there has been compliance with a statutory procedure that is itself reasonable. And this seems a correct analysis of the due process requirement as established by the Supreme Court.[134]

Moreover, if due process requires actual notice, defendant's special appearance in *Solida* demonstrates that he apparently did in fact receive adequate and timely notice of the lawsuit pending against him.[135]

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133. TENN. CODE ANN. § 21-218 (Cum. Supp. 1978); *see* text accompanying notes 189-94 *infra*.

134. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 286-87 (footnotes omitted); *see* 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 25, Comment e (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 5, Comment c (Tent. Draft No. 5, 1978).

135. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 5, Comment d (Tent. Draft No. 5, 1978).

The service requirements of the Tennessee long-arm statute[136] also received federal scrutiny in *Shires v. Magnavox Co.*[137] Individual defendants in an antitrust action moved to quash service of process on the ground that the person signing the return-receipts was not authorized to accept service on their behalf. A corporate defendant also moved to quash service on the same ground although service was made on an agent of a wholly-owned subsidiary. Plaintiffs offered no proof that the return-receipts were signed by or on behalf of the moving defendants.[138] Because plaintiffs had the burden of establishing the validity of service but did not do so, the United States District Court for the Eastern District of Tennessee granted defendants' motions to quash.

Shires did not present a due process problem because defendants were in fact given adequate and timely notice of the action against them[139] although there is some indication the district court thought due process was involved.[140] The only apparent practical effect of quashing service, therefore, is to ensure strict compliance with the prescribed method of giving notice, an advantage of questionable value when measured against the expense and inconvenience of requiring the plaintiffs to serve the defendants a second time.

Three decisions of the Tennessee Supreme Court dealt with more substantial problems concerning the prescribed method of notification. In *Saylors v. Riggsbee*[141] plaintiffs brought an action on March 13, 1970, for damages for wrongful death resulting from an automobile accident that occurred on March 14, 1969. At the time of the accident the nonresident motorist statute provided that "[t]he agency of the secretary of state to accept service of process shall continue for a period of one (1) year from the date of any accident or injury . . . ."[142] Prior to institution of the action in *Saylors*, however, the statute was amended to provide that "[t]he agency of the secretary of state to accept service of process for both personal injuries and property damages shall

136. *See* TENN. CODE ANN. §§ 20-235 to 240 (Cum. Supp. 1978).

137. 74 F.R.D. 373 (E.D. Tenn. 1977).

138. *See* TENN. CODE ANN. § 20-237 (Cum. Supp. 1978).

139. *See* text accompanying note 135 *supra*.

140. 74 F.R.D. at 376.

141. 544 S.W.2d 609 (Tenn. 1976).

142. 1949 Tenn. Pub. Acts ch. 47, § 2 (current version at TENN. CODE ANN. § 20-224 (Cum. Supp. 1978)).

continue for such period of time or so long as the cause of action is not barred by the statute of limitations of this state . . . ."[143] Plaintiffs voluntarily dismissed their action on June 22, 1972, and, pursuant to the saving statute,[144] reinstituted the action on June 22, 1973. Again, process was served on the secretary of state, who accepted service of the reinstituted action on June 28, 1973. Defendants argued that the amended statute increasing the duration of the secretary's fictitious agency could not be applied retroactively to accidents occurring prior to its enactment and that therefore, the action had not been reinstituted in timely fashion. The Tennessee Supreme Court held that the amended statute should and constitutionally could be given retroactive application, and accordingly reversed the trial court's quashing of process and abatement of the action.

"[P]rocedural statutes," the court noted, "apply retrospectively not only to causes of action arising before such acts become law, but to all suits pending when the legislation takes effect . . . , unless the legislature indicates a contrary intention or immediate application would produce an unjust result . . . ."[145] The test for determining whether a statute is procedural or substantive depends upon whether it deals with " 'the mode or proceeding by which a legal right is enforced,' " on the one hand, or whether it " 'gives or defines the right,' " on the other hand.[146] The process statute under consideration, the court stated, "created no rights and imposed no liabilities."[147] Accordingly, the amendment to the nonresident motorist statute was procedural and was given retroactive application.

The court acknowledged[148] that the holding in *Saylors* was

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143. TENN. CODE ANN. § 20-224 (Cum. Supp. 1978).

144. *Id.* § 28-106 (1955) provides:

> If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

145. 544 S.W.2d at 610.

146. *Id.* (quoting Jones v. Garrett, 192 Kan. 109, 114, 386 P.2d 194, 198 (1963)).

147. *Id.*

148. *Id.* at 611.

foreshadowed by the decision in *Speight v. Miller*.[149] In that case the court permitted retroactive application of an amendment to the nonresident motorist statute, which increased the secretary's fictitious agency from one to three years after the accident in actions for property damage.[150] The only decision that tended to block the court's path was *Henderson v. Ford*,[151] which refused to permit retroactive application of the same amendment to the nonresident motorist statute involved in *Saylors*. Although the court in *Saylors* did not expressly overrule *Henderson*, it quite rightly rejected the theoretical foundation upon which *Henderson* was built.[152] *Henderson*, it would therefore appear, lives on in name alone.

Herring v. Estate of Tollett,[153] the second decision of the Tennessee Supreme Court during the survey period concerning the appropriate method of notification, involved the proper procedure to be followed for filing notice in probate court of the pendency of a tort action in circuit court. Appellants commenced a damage action against decedent's administrator in the circuit court of Cumberland County for injuries and loss of services arising out of a vehicular accident. Appellants also filed a claim, with a copy of their previously filed complaint appended, in the county court of Cumberland County where deceased's estate was being administered. This claim was filed within six months after the statutorily mandated notice to creditors by the administrator.[154] The administrator excepted to appellants' claim principally on the ground that it was an unliquidated tort claim pending in circuit court. The county judge disallowed and dismissed the claim, reasoning that the claim " 'is one sounding in tort and the claimants cannot be deemed creditors until they obtain judg-

149. 223 Tenn. 259, 443 S.W.2d 657 (1969).

150. 1968 Tenn. Pub. Acts ch. 574, § 1 (current version at TENN. CODE ANN. § 20-224 (Cum. Supp. 1978)).

151. 488 S.W.2d 720 (Tenn. 1972), *noted in* 40 TENN. L. REV. 746 (1973).

152. 544 S.W.2d at 611. *Henderson* can be distinguished from *Saylors* on its facts since in *Henderson*, unlike *Saylors*, the statute extending the agency of the secretary of state was not in effect when the action was initially commenced. However, if, as the supreme court correctly noted in *Saylors*, the secretary of state's statutory " 'agency' exists only in theory and is a pure fiction," *id.*, then this difference is inconsequential.

153. 550 S.W.2d 660 (Tenn. 1977).

154. TENN. CODE ANN. § 30-509 (1977).

ments.' "[155] The state supreme court reversed.

The source of the problem confronting the court in *Herring* was the 1947 decision of the Tennessee Supreme Court in *Collins v. Ruffner*.[156] *Collins* arose when two automobiles collided, instantly killing both drivers. Plaintiff, as administratrix of the estate of one of the deceased drivers, brought a damage action in circuit court against the administrator of the estate of the other driver. The Tennessee statute then in effect dealing with the inventory and management of estates provided that "within twelve (12) months from the date of the notice to creditors . . . all persons . . . having claims against the estate of the decedent . . . shall file them . . . with the clerk of the Court in which the estate is being administered."[157] Another section of the Code provided: "Duplicate copies of the first pleading filed in original actions against a personal representative, shall be filed with the Clerk of the Court where the administration originated, to be noted by him in the record of claims as are other claims filed."[158] Defendants in *Collins* sought dismissal of plaintiff's circuit court damage action on the ground that plaintiff failed to file either a claim or copies of the pleadings in that action with the county court where defendant's decedent's estate was being administered. The supreme court held that plaintiff's action should not have been dismissed by the circuit court.

For present purposes it is sufficient to note only two of the reasons offered by the court for its holding in *Collins*. One was that the only persons required to file claims in probate are creditors of the deceased, and the holder of a cause of action in tort is not a creditor until his claim is reduced to judgment.[159] Another reason was far more practical: "No jurisdiction is conferred . . . on the county judge to try, adjudge, and render judgment in a negligence case. No machinery is set up in that court and no procedure prescribed."[160]

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155. 550 S.W.2d at 661 (quoting the judge of the county court of Cumberland County).

156. 185 Tenn. 290, 206 S.W.2d 298 (1947).

157. 1939 Tenn. Pub. Acts ch. 175, § 2 (current version at TENN. CODE ANN. § 30-510 (1977)).

158. 1939 Tenn. Pub. Acts ch. 175, § 6 (current version at TENN. CODE ANN. § 30-511 (1977)).

159. 185 Tenn. at 295-96, 206 S.W.2d at 300.

160. *Id.* at 296, 206 S.W.2d at 301.

These are not entirely satisfactory explanations for the result in *Collins*. In the first place, the statute being construed by the court did not speak of creditors but rather of "all persons . . . having claims against the estate of the decedent . . . ."[161] The holder of an unliquidated chose in action would seem to fall within the scope of this statutory language since ultimately he seeks recovery out of the assets constituting the decedent's estate. Second, requiring a copy of the first pleading in an unliquidated tort case to be filed with the court where decedent's estate is being administered does not necessarily mean, as the court apparently assumed, that the action has to be adjudicated there. The action could be adjudicated in another court of competent jurisdiction, while filing a copy of the first pleading would serve to notify the probate court to hold in abeyance final distribution of the estate pending the outcome of the tort action. On the other hand, nothing in the statute construed in *Collins* expressly authorized such bifurcated proceedings.[162] Moreover, since plaintiff commenced her action within the twelve-month limitation period prescribed by the statute, the administrator of decedent's estate had timely notice of plaintiff's inchoate claim. While the opinion in *Collins* is silent on the matter, it seems entirely probable that there had not yet been a final distribution of the estate. Thus the *Collins* court quite understandably may have perceived no good reason to dismiss plaintiff's action.

Regardless of their deficiencies, each of these reasons offered by the court for its holding in *Collins* took on new and independent life in subsequent decisions of the Tennessee Supreme Court. For example, in *McMahan v. Beach*,[163] a tort action for damages occasioned by a traffic accident was commenced against the administrator of decedent's estate less than six months after issuance of letters of administration. At that time the Code exempted an administrator from suit for a period of six months after issuance to him of letters of administration,[164] a provision apparently designed to afford the administrator time in which to decide

161. 1939 Tenn. Pub. Acts ch. 175, § 2 (current version at TENN. CODE ANN. § 30-510 (1977)); *see* text accompanying note 157 *supra*.

162. 1939 Tenn. Pub. Acts ch. 175, §§ 1-12 (current version at TENN. CODE ANN. §§ 30-501 to 527 (1977)).

163. 198 Tenn. 168, 278 S.W.2d 680 (1955).

164. 1939 Tenn. Pub. Acts ch. 175, § 6 (current version at TENN. CODE ANN. §§ 30-511, -1001 (1977)).

whether to pay claims against the estate. Nonetheless, relying on that portion of *Collins* in which the court noted that county courts are not empowered to adjudicate tort claims, the court in *McMahan* held that "the exemption of an administrator from suit for a period of six months after issuance of letters does not apply to tort actions."[165] So too, in *Darby v. Union Planters National Bank*[166] appellant filed a medical malpractice claim against the estate of a deceased doctor but apparently did not commence an independent action in a court empowered to adjudicate such a claim. The executor excepted to appellant's claim, and the probate court dismissed it. On appeal the supreme court affirmed, reasoning that "appellant is not a creditor until such time as a court of competent jurisdiction shall have determined whether or not the estate of deceased is liable for the alleged negligent wrong."[167]

Apparently the probate court in *Herring* construed the *Collins* line of cases as standing for the proposition that since a claimant asserting an unliquidated tort claim is not a creditor until his claim is reduced to judgment, a decedent's estate may be finally distributed even though the tort action has not yet been finally adjudicated, and even though the action was timely commenced in a court of competent jurisdiction, and a copy of the complaint was promptly filed in the probate court. Thus, while *Collins* permitted recovery against an estate despite seeming noncompliance with the statutory scheme, the probate court in *Herring* denied recovery even though plaintiff complied with every requirement of the current version of the Code.[168]

Fortunately the state supreme court reached the only sensible result in *Herring*. "Whenever the probate court is put on notice of the pendency of a tort action in another court by the filing of a copy of the complaint, or by any other good and sufficient means," the court held, "the probate court must hold in abeyance a final distribution of the . . . estate, pending the outcome of a tort action."[169] The court, however, did not overrule *Collins*. Only "[b]etter practice," not the Code itself, "demands that the court in which the estate is being administered be put

165. 198 Tenn. at 169, 278 S.W.2d at 681.
166. 222 Tenn. 417, 436 S.W.2d 439 (1969).
167. *Id.* at 421, 436 S.W.2d at 441.
168. *See* TENN. CODE ANN. §§ 30-510 to 511 (1977).
169. 550 S.W.2d at 662.

on notice of the pendency of a tort action in another court. Filing a copy of the complaint is sufficient to accomplish this."[170]

It seems likely that problems will continue to arise in this area of the law until the state supreme court is willing to view afresh the statutory language of the current version of the Code. As the court itself noted in *Herring*,[171] nothing in the Code exempts unliquidated tort claims from its filing provisions. Instead, the Code requires everyone seeking recovery out of the assets of a decedent's estate to file a claim against the estate within six months after the date of notice to creditors.[172] In the case of claims founded on causes of action beyond the jurisdictional competence of the probate court, the Code would seem to require that an action be instituted on such a cause of action within the six-month limitation period[173] and that a copy of the complaint be filed with the clerk of the court where the estate is being administered.[174] The Code specifically provides that in such circumstances

> the court wherein the administration is pending shall hold in abeyance any action on such claim until the final determination of said independent suit, whereupon, on the filing of a certified copy of such final judgment or decree with the clerk of the court wherein the administration is pending, such court is authorized to enter judgment accordingly.[175]

If an action is instituted within the six-month limitation period but a copy of the complaint is not filed with the probate court, the plaintiff runs the risk that the probate court may finally distribute the estate out of ignorance of his claim. If the plaintiff fails to file a copy of his complaint but the probate court is aware of the plaintiff's action against the decedent's administrator, then dictum in *Herring* appears to require the probate court to withhold final distribution of the estate,[176] although that sensible

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170. *Id.*

171. *Id.*

172. TENN. CODE ANN. § 30-510 (1977) requires "all persons . . . having claims against the estate of the decedent" to file them within six months from the date of notice to creditors.

173. TENN. CODE ANN. § 30-513.

174. *Id.* § 30-511.

175. *Id.* § 30-518.

176. The state supreme court stated that final distribution of the estate should be held in abeyance whenever the probate court has notice of a pending

result is hard to square with the literal language of the Code.[177] Moreover, in cases in which the plaintiff does not commence his action within six months from the date of notice to creditors, the Code appears to render the plaintiff's action untimely and "forever barred."[178] As long as the reasoning of *Collins* remains authoritatively unimpeached, however, a confident statement of the meaning of the Code can be offered only by one who walks right in "while the angels wait outside and tremble."[179]

Tennessee State Board of Education v. Cobb[180] was the third and final decision of the Tennessee Supreme Court during the survey period concerning the appropriate method of notification. Plaintiff in *Cobb* alleged that he had become tenured and had been improperly discharged from his position as assistant superintendent of the Tennessee School for the Blind in Davidson County. Plaintiff commenced his action in the chancery court for Davidson County under the judicial review provision[181] of the general teacher tenure statutes.[182] Under that provision a teacher may obtain judicial review by filing a petition in the chancery court of the county in which he was employed. Upon filing of the petition the clerk and master is directed to serve the named defendants by registered return-receipt mail. This method of obtaining judicial review had been made expressly applicable to those teachers under its jurisdiction by a rule of the Tennessee Department of Education.[183] Plaintiff complied with the statute in all respects, defendants being served with a copy of plaintiff's petition by registered mail. However, defendants were never served in accordance with the procedure set forth in the Tennessee Rules of Civil Procedure, which ordinarily require the clerk to issue a summons and to cause it, together with a copy of the complaint, to be delivered to a person authorized to serve process personally on the defendant.[184] The supreme court rejected defendants' contention that process and service were insufficient for

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tort action "by any . . . good and sufficient means . . . ." 550 S.W.2d at 662.

177. *See* TENN. CODE ANN. §§ 30-510 to 512 (1977).

178. *Id.* § 30-513.

179. The phrase is Professor Rosenberg's. Rosenberg, *The Adversary Proceeding in the Year 2000*, 1 PROSPECTUS 5, 6 (1968).

180. 557 S.W.2d 276 (Tenn. 1977).

181. TENN. CODE ANN. § 49-1417 (1977).

182. *Id.* §§ 49-1401 to 1425 (1977 & Cum. Supp. 1978).

183. 557 S.W.2d at 277.

184. TENN. R. CIV. P. 4.

failure to comply with the Tennessee rules.

Rule 4 itself, the court noted, recognizes "other methods of accomplishing service of process, in addition to personal service of a summons."[185] For example, rule 4.05 authorizes constructive service in the manner provided by statute as do those portions of rule 4.04 that deal with service on foreign corporations and nonresidents.[186] The court concluded:

> [W]e are of the opinion that whenever a special statute dealing with a particular type of judicial action, such as review of a Board of Education under the Teacher Tenure Law, contains specific provisions for process and service, that method, in lieu of the general provisions of Rule 4, is permissible and may be followed. We are particularly persuaded to this view in the present case since the State Board itself, by its regulations, expressly authorized judicial review under the provisions of [the Tennessee Code].[187]

The court's holding in *Cobb* engrafts on Tennessee rule 4 a provision comparable in some respects to Federal Rules of Civil Procedure 4(d)(7) and 4(e), which authorize service by use of federal statutes in certain specified circumstances.[188] Only one aspect of the court's opinion needs to be emphasized—namely, that while service may be made in accordance with a statute, nothing in *Cobb* expressly precludes service in accordance with the Tennessee Rules of Civil Procedure, even if a statute contains specific provisions for process and service.

The remaining development during the survey period in this area of the law is statutory. The Tennessee Code dispenses with personal service in certain circumstances if the defendant is a nonresident of this state.[189] In such cases, however, notice must be given by publication[190] and, under a 1977 amendment to the Code, a copy of the newspaper clipping containing the publication must be mailed to the nonresident's last known address by return-receipt certified or registered mail.[191] "The return of the

185. 557 S.W.2d at 277.

186. TENN. R. CIV. P. 4.04(5), (7).

187. 557 S.W.2d at 277.

188. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1112-1118 (1969 & Supp. 1977).

189. TENN. CODE ANN. § 21-212 (1955).

190. *Id.* § 21-214.

191. *Id.* § 21-218 (Cum. Supp. 1978).

receipt signed by the defendant or his duly authorized agent, or its return marked refused, evidenced by appropriate notation of such fact by the postal authorities"[192] is evidence of personal notice. If such evidence is lacking, "the court may find through independent proof that the defendant had actual notice in compliance with notice requirements."[193] If the court fails to find that a defendant had actual notice, "it may order new publication on applicable grounds, or order such other and further action to be taken to give the defendant notice."[194]

The same amendment also adds a new provision to the Code for divorce actions "[i]n those counties where the divorce referee mails notice of the filing of the divorce and a copy of the complaint to a nonresident defendant by certified or registered mail return receipt requested . . . ."[195] In those counties it is not necessary for the clerk of the court to mail further notice; "[n]otice to the nonresident defendant from the . . . referee [is] sufficient."[196] The amended section also provides, although probably unnecessarily, that "[n]othing in this section shall be deemed to have changed or amended requirements of the law as to venue or jurisdiction."[197]

III. STANDING: AN ASPECT OF JUSTICIABILITY

Not all disputes properly brought before an appropriate forum are considered susceptible of judicial resolution. The reasons for declaring a dispute not justiciable vary, one of which is that the party presenting the dispute for adjudication lacks standing, that is, he "is not properly situated to be entitled to judicial determination of the dispute."[198] While the Tennessee Supreme Court was presented with two cases raising questions concerning standing, the court found it necessary to answer the standing question in only one of them.

In *Roberts v. State Board of Equalization*[199] a trustee of

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. 13 C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 176 (1975).
199. 557 S.W.2d 502 (Tenn. 1977).

Roane County sought judicial review in the chancery court of Davidson County of the action of the State Board of Equalization concerning tax assessments on enriched uranium owned by ten Japanese utilities and located in that portion of the Oak Ridge complex situated in Roane County. The county itself, however, was not a party to the petition, and the chancellor ruled that it was an indispensable party.[200] The trustee was given an opportunity to have the county join his petition but the county, acting through its quarterly court, resolved not to join in the trustee's petition for review. Accordingly, the chancellor dismissed the petition, and the state supreme court affirmed.

The court stated that the issue before it was whether Roane County was an "indispensable party"[201] to a petition seeking review of the action of the State Board of Equalization or, put another way, "[c]an the county trustee, acting independently of the county court, petition for a review of the action of the State Board of Equalization?"[202] Noting the difficulty in determining whether review was being sought under the relatively new Uniform Administrative Procedures Act[203] or by way of common-law certiorari,[204] the court observed that under either procedure review may be sought only by someone "aggrieved" by the action sought to be reviewed.[205] While the duties of a county trustee include the obligations to make assessments and to collect taxes, his duty to collect taxes "is a ministerial function . . . ."[206] Moreover, the right to appeal to the State Board of Equalization from assessments of the county trustee is given by statute only to the state, the county, and the assessed party.[207] The county trustee, therefore, is merely a " 'fiscal agent of the county,' "[208] which acts through its quarterly court. Thus, the supreme court

200. *Id.* at 503-04; *see* TENN. R. CIV. P. 19.01-.02.

201. 557 S.W.2d at 503.

202. *Id.*

203. TENN. CODE ANN. §§ 4-507 to 527 (Cum. Supp. 1978).

204. *Id.* § 27-901 (1955).

205. TENN. CODE ANN. § 4-523 (Cum. Supp. 1978) permits "[a] person who is aggrieved by a final decision in a contested case" to seek judicial review, and TENN. CODE ANN. § 27-901 (1955) permits review by "[a]nyone who may be aggrieved by any final order or judgment of any board or commission . . . ."

206. 557 S.W.2d at 503.

207. TENN. CODE ANN. § 67-832 (1976).

208. 557 S.W.2d at 503 (quoting Dulaney v. Dunlap, 43 Tenn. (3 Cold.) 306, 312 (1866)).

held that "[t]he real party in interest, the party that stands to be affected by action of the State Board of Equalization, and the proper party to question the board's actions with respect to assessments on property in Roane County is Roane County acting through its governing body, the county court."[209]

Whatever else may be said of the opinion in *Roberts*, it provides a vivid illustration of the overlap among the concepts of standing to sue, indispensable parties, and the real party in interest. In the portions of the opinion quoted above, the court itself expressly refers to "indispensable part[ies]" and "the real party in interest," and its discussion of whether the trustee was an "aggrieved party" within the meaning of the Administrative Procedures Act or common-law certiorari refers implicitly to the notion of standing to sue, under which heading *Roberts* has been conveniently placed for purposes of this survey. Professors Wright and Miller have attempted to disentangle these three concepts, but they observe that "there are situations in which a Rule 17(a) objection [concerning the real party in interest] is enmeshed in a question whether a particular person who is not before the court should be considered indispensable under Rule 19."[210] Similarly, they note:

> To the extent that standing . . . is understood to mean that the litigant actually must be injured by the governmental action that he is assailing, then it closely resembles the notion of real party in interest under Rule 17(a), inasmuch as both terms are used to designate a plaintiff who has shown that he possesses a sufficient interest in the action to entitle him to be heard on the merits.[211]

It is, therefore, quite understandable why the court in *Roberts* failed to distinguish among the concepts of standing to sue, real parties in interest, and indispensable parties. The overlap of these concepts also suggests that only rarely should differing procedural consequences turn on distinguishing among them.

A question concerning standing was also raised, though left unanswered, in *Blair v. Watts*.[212] *Blair* involved a challenge to the

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209. *Id.* at 504.

210. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1542, at 640 (1971).

211. *Id.* § 1542, at 641 (footnote omitted).

212. 555 S.W.2d 709 (Tenn. 1977).

procedure utilized in appointing the assistant chief of police of Columbia, Tennessee. After the incumbent to that office was promoted to another position, the city manager notified the Civil Service Board that a vacancy existed. Examinations were given to the seven applicants for the position and the Board certified to the city manager the three applicants obtaining the highest test scores. Before any further action was taken, one of the three applicants certified as eligible for the position advised the city manager that he did not wish to be considered for the position. The city manager notified the Board of this development and requested a third candidate. The Board certified two additional names because these applicants had obtained identical scores on the examination. One of these two was appointed assistant chief of police, and, as a result, a member of the police force of Columbia, who was eligible to take the examination but elected not to be an applicant, brought an action for mandamus directing the city manager to appoint one of the three applicants originally certified for consideration. After this action was brought, two of the original applicants certified by the Board, both of whom sought appointment to the position, moved for leave to join as parties plaintiff.[213] Their motion was granted and apparently no error was assigned concerning this action of the trial court. As a result, the state supreme court did not pass on whether the original plaintiff had standing. The court did state that both plaintiffs who joined the action had

> a special interest in this litigation and [were] subject to a special injury not common to the public generally. . . . Either of these plaintiffs, or both of them, clearly have standing to bring this action and the issues for adjudication are the same whether pursued by [all three], or only by [the joined plaintiffs].[214]

Accordingly, the supreme court pretermitted the issue of the original plaintiff's standing.

IV. PRETRIAL PROCEDURE

A. Pleading

Once an appropriate forum has been selected for the adjudication of a justiciable controversy, the parties must advise the

213. *See* TENN. R. CIV. P. 24.

214. 555 S.W.2d at 710-11 (citations omitted).

court as well as one another of their respective claims and defenses. The pleadings, the first of the formal pretrial devices, serve this notice-giving function. Historically, the pleadings have been called upon to serve other purposes as well, including to narrow and to define the issues for trial, to disclose the facts the parties believe exist, and to dispose of claims and defenses.[215] "To a large extent, of course, the formulation of a State's general pleading rules will depend upon its views regarding the relative importance to be attached to, and the efficacy of the pleadings as a means of pursuing, each of these objectives."[216]

In strict theory the Tennessee Rules of Civil Procedure deemphasize the importance of the pleadings as an issue-formulating or discovery mechanism and as a means of speedily disposing of claims and defenses. Other devices are provided to perform these functions. For example, the relevant facts can be unearthed by discovery,[217] and the issues can be narrowed and defined by partial summary adjudication[218] or by a pretrial conference.[219] Similarly, summary judgment serves the end of speedily and inexpensively disposing of claims in cases in which there is no genuine issue as to any material fact.[220] Yet, as cases like *Swallows v. Western Electric Co.*[221] and *Jose v. Equifax, Inc.*[222] demonstrate, there is still a generally held belief in the efficacy of the pleadings to dispose of at least certain kinds of claims.

1. The Complaint

a. Specificity and Substantive Legal Sufficiency

Plaintiff in *Swallows* sought recovery from his employer for outrageous conduct and invasion of privacy. Plaintiff alleged that two managerial level employees of Western Electric suspected him of mailing to each of them, in envelopes without return addresses, an ace of spades, which they construed as threats on their

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215. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 59-60 (1969).

216. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE 568 (3d ed. 1976).

217. *See* TENN. R. CIV. P. 26-37.

218. *See id.* R. 56.

219. *See id.* R. 16.

220. *See id.* R. 56.03.

221. 543 S.W.2d 581 (Tenn. 1976).

222. 556 S.W.2d 82 (Tenn. 1977).

lives. Plaintiff further alleged that despite his denials and the absence of any proof whatever, these employees, while acting in the scope of their employment, " 'continued to harass and accuse him' "[223] and ultimately prevailed on their superiors at Western to have Pinkerton, a co-defendant in the action, investigate plaintiff's " 'background, his private life, and all other manner of things . . . in the most minute and personal detail.' "[224] Plaintiff also alleged that Western and Pinkerton " 'knew, or in the exercise of reasonable diligence and good judgment, should have known, that he had nothing to do with the mailing of the playing cards . . . [but they nonetheless] continued to harass and investigate him for a period of approximately six (6) months.' "[225] Furthermore, Western and Pinkerton had actual knowledge of mild emotional difficulties in plaintiff's past and should have known their conduct would have " 'a most deleterious effect upon [plaintiff's] emotional stability and well being' "[226] and in fact did cause plaintiff to suffer " 'the most grievous mental and emotional . . . suffering . . . .' "[227] On defendants' motion the trial court dismissed plaintiff's complaint for failure to state a claim for which relief could be granted, and the supreme court affirmed.

A recovery for the tort of outrageous conduct, the court stated, requires conduct so "beyond the pale of decency [as] to be regarded as atrocious and utterly intolerable in a civilized society,"[228] as well as resultant "serious mental injury."[229] Certain trivialities, such as " 'mere insults, indignities, threats, petty oppression [*sic*], or other trivialities' "[230] are inadequate bases of liability. Invasion of privacy, on the other hand, " 'exists only if the conduct is such that a defendant should have realized it would be offensive to persons of ordinary sensibilities; and . . . *it is only where the intrusion has gone beyond the limits of de-*

223. 543 S.W.2d at 582 (quoting amended complaint).

224. *Id.* (quoting amended complaint).

225. *Id.* (quoting amended complaint).

226. *Id.* (quoting amended complaint).

227. *Id.* (quoting amended complaint).

228. *Id.* (citing Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966)).

229. *Id.* (citing Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966)).

230. *Id.* at 582-83 (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 479, 398 S.W.2d 270, 274 (1966), which quoted 1 RESTATEMENT (SECOND) OF TORTS § 46, Comment d at 73 (1965)).

cency that liability accrues . . . .' "[231]

The court held that under the Tennessee Rules of Civil Procedure, the plaintiff in a tort action has "the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom."[232] Nothing in the simplified pleading rules permits allegations "replete with conclusions,"[233] which fail to describe "the substance and severity"[234] of the allegedly outrageous conduct or invasion of privacy. " '[I]n an action of this kind' "[235] the rules require that the " 'actionable conduct' "[236] be " 'set out' "[237] so that the trial court can determine whether the defendant's conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as 'mere insults, indignities, threats, annoyances, petty oppression [*sic*], or other trivialities,' for which [defendants] would not be liable."[238] Since plaintiff's complaint lacked the requisite specificity it was properly dismissed.

In *Jose v. Equifax, Inc.*[239] plaintiff brought a workers' compensation action to recover for " 'a severe psychiatric illness' "[240] occasioned by " 'a tremendous amount of pressure and tension' "[241] placed upon him as claims director and field representative for his employer. Plaintiff alleged that these pressures ultimately lead to his habitual alcoholism. Plaintiff's complaint did not delineate the nature of his employment duties or the character of the psychiatric illness he suffered. No attempt was made to amend plaintiff's complaint either before or after his employer

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231. *Id.* at 583 (quoting Martin v. Senators, Inc., 220 Tenn. 465, 473, 418 S.W.2d 660, 664 (1967)) (emphasis added).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)).

236. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)).

237. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)). The court's reliance on *Medlin*, which was decided prior to adoption of the Tennessee Rules of Civil Procedure, is questionable.

238. *Id.* (citing 1 RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965)).

239. 556 S.W.2d 82 (Tenn. 1977).

240. *Id.* at 83 (quoting complaint).

241. *Id.* (quoting complaint).

moved to dismiss for failure to state a claim. As a result, the supreme court affirmed the trial court's dismissal.

The court's opinion carefully defines the limits of its holding. After a partial survey of prior Tennessee cases, the court noted that mental and nervous illnesses are compensable in workers' compensation actions "when shown to be caused by an industrial, work-related accident."[242] Moreover, the court stated that it was "not inclined to limit recovery to cases involving physical, traumatic injury or to impose any other artificial limitation upon the coverage afforded by the compensation statutes."[243] Quite to the contrary, the court indicated its readiness in a proper case to permit recovery for mental or nervous disorder even if the cause is solely "a mental stimulus, such as fright, shock or even excessive, unexpected anxiety . . . ."[244] However, in order to fall within the scope of the workers' compensation statute, a plaintiff must prove he suffered an "injury . . . by accident,"[245] and this statutory requirement "still does not embrace every stress or strain of daily living or every undesirable experience encountered in carrying out the duties of a contract of employment. Workmen's compensation coverage is not as broad as general, comprehensive health and accident insurance."[246]

Giving plaintiff "the benefit of the most liberal interpretation of the compensation law,"[247] his "general and conclusory allegations"[248] attempted to set forth a claim "on the periphery of coverage provided by the statute."[249] When defendant challenged the sufficiency of plaintiff's complaint, "it was incumbent upon [plaintiff] to state with some specificity and clarity what sort of 'accidental injury' was being claimed."[250] Accordingly, the court held that the "conclusions and generalities"[251] set forth in plaintiff's complaint failed to state a claim for relief under the workers' compensation statute.

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242. *Id.* at 84.
243. *Id.*
244. *Id.*
245. TENN. CODE ANN. § 50-903 (1977).
246. 556 S.W.2d at 84.
247. *Id.*
248. *Id.* at 83.
249. *Id.* at 84.
250. *Id.*
251. *Id.*

The heart of the procedural question involved in both *Swallows* and *Jose* is the meaning to be ascribed to rule 8.01's requirement that the pleader set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[252] Nothing in the literal language of rule 8.01 requires the pleader to allege the "facts" constituting his "cause of action," which was typically required by the codes,[253] nor does the rule proscribe the use of "conclusions," which were typically considered forbidden by the courts construing the requirement of code pleading that the pleader allege the "facts constituting a cause of action."[254] Yet both *Swallows* and *Jose* condemn "conclusions," and *Swallows* requires the pleader to aver "facts" sufficient to show a cause of action. The mere use by the supreme court of obsolete nomenclature is not in itself harmful. "However," as Professors Wright and Miller point out with regard to the federal rules, "there always is the danger that the use of archaic terms . . . will tend to revive the very distinctions that the . . . rules repudiated."[255]

A partial explanation for the results in *Swallows* and *Jose* may lie in the fact that rule 8.01 does not simply require the pleader to set forth "a short and plain statement of the claim" but also requires that the statement show "the pleader is entitled to relief."[256] As Professor Millar observed in commenting on the identical language of federal rule 8(a)(2):

> If the provision had stopped with requiring "a short and plain statement of the claim," there would be little doubt that the [rule dispensed with any requirement that the pleader state all the essential elements of his claim]. But the addition of the participial clause "showing that the pleader is entitled to relief" is disturbing. A very fair argument could be made to the effect that the pleading would not show entitlement to relief if it omitted an essential element of what we have been accustomed to speak of as the cause of action, even though not necessary to conveying adequate notice of the claim, because in the absence of that element there could be no recovery.[257]

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252. TENN. R. CIV. P. 8.01.

253. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218 (1969).

254. *See id.*

255. *Id.* § 1218, at 141.

256. TENN. R. CIV. P. 8.01; *see* text accompanying note 252 *supra*.

257. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 192 (1952).

Based on their reading of a "host" of federal cases, Professors Wright and Miller state that:

> [The] cases [suggest] that the complaint, and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis of recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.[258]

A more convincing explanation of *Swallows* and *Jose* may lie in the types of claims being asserted. Although rule 8.01 on its face does not purport to establish special pleading requirements for certain kinds of cases, nonetheless the standard for successful pleading may be more stringent depending upon an unarticulated desire to discourage what is viewed as vexatious or simply unmeritorious litigation. Thus, in *Jose* the court stressed the fact that plaintiff's claim was "on the periphery of coverage provided by the statute."[259] In *Swallows* the court may have looked askance on the assertion of job-related claims for outrageous conduct and invasion of privacy, particularly by an emotionally disturbed employee.[260]

Whether it is appropriate to establish more stringent pleading requirements for certain kinds of claims is another matter. Nothing in rule 8.01 itself gives fair warning of special pleading requirements. Moreover, dismissal of a plaintiff's complaint followed by an appeal may only increase the duration and expense of litigation, and thereby frustrate the purpose of the rules, if plaintiff is permitted to amend after affirmance of the dismissal on appeal. On the other hand, if plaintiff is not permitted to

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258. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 120-23 (1969) (footnotes omitted).

259. 556 S.W.2d at 84.

260. Donaldson v. Donaldson, 557 S.W.2d 60 (Tenn. 1977), which has already been discussed in another context and which at base involved a dispute over support, see text accompanying notes 63-79 *supra*, also admits of an explanation similar to that given for *Swallows*; that is, the court may have thought it desirable at least in the context presented to discourage claims for "abuse of court process." 557 S.W.2d at 64.

amend after appeal, in short, if granting a rule 12.02(6) motion to dismiss in effect means plaintiff has no claim as opposed to meaning simply that the claim has not been adequately stated in the complaint, then at least in some circumstances "there is the possibility that plaintiff may not realize that more than his formal statement of the claim is being contested on a given Rule [12.02(6)] motion [to dismiss] and may not prepare . . . to defend the substantive merits of his claim."[261] If it is desirable to test the merits of plaintiff's claim in a preliminary motion, the proper procedural device is a motion under rule 56 for summary judgment. And if it is also desirable in a particular case to secure immediate appellate review of the trial court's ruling on the summary judgment motion, an appeal not otherwise available should be sought under the interlocutory appeals statute.[262]

In any event, the approach of the court to the pleading question in *Swallows* and *Jose* contrasts markedly with the approach of the court to the same basic question in *Ladd v. Roane Hosiery, Inc.*[263] and *Adams v. Carter County Memorial Hospital.*[264] In *Ladd* plaintiff brought an action against her employer and one of her supervisors, contending that the latter induced her employer to breach or to terminate her employment contract. On appeal plaintiff effectively abandoned her claims against her employer. With regard to plaintiff's claim against her supervisor, the state supreme court held that the trial court improperly granted defendant's motion for judgment on the pleadings.

When passing upon a motion predicated on the ground that the plaintiff had failed to state a claim upon which relief could have been granted, the court stated, "the facts pleaded and the allegations made must be viewed in the light most favorable to the plaintiff, with every doubt resolved in his behalf."[265] Quoting from the classic United States Supreme Court case of *Conley v. Gibson*,[266] the Tennessee Supreme Court also stated that a "complaint should be dismissed only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

261. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 615 (1969).

262. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

263. 556 S.W.2d 758 (Tenn. 1977).

264. 548 S.W.2d 307 (Tenn. 1977).

265. 556 S.W.2d at 759.

266. 355 U.S. 41 (1957).

which would entitle him to relief.' "[267] In *Ladd* plaintiff alleged that her supervisor " 'induced the corporation to terminate or breach the contract of employment between [her] and the corporation;' "[268] and that her supervisor " 'had neither reason, nor excuse [for doing so], and was actuated only through a spirit of vindictiveness and malice . . . .' "[269] These allegations, the court held, "are sufficient to set forth [an actionable] claim that [her supervisor] unlawfully and without justification procured the discharge of the plaintiff by [her employer]."[270] Furthermore, it was irrelevant that this theory may not have been the precise theory plaintiff intended to set forth in her complaint.

> [W]here, as here, the facts are sufficient to set forth a valid claim for relief under some theory of recovery, it is immaterial that this theory is not the one originally envisaged by the plaintiff. The complaint is still sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.[271]

Finally, the court rejected defendant's arguments that plaintiff was not entitled to recover because her employment was terminable at will and because defendant was her supervisor. "While her employment . . . may have been terminable at the will of [her employer] this does not absolve defendant . . . from liability if he wrongfully induced that termination."[272] While defendant may not be liable if he acted within the scope of his employment,

> at no point in her pleadings does the plaintiff admit that [her supervisor's] acts were within the scope of his duties, and the mere possibility that such a defense may be established at some point does not justify the dismissal of the plaintiff's claim at this stage of the proceedings.[273]

Thus, "in light of the liberal construction that must be given a complaint tested by a motion for judgment on the pleadings under [Tennessee Rule of Civil Procedure] 12.03,"[274] the su-

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267. 556 S.W.2d at 760 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted)).

268. *Id.* (quoting complaint).

269. *Id.* (quoting complaint).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

preme court reversed the trial court's dismissal of plaintiff's action against her supervisor.

In *Adams v. Carter County Memorial Hospital*[275] a widow brought a damage action for the wrongful death of her husband, who committed suicide while a patient at defendant hospital and while under the care and supervision of defendant physician. The fatal injuries were sustained when plaintiff's husband plunged down a staircase at the hospital. The trial court's dismissal of plaintiff's complaint for failure to state a claim upon which relief can be granted was summarily reversed by the supreme court. Rule 8 of the Tennessee Rules requires only a short and plain statement of the claim showing the pleader is entitled to relief along with a demand for relief. "The complaint," the court observed, "contained detailed averments of malpractice against each defendant and alleged that these breaches of duty proximately caused the death of their patient, the plaintiff's husband. It thus stated a cause of action under well settled rules of liability in such cases."[276] It was not necessary for plaintiff to refer expressly to the wrongful death statute because "[p]laintiff does not rely upon the violation of any statute as the basis of her cause of action; hence, Rule 8.05(1) . . . does not apply."[277] Noting that "neither the order of dismissal nor the motions to dismiss point out any alleged particular deficiency of the complaint,"[278] the court reiterated its conclusion that the allegations were sufficient.

Whatever the reason, the court seems to have been far more willing to construe the complaint in plaintiff's favor in *Ladd* and *Adams* than it was in *Swallows* and *Jose*. It would not have been difficult, for example, to label as mere "conclusions" plaintiff's assertions in *Ladd* that her supervisor " 'induced the corporation to terminate or breach the contract of employment between [her] and the corporation,' "[279] and that her supervisor " 'had neither reason, nor excuse [for doing so], and was actuated only

275. 548 S.W.2d 307 (Tenn. 1977).

276. *Id.* at 308.

277. *Id.* at 309. TENN. R. CIV. P. 8.05(1) provides: "The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified." The rule also requires "[t]he manner in which violation of any statute, ordinance or regulation is claimed" to be set forth. *Id.*

278. 548 S.W.2d at 309.

279. 556 S.W.2d at 760 (quoting Ladd's complaint).

through a spirit of vindictiveness and malice . . . .' "[280] The point being made here is not that the court should engage in the fruitless enterprise of attempting to distinguish between "facts" and "conclusions," but that in truth the detail required in the plaintiff's complaint does appear to vary from case to case.

b. Timeliness

Adams v. Carter County Memorial Hospital[281] also involved a question concerning the timeliness of plaintiff's action. The injuries from which plaintiff's husband died occurred on February 11, 1973, and plaintiff's complaint was filed on February 8, 1974. Process was served on defendant hospital the same day the action was commenced, but defendant physician was not served until August 14, 1974. He moved to quash and dismiss the action against him, arguing the action was not properly commenced because plaintiff did not "prosecute and continue the action"[282] as required by law; that, as a result, service was wholly ineffective; and that in the meantime the one-year statute of limitation[283] had run. The trial court granted the physician's motion, and the supreme court affirmed except with regard to the trial court's ruling that the action was barred by the statute of limitation.

Under rule 4.03 of the Tennessee Rules, the court noted, "the efficacy of this summons terminated upon the expiration of thirty days next following its issuance . . . ."[284] Though the Tennessee Rules contain no express provision dealing with the situation presented in which process is neither served nor returned within the thirty-day period,

> plaintiff cannot sit idly by when confronted with such a situation. We hold that when the summons is not returned at the end of thirty days following its issuance, the plaintiff must apply for and obtain issuance of new process within six months, or recommence the action within one year, of the end of said thirty days period in order to preserve the original commencement of the action as a bar to the running of a statute of limitations.[285]

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280. *Id.* (quoting Ladd's complaint).

281. 548 S.W.2d 307 (Tenn. 1977).

282. *Id.* at 308 (quoting a defendant's motion to quash the summons and to dismiss the action).

283. *See* TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

284. 548 S.W.2d at 309 (citing TENN. R. CIV. P. 4.03).

285. *Id.* (footnote omitted).

It followed that plaintiff could have applied for and obtained issuance of a new summons until September 10, 1974; but, since this was not done, the action was properly dismissed by the trial court.[286] However, it was error for the trial court to hold plaintiff's action barred by the one-year statute of limitation because, under the saving statute,[287] "[p]laintiff may timely recommence the action against defendant [physician] by filing a new complaint any time within one year of the entry of judgment of this Court affirming the order of dismissal of the trial court."[288]

The court's resolution in *Adams* of the problem of unserved and unreturned process is substantially in accord with the ill-fated 1975 proposed amendments to the Tennessee Rules of Civil Procedure.[289] The proposed amendment to rule 3 provides:

> [I]f the process is not served or not returned within 30 days from issuance, regardless of the reason, plaintiff, if he wishes to rely upon the original commencement as a bar to the running of a statute of limitations, must either prosecute and continue the action by applying for and obtaining issuance of new process from time to time, each new process to be obtained within six months from issuance of the previous one, or plaintiff must recommence the action within one year from issuance of the initial process not served or not returned within 30 days from issuance.

Similarly, rule 4.03 as amended would permit plaintiff to obtain a new summons not only, as provided by current rule 4.03, when any prior summons has been returned unserved but also "in the event that such prior summons has not been returned within 30 days after its issuance."[290] Presumably the holding in *Adams* effectively authorizes plaintiff to obtain a new summons as contemplated by the proposed amendment to rule 4.03. However, *Adams* differs from the proposed amendments to the Tennessee Rules in that the time for recommencing the action or obtaining new process is measured not, as under the proposed rule, from issuance of the original process, but thirty days following its issuance.[291] In addition, *Adams* goes beyond the proposed amend-

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286. *Id.* at 309-10.
287. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*
288. 548 S.W.2d at 310.
289. *See* text accompanying note 456 *infra.*
290. PROPOSED TENN. R. CIV. P. 4.03.
291. *See* text accompanying note 285 *supra.*

ments insofar as the court indicated that plaintiff there could recommence her action by filing a new complaint "any time within one year of the entry of judgment of *this Court* affirming the order of dismissal of the trial court."[292]

The court's tidying-up of this area of procedural law is welcomed, although it would seem even more convenient to permit plaintiff to obtain issuance of new process any time within one year from issuance of the initial process (or within one year following thirty days after issuance of initial process), thereby eliminating any need to recommence the action.[293] Moreover, if actual notice is not a precondition to rendition of a valid judgment,[294] then there would be no constitutional impediment to eliminating the current requirement of repetitious attempts to serve defendant as long as there were satisfactory evidence that there had been compliance with a procedure that is itself reasonably designed to afford notice. The requirements of *Adams* and the proposed amendments to the rules, therefore, may exceed the requirements of due process.

Finally, at least passing attention should be given to the question whether plaintiff in *Adams* would have been permitted to recommence her action against defendant physician if she had not appealed and if the only basis of dismissal involved the propriety and timeliness of the chosen method of initiating the action. Traditionally a judgment for the defendant bars another action only if judgment is rendered "on the merits."[295] In the hypothetical situation the trial court would not have passed on the substantive sufficiency of plaintiff's claim, but only upon the propriety and timeliness of the chosen method of initiating the action. Therefore, under traditional notions of res judicata, plaintiff would be free to recommence her action, at least in a jurisdiction with a limitation period that had not expired. However, the current version of the proposed Restatement (Second) of Judgments eliminates any requirement that a judgment in favor of the defendant be on the merits.[296] Subject to certain exceptions not

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292. 548 S.W.2d at 310 (emphasis added).

293. Apparently, however, some members of the bench and bar consider the current six-month provision of rule 3 as being too long a period for obtaining issuance of new process. *See* TENN. R. CIV. P. 3, Committee comment.

294. *See* text accompanying note 134 *supra*.

295. *See* RESTATEMENT OF JUDGMENTS §§ 45(b), 48 (1942).

296. RESTATEMENT (SECOND) OF JUDGMENTS §§ 45(b), 48 (Tent. Draft No. 1, 1973).

here relevant,[297] any "valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."[298] Rule 41.02(3) of the Tennessee Rules is substantially similar. It provides that, "[u]nless the court in its order for dismissal otherwise specifies," an involuntary dismissal "and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."[299] Unless the state supreme court is willing to construe the language of rule 41.02(3) concerning dismissals for lack of jurisdiction expansively or is willing to hold the rule is subservient to the saving statute (a holding that would be difficult to square with the statute under which the Tennessee Rules were drawn),[300] it would seem to follow that rule 41.02(3), literally applied, would bar plaintiff from recommencing her action. The desirability of such a result is certainly debatable, but until rule 41.02(3) is authoritatively construed to mean otherwise, an appeal in cases like that hypothesized seeking entry of a judgment without prejudice seems the only prudent path to follow.

A novel question concerning the Tennessee saving statute was resolved by the Court of Appeals for the Sixth Circuit in *Lee v. Crenshaw*.[301] Plaintiff originally filed a complaint on January 31, 1975, alleging medical malpractice on February 1, 1974, by a physician, a clinic, and a hospital. The action was commenced in state circuit court, and on the day the complaint was filed plaintiff's attorney informed personnel in the clerk's office that a voluntary dismissal[302] would be taken immediately. An affidavit submitted by a deputy clerk indicated that plaintiff's attorney also gave instructions not to issue a summons because of plaintiff's intent to take an immediate nonsuit. An affidavit submitted by plaintiff's attorney denied the giving of any such instructions. No summons was ever issued by the clerk, and plaintiff's attorney, who obtained an order of nonsuit without prejudice from a judge of the circuit court the same day the complaint was filed, was well aware that no summons had issued. When plaintiff recommenced

297. *Id.* § 48.1.
298. *Id.* § 48.
299. TENN. R. CIV. P. 41.02(3).
300. *See* TENN. CODE ANN. § 16-116 (Cum. Supp. 1978).
301. 562 F.2d 380 (6th Cir. 1977).
302. *See* TENN. R. CIV. P. 41.01.

his action in federal district court on January 28, 1976, defendants moved for summary judgment, arguing that the one-year statute of limitation governing personal injury actions[303] had run. The district court rejected plaintiff's contention that the action was still alive by virtue of the saving statute[304] and granted summary judgment in defendants' favor. The Sixth Circuit reversed.

The federal court of appeals reasoned that rule 3 of the Tennessee Rules clearly provides that an action is commenced for purposes of the statute of limitation when the complaint is filed[305] and does not require as a necessary component of commencement of the action that process be issued.[306] Accordingly, the court concluded that "failure to issue process [does] not by itself preclude the commencement of [plaintiff's] cause of action under Rule 3 of the Tennessee Rules of Civil Procedure."[307] However, that conclusion did not dispose of the matter because plaintiff did not rely on rule 3, but rather on the saving statute, which "predates Rule 3 and . . . was not repealed or modified by the promulgation of the Tennessee Rules of Civil Procedure."[308] Turning to cases decided under the saving statute,[309] the court concluded that "notice to the defendant and diligence by plaintiff's counsel are pertinent to the applicability of the saving statute."[310] The reason justifying the statute " 'is that the bringing of a suit, whether prosecuted to final judgment or not, gives the defendant notice that the plaintiff has a demand which he proposes to assert.' "[311] If the failure to issue process stemmed from no fault or lack of diligence by plaintiff's counsel, then the saving statute would apply.[312] But if plaintiff's counsel instructed that process

303. TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

304. *Id.* § 28-106 (1955); *see* note 144 *supra*.

305. TENN. R. CIV. P. 3 provides in part: "An action is commenced within the meaning of any statute of limitations upon . . . filing of a complaint, whether process be returned served or unserved . . . ."

306. *Id.* R. 4.01 provides in part: "Upon the filing of the complaint the clerk of the court wherein the complaint is filed shall forthwith issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process."

307. 562 F.2d at 382.

308. *Id.*

309. The Sixth Circuit relied principally upon Burns v. Peoples Tel. & Tel. Co., 161 Tenn. 382, 33 S.W.2d 76 (1930).

310. 562 F.2d at 382.

311. *Id.* (quoting Burns v. Peoples Tel. & Tel. Co., 161 Tenn. 382, 387, 33 S.W.2d 76, 78 (1930)).

312. 562 F.2d at 383.

not issue "in order to avoid giving notice to defendants of the cause of action, there would be no justification for invoking the saving statute."[313] Since there was a factual dispute regarding why the summons did not issue when plaintiff's complaint was originally filed, it followed that summary judgment was improperly granted and the case should be remanded for resolution of the factual dispute.

The court in *Lee* did not consider whether the tolling provision of rule 3 would have dictated the same result, since plaintiff did not raise the issue in the district court.[314] The saving statute differs from rule 3 in that the statute simply provides that if an action is timely "commenced" a plaintiff may recommence his action if the judgment is rendered on "any ground not concluding his right of action . . . ."[315] The tolling provision of rule 3, on the other hand, assumes that process will issue and service will be attempted as provided in rule 4.01.[316] This distinction seems more apparent than real, however, since the saving statute uses the word "commenced" as it was defined under prior statutory law. Under that law, "the suing out of a summons is the commencement of an action . . . ."[317] Thus, it would appear both the saving statute and the rule require that process be issued, although there is eminent good sense in the holding of *Lee* that the parties should not be penalized because of the inadvertent actions of the clerk of the trial court over whom the parties have no control.[318]

Moreover, it would be quite sensible to view the saving statute, as the Sixth Circuit apparently did in *Lee*, not as a tolling provision but as a statute of limitation designed to require prompt reassertion of claims by a plaintiff who, as contemplated by rule 41.02(1), diligently prosecuted his initial action but had judgment entered against him after expiration of the limitation period "upon any ground not concluding his right of action"[319]—language that can be construed as incorporating by

313. *Id.*

314. *Id.* at 382 n.2.

315. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*

316. *See* notes 305-06 *supra.*

317. Code of 1858, § 2754 (repealed by 1972 Tenn. Pub. Acts ch. 565, § 1).

318. *See* General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 214 (Tenn. 1977).

319. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*

reference the provisions of the Tennessee Rules.[320] So viewed, the saving statute would not be available in cases like *Lee* or in any other instance in which the plaintiff did not diligently prosecute his initial action but utilized the saving statute as a tolling provision to extend the time otherwise available under the applicable statute of limitation for commencing his action.

Because the Sixth Circuit decided *Lee* under the saving statute and not under rule 3, the opinion does not discuss the significance of the trial court's dismissal of plaintiff's action without prejudice. Since rule 41.01 provides that voluntary nonsuits are generally without prejudice,[321] the trial court's dismissal was consistent with the rule. However, it is at least arguable that unless an action is properly commenced the provisions of rule 41.01 are inapplicable. If so, the outcome of cases like *Lee* would be wholly unaffected by the trial court's dismissal without prejudice. In any event, *Lee* makes clear that an attorney who directs the clerk not to issue process does so at his peril.

c. Verification

The more limited purpose served by the pleadings under the Tennessee Rules—a matter touched upon previously[322]—is reflected in rule 11, which eliminates the former equity requirement that the pleadings be verified.[323] The pleadings must still be verified, however, "when otherwise specifically provided by rule or statute."[324] In *Blair v. Watts*[325] defendants contended that plaintiff's action was fatally defective because the complaint was not supported by affidavit as required by statute.[326] The state supreme court noted that the term "affidavit" at the time the Code

320. *See* TENN R. CIV. P. 41.

321. Tennessee rule 41.01 carves out exceptions for class actions and actions wherein a receiver has been appointed. *See id.* R. 23.05, 66. Rule 41.01(2) also provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or including the same claim."

322. *See* text accompanying notes 217-20 *supra*.

323. Under TENN. R. CIV. P. 11 pleadings are signed by an attorney of record or, if a party is not represented by an attorney, by the party.

324. *Id.*

325. 555 S.W.2d 709 (Tenn. 1977).

326. The statutory provision involved was TENN. CODE ANN. § 23-2001 (1955), which provides that mandamus may issue upon a petition or bill "supported by affidavit."

section was enacted was synonymous with "sworn petition."[327] The intent of the provision "is simply that the facts alleged . . . be supported by oath or affidavit."[328] Since both the original and amended complaint were sworn to by plaintiff, the court quite properly overruled defendants' assignment of error.

2. Responsive Pleading

The defendant's correct procedural response for raising a res judicata defense to the complaint was discussed in *Usrey v. Lewis*.[329] Defendants raised their res judicata objection in *Usrey* by way of a motion to dismiss, and plaintiffs responded with a motion to " 'strike, quash and dismiss' "[330] defendants' motion. The Tennessee Court of Appeals held:

> [R]es judicata in an *affirmative defense* which must be *plead* specially . . . . [T]he proper method to present the defense of res judicata is by a *pleading* (answer), and not by a motion. If, from affidavits or other evidence, the facts supporting the defense are made to appear uncontroverted, then a motion for summary judgment would be in order.[331]

The court then treated defendants' motion as an answer presenting the defense of res judicata and as a motion for summary judgment.[332] The court also stated that plaintiffs' motion to strike was an appropriate method under rule 12.06 to raise a question concerning the legal sufficiency of defendants' defense.[333]

The opinion in *Usrey* reflects a commendable willingness to consider the substance of defendants' res judicata defense despite noncompliance with what the court perceived to be the appropriate method for raising that defense. Moreover, the court's construction of the rules as requiring that a res judicata defense be pleaded in defendant's answer is certainly credible and parallels that given to Federal Rule of Civil Procedure 8(c) by several federal courts.[334] However, a number of other federal courts per-

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327. 555 S.W.2d at 711.
328. *Id.*
329. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).
330. *Id.* at 613.
331. *Id.* at 614.
332. *Id.*
333. *Id.*
334. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277 (1969).

mit all affirmative defenses to be raised by motion, often by converting a motion to dismiss or for judgment on the pleadings into a motion for summary judgment.[335] The results reached in these federal cases seem sound since they avoid the wastefulness inherent in requiring defendant to prepare an answer to a case that admits of a summary disposition.[336] It would, therefore, seem best not to construe *Usrey* as an impediment to a similar development in the Tennessee case law.

Also, the court in *Usrey* was quite correct in stating that a motion to strike is an appropriate mechanism to dispose of an insufficient defense.[337] Only rarely, however, will a defense be so obviously without merit as to permit the court to grant the motion without consideration of matters outside the pleadings. Typically, therefore, the appropriate mechanism to test the sufficiency of a defense is by way of a motion for partial summary adjudication, which can be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[338] "However," Professors Wright and Miller contend, "it is questionable whether this procedure will be worth the effort in many cases. As one [federal] court noted, the partial summary judgment will narrow, but not terminate the controversy between the parties, and thus smacks of 'polishing' the pleadings."[339]

3. Amendments

A peculiarly informative indication of the significance a given procedural system attaches to the pleadings is reflected in its attitude toward amendments. "At common law a litigant had very little freedom to amend his written pleadings other than to correct formal defects and remedy errors of oversight."[340] *Adams v. Carter County Memorial Hospital*[341] and, more graphically,

335. *Id.*

336. *Id.* § 1277, at 337.

337. TENN. R. CIV. P. 12.06 permits the trial court to "order stricken from any pleading any insufficient defense . . . ."

338. *See* TENN. R. CIV. P. 56.

339. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1381, at 804 (1969).

340. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1471, at 355 (1971).

341. 548 S.W.2d 307 (Tenn. 1977).

Farrar v. Farrar,[342] on the other hand, are illustrations of the increased freedom to amend sanctioned by the Tennessee Rules.

In *Adams* the state supreme court construed Tennessee rule 15.01 to mean exactly what it says: "[A] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served." Accordingly, the court found error in the trial court's denial of plaintiff's motion to amend his complaint since defendants had filed and served only motions to dismiss and under the rules "[a] motion is not . . . a responsive pleading."[343]

By contrast, *Farrar v. Farrar*[344] involved the distinguishable problem that arises if there is a variance between the pleadings and the proof. In *Farrar* both plaintiff-husband and defendant-wife sought a divorce, the former an absolute divorce and the latter a divorce from bed and board, on the ground of cruel and inhuman treatment. After repeated motions for a more definite statement,[345] defendant amended her counterclaim three times to set forth the details of an open and continuous relationship between plaintiff and a named woman. The amended pleadings, however, contained no specific charges of adultery. The supreme court's review of the testimony, particularly plaintiff's, convinced it that plaintiff engaged in a "persistent pattern of adulterous conduct."[346] The court then held that "proof of adultery is admissible in a divorce action charging cruel and inhuman treatment and may form the basis for a decree resting upon cruel and inhuman treatment."[347] While adultery was not specifically alleged, the court took note of legislation[348] attempting "to de-scandalize divorce proceedings"[349] and construed defendant's detailed allegations as impliedly charging adultery.[350] "Moreover, this was the major issue tried by the parties. Under these circumstances Rule

342. 553 S.W.2d 741 (Tenn. 1977).

343. 548 S.W.2d at 309; *see* TENN. R. CIV. P. 7.01. It is somewhat anomalous that if defendant chooses to incorporate a rule 12 defense in his answer, he no longer may amend as a matter of course more than 15 days after service of his answer. However, the admonition of rule 15.01 that leave to amend be freely given renders this anomaly without significant practical effect.

344. 553 S.W.2d 741 (Tenn. 1977).

345. *See* TENN. R. CIV. P. 12.05.

346. 553 S.W.2d at 744.

347. *Id.*

348. TENN. CODE ANN. § 36-805 (1977).

349. 553 S.W.2d at 744.

350. *Id.*

15.02 . . . comes into play and we may treat this issue as being 'tried by express or implied consent of the parties . . . as if they [*sic*] had been raised in the pleadings.' "[351] Perhaps it would have been "better practice"[352] for defendant to have moved to amend her counterclaim yet another time, but the court held that "the failure to do so does not preclude this Court from deciding the issues the parties tried in the Court below."[353] Having noted that the parties were "fully apprised in advance of the nature of the proof,"[354] the court concluded its discussion of the pleading issue by agreeing with the dissenting judge in the court of appeals that "[n]o useful purpose can be served by dismissing this case and requiring the [wife] to institute a new suit, alleging adultery and desertion and relitigating the issues anew."[355]

At first blush it is somewhat startling that the court of appeals reversed the trial court's award of a divorce to the wife, but "[u]nlike most legal contests a suit for divorce is not regarded as wholly in the hands of the two parties. The parties cannot consent to a divorce. It is not surprising then that [a] court examines with great care the process of proof."[356] This consideration, however, was not deemed to be significant by the supreme court because it could not find "the slightest suggestion"[357] that the evidence of adultery was the result of collusion or coercion. Moreover, the recent addition of irreconcilable differences as a ground for divorce in Tennessee[358] is reflective of changing societal attitudes concerning the circumstances in which divorce should be permitted and adds further support to the court's decision in *Farrar*.

B. Joinder of Claims and Parties

"In its simplest form, the paradigm of a lawsuit has a single plaintiff asserting a single cause of action against a single defen-

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351. *Id.* (quoting TENN. R. CIV. P. 15.02).

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* (quoting Drowota, J., dissenting in the court of appeals in an unreported opinion).

356. J. COUND, J. FRIEDENTHAL & A. MILLER, TEACHERS MANUAL FOR CIVIL PROCEDURE: CASES AND MATERIALS 92 (1970).

357. 553 S.W.2d at 744.

358. TENN. CODE ANN. § 36-801 (Cum. Supp. 1978).

dant."[359] As the complexity of society has increased and as more intricate disputes have been generated, however, procedural devices have emerged by which the scope of civil litigation has expanded by permitting the joinder of claims and parties.[360] This expansion in turn has given rise to novel procedural issues, one of which involves the question whether a plaintiff, by instituting his action, thereby waives a statute of limitation defense to a counterclaim asserted by a defendant after the limitation period on the counterclaim has run.

1. Counterclaims—Timeliness

In *Brown v. Hipshire*[361] plaintiffs commenced an action on July 28, 1976, for an alleged tort that occurred on August 27, 1975. Defendant was served with process on August 3, 1976, and answered, denying liability, on September 7, 1976. Thereafter on November 10, 1976, defendant moved to amend in order to assert an omitted counterclaim. This motion was granted, and defendant filed his counterclaim on December 10, 1976, alleging assault and battery. Plaintiffs asserted that the applicable one-year statute of limitation[362] barred defendant's counterclaim and the trial court sustained plaintiffs' plea. On an interlocutory appeal the state supreme court affirmed.

In its 1969 decision in *Lovejoy v. Ahearn*,[363] the Tennessee Supreme Court held that counterclaims sounding in tort must be asserted within the applicable limitation period. Defendant in *Brown* conceded that under *Lovejoy* his counterclaim was untimely, but sought to have the court overrule that decision. The court refused to do so, reasoning that "[t]he policy undergirding limitation of actions is legislative policy, not judicial policy."[364] Based upon this reasoning, the court further stated: "[I]t is not the prerogative of the courts to create an exception by grafting upon the statute a waiver or a tolling provision for the benefit of counterclaimants in tort actions."[365] The court recognized that in

359. J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 502 (2d ed. 1974).

360. *E.g.*, TENN. R. CIV. P. 13-14, 18-20, 22-24.

361. 553 S.W.2d 570 (Tenn. 1977).

362. TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

363. 223 Tenn. 562, 448 S.W.2d 420 (1969).

364. 553 S.W.2d at 571.

365. *Id.* at 572.

another line of cases it has held that the statute of limitation does not bar a defendant's plea of set-off[366] and that,

> while originally a purely defensive plea [set-off] has been expanded, so that, admittedly, there are some cases where a defendant in a contract action asserts as a set-off a claim that could also be the subject of an independent action. But, in our opinion, it does not follow that this occasional similarity between a set-off in a contract action and a counterclaim in a tort action requires tolling of the limitation period for a tort counterclaim that is in no circumstances a defensive plea. The courts, in allowing all defensive pleas available to defendants, are not grafting exceptions upon statutes of limitation governing the commencement of independent actions.[367]

Finally, the court noted that at the time defendant was served with process the limitation period had not run on his counterclaim, and that he did not even seek leave to file his omitted counterclaim until over two months after he answered and without any factual assertion that his failure to include the counterclaim in his answer was the product of oversight, inadvertence or excusable neglect "as required by [Tennessee Rule of Civil Procedure] 13.06."[368] Accordingly, the court thought it doubtful "that any jurisdiction would extend the lifeline to [a defendant], who has so negligently responded to the stimulus of the statute of limitations."[369]

The holding of the earlier case of *Lovejoy v. Ahearn*[370] adhered to in *Brown* has been more extensively criticized in an earlier article.[371] The essential point made there is that none of the purposes served by statutes of limitation are frustrated by permitting adjudication of counterclaims that arise out of the transaction or occurrence sued upon by plaintiff.

> Generally speaking, statutes of limitation seek to provide repose by establishing a specified time beyond which an individual may not be sued for his past misdeeds, and to prevent the assertion of claims which may be stale in terms of availability

366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 573.
370. 223 Tenn. 562, 448 S.W.2d 420 (1969).
371. *See* Sobieski, *Counterclaims and Statutes of Limitations: A Critical Commentary on Present Tennessee Law*, 42 TENN. L. REV. 291 (1975).

> of witnesses and other relevant evidence. By bringing his action, however, plaintiff has made it abundantly clear that he does not desire to lay to rest the transaction or occurrence upon which his claim is founded. Adjudication of a claim of defendant based upon the same transaction or occurrence would not entail inquiry into wholly unrelated matters which plaintiff justifiably believed were beyond reawakening. Similarly, if a transaction or occurrence is not so stale in terms of the availability of evidence as to prevent litigation of plaintiff's claim, it would seem to follow that the evidence would be equally available for purposes of adjudicating defendant's claim arising out of the same transaction or occurrence.[372]

Whether for these reasons or others, the holding in *Lovejoy*, confirmed in *Brown*, was recently set aside by legislation.[373]

Still, it seems appropriate to express some dissatisfaction with the court's approach to the resolution of the question presented in *Brown*. To say, as the court did, that the policy underlying statutes of limitation is legislative and not judicial provides no answer to the question whether a defendant should be permitted to assert a counterclaim after the limitation period has expired. That question can be answered only by considering the policies that statutes of limitation seek to further. Until that is done it is hardly convincing to contend, as the *Brown* court did, that "it is not the prerogative of the courts to create an exception . . . [to] the statute"[374] or that "it is doubtful that any jurisdiction would extend the lifeline to [a defendant], who has so negligently responded to the stimulus of the statute of limitations."[375] Similarly, the court's reference to Tennessee rule 13.06 is somewhat mystifying since that provision is not designed to breathe new life into a time-barred claim, but instead to provide an escape route from the barring effect of the failure to assert a compulsory counterclaim.[376] Moreover, tort claims are expressly exempted from the compulsory counterclaim rule,[377] thus rendering

372. *Id.* at 293-94.

373. 1978 Tenn. Pub. Acts ch. 758, §§ 1-2.

374. 553 S.W.2d at 572.

375. *Id.* at 573.

376. TENN. R. CIV. P. 13.06 provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

377. TENN. R. CIV. P. 13.01.

rule 13.06 largely irrelevant. All of which simply says that the fundamental weakness of *Brown* was its failure to ask why.

2. Impleader

Another procedural mechanism, besides counterclaims, with which a defending party can expand the scope of civil litigation is impleader, which permits a defending party, as a third-party plaintiff, to "cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or a part of the plaintiff's claim against him."[378] In *Velsicol Chemical Corp. v. Rowe*[379] the Tennessee Supreme Court considered the availability of rule 14 on impleader in a nuisance action seeking damages. The original plaintiffs in *Velsicol*, residents and homeowners in the Alton Park area of Chattanooga, brought their damage action against Velsicol Chemical Corporation, alleging that Velsicol's chemical manufacturing plant in Alton Park emitted pollutants that contaminated the air and water, and constituted both a nuisance and a trespass by depositing identifiable pollutants on plaintiffs' properties. Plaintiffs also alleged Velsicol acted in intentional disregard of the law and previously-issued injunctions, entitling plaintiffs to punitive damages. Velsicol answered, denying liability, and filed third-party complaints against five additional defendants, contending that each of these defendants operated plants in Alton Park that emitted pollutants, thus rendering them liable for "whatever amount of recovery is made by said plaintiffs."[380] The trial court granted the third-party defendants' motions to dismiss on the ground that the third-party complaint failed to state a claim for relief since the original defendant and third-party defendants were not joint tortfeasors, and thus the original defendant was not entitled either to contribution or indemnity. On an appeal from the order of dismissal, the state supreme court reversed.

Most of the opinion of the court is devoted to the substantive question whether Velsicol was entitled to either indemnity or contribution.[381] In language reminiscent of *Swallows* and *Jose*[382] the court concluded that "the third-party plaintiff has not alleged

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378. *Id.* R. 14.01.
379. 543 S.W.2d 337 (Tenn. 1976).
380. *Id.* at 338.
381. *Id.* at 338-43.
382. *See* text accompanying notes 221-51 *supra*.

facts sufficient to give rise to a possible right of indemnity against the third-party defendants."[383] Contribution, however, was another matter. After an extensive discussion of the law of Tennessee and elsewhere, the court held that parties can be jointly and severally liable "when an indivisible injury has been caused by the concurrent, but independent, wrongful acts or omissions of two or more wrongdoers, whether the case be one of negligence or nuisance."[384] This rule is subject to the statutory exception that "one who intentionally causes or contributes to an injury has no right of contribution."[385]

Having settled upon the governing substantive law, the procedural issues involved in *Velsicol* presented little difficulty. Rule 14, the court stated, authorizes "a third-party complaint based upon a claim of one tortfeasor for indemnity or contribution from other alleged 'joint tortfeasors.' "[386] Moreover, the "may be liable" language of rule 14[387] means that the "allegations of the third-party complaint need not show that recovery is a certainty; the complaint should be allowed to stand if, under some reasonable construction of the facts which might be advanced at trial, recovery would be possible."[388] Nor was the third-party complaint premature. As noted by Professor Moore, whom the court quoted approvingly:[389]

> The fact that contribution may not actually be obtained until the original defendant has been cast in judgment and has paid does not prevent impleader; the impleader judgment may be so fashioned as to protect the rights of the other tort-feasors, so that defendant's judgment over against them may not be enforced until the defendant has paid plaintiff's judgment or more than his proportionate share, whichever the law may require.[390]

Accordingly, the supreme court reversed the trial court's judgment dismissing the third-party action and remanded for further proceedings.

The opinion in *Velsicol* does not expressly indicate whether

383. 543 S.W.2d at 339.
384. *Id.* at 343.
385. *Id.* at 343 n.4; *see* TENN. CODE ANN. § 23-3102(c) (Cum. Supp. 1978).
386. 543 S.W.2d at 338.
387. *See* text accompanying note 378 *supra*.
388. 543 S.W.2d at 343.
389. *Id.* at 343-44.
390. 3 MOORE'S FEDERAL PRACTICE ¶ 14.11, at 322-23 (2d ed. 1974).

intent within the meaning of the contribution statute is synonymous with the intent required to support an award of punitive damages. Nor is the opinion entirely clear as to whether damages are to be apportioned pro rata as provided by statute[391] or according to the extent to which each defendant caused the harm for which plaintiffs seek compensation.[392] For present purposes, however, it is sufficient to note that the impleader issue involved in *Velsicol* probably would be unaffected, regardless of how these matters are resolved, since, at the time the third-party complaint is filed, recovery is reasonably possible.[393]

3. Need to Make the Attorney General a Party

Generally speaking, the joinder of parties is permissive, not mandatory.[394] *Paty v. McDaniel*,[395] however, is a reminder of the attorney general's right to be heard in certain types of litigation. *Paty*, which ultimately reached the United States Supreme Court,[396] involved the question of whether the Tennessee constitutional provision rendering ministers of the gospel and priests of all denominations ineligible for a seat in the General Assembly[397] violates the Federal Constitution. A candidate for the 1977 constitutional convention brought an action to have a Baptist minister declared ineligible to run for and serve as a delegate to the constitutional convention, the qualifications to serve as a delegate to the constitutional convention being the same as those for membership in the House of Representatives.[398] In his answer, defendant alleged that the Tennessee constitutional prohibition on his service as a delegate violated the United State Constitution. Under the Tennessee Code, the attorney general in a declaratory judgment action is entitled to be served and to be heard if a

391. *See* TENN. CODE ANN. §§ 23-3102(b), -3103 (Cum. Supp. 1978).

392. At one point in its opinion the court refers to Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952), which, the court stated, permits a defendant to "reduce his liability by showing the amount of damage caused by his acts only, or the amount that was caused by other defendants." 543 S.W.2d at 342. Later, the supreme court stated that it "adopt[s] the rule of *Landers*." *Id.* at 343.

393. *See* text accompanying note 388 *supra*.

394. *See, e.g.*, TENN. R. CIV. P. 20. *But see id.* R. 19.

395. 547 S.W.2d 897 (Tenn. 1977).

396. McDaniel v. Paty, 435 U.S. 618 (1978).

397. TENN. CONST. art. 9, § 1.

398. 1976 Tenn. Pub. Acts ch. 848, § 4.

statute, ordinance, or franchise of statewide effect is alleged to be unconstitutional[399] as defendant alleged in *Paty*. A similar but even more expansive provision is contained in the Tennessee Rules of Civil Procedure.[400] Accordingly, on the first appeal to the state supreme court, the case was remanded to the trial court to permit the attorney general to be made a party.

C. *Disposition Without a Full Trial*

Lawsuits are often disposed of without a full trial. The essential purpose of a trial is to present evidence on contested issues of fact. Issues of law, on the other hand, can be resolved without a trial; all that is needed is a means of bringing the legal contentions to the court's attention. One such mechanism is a motion for summary judgment, which may be granted, in the language of Tennessee rule 56.03, only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

The availability of summary judgment in medical malpractice actions was the central focus of the state supreme court's attention in *Bowman v. Henard*.[401] In response to plaintiff's allegations of professional negligence in the death of her husband, defendants moved for summary judgment. Their motions were supported by their own affidavits as well as the affidavits of other practitioners of medicine and surgery and other radiologists. All of the affidavits asserted essentially that defendants acted in conformity with the standard of care required by law. Plaintiff responded with an affidavit of one of her attorneys who stated that based on his experience "a case of negligence can be made out . . . [and that] based upon the facts . . . a jury will likely conclude the defendants were guilty of negligence."[402] The trial court granted defendants' motions for summary judgment; the court of appeals affirmed, and on certiorari the supreme court also affirmed.

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399. TENN. CODE ANN. § 23-1107 (1955).

400. TENN. R. CIV. P. 24.04 provides:

When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any action to which the state or an officer or agency is not a party, the court shall require that notice be given the attorney general, specifying the pertinent statute, rule or regulation.

401. 547 S.W.2d 527 (Tenn. 1977).

402. *Id.* at 529.

The purpose of summary judgment, the court reasoned, is " 'to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no dispute regarding the material facts.' "[403] On the other hand, summary judgment is not designed to resolve disputed questions of fact or "to force a party to try his case on affidavits with no opportunity to cross-examine witnesses."[404] As a general rule, therefore, summary judgment is not appropriate in negligence actions because, as noted by two distinguished commentators cited by the court, "[j]udge and jury each have a specialized function in negligence actions and particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation."[405] Moreover, summary judgment is particularly inappropriate in medical malpractice actions because of "the natural tendency of [defendants' professional] colleagues to be good Samaritans and come to their rescue in a time of distress."[406] In addition, the court conceded that it is also generally true that, " '[b]ecause opinion testimony always is subject to evaluation by the fact finder,' "[407] expert opinion testimony is " 'not an appropriate basis for summary judgment.' "[408]

None of these considerations, however, rendered summary judgment inappropriate in *Bowman*. Unlike most negligence actions, a medical malpractice action requires expert testimony unless the alleged malpractice is within the common knowledge of a layman.[409] Because the deceased died of " 'cardio-renal failure,' following 'an exploratory operation' revealing 'a mass in the pelvis, probably a ruptured Mechel's Diverticulum,' "[410] the court concluded, quite safely it seems, that these are not matters within the common knowledge of laymen but require expert testimony.[411] Accordingly, this case fell within an exception to the

403. *Id.* (quoting Evco Corp. v. Ross, 528 S.W.2d 20, 24-25 (Tenn. 1975)).

404. *Id.* at 530.

405. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2729, at 560 (1973), *cited in* 547 S.W.2d at 530.

406. 547 S.W.2d at 530.

407. *Id.* (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 690-92 (1973)).

408. *Id.* (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 690-92 (1973)).

409. *Id.* at 530-31.

410. *Id.* at 531.

411. *Id.*

rule disallowing summary judgment in most negligence actions: " '[I]f the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert, summary judgment may be proper.' "[412] Here, the only affidavit submitted by plaintiff was from one of her attorneys, who simply was not a qualified expert on matters of medical malpractice.[413] Plaintiff, therefore, failed to comply with Tennessee rule 56.05, which provides that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.[414]

Based on these considerations, the court held:

> [I]n those malpractice actions wherein expert medical testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise. In those cases wherein the acts are [*sic*] complained of are within the ken of the common layman, the affidavit [*sic*] of medical experts may be considered along with all other proof, but are not conclusive.[415]

The scope of the holding in *Bowman* is obviously intended to be quite narrow, and the court's opinion as well as rule 56 itself seem to support the following generalizations. In malpractice actions in which expert testimony is not required, summary judgment is rarely appropriate since usually there will be disputed questions of fact or disputes concerning application of the governing legal standard to a given fact situation. In malpractice actions in which expert testimony is required and expert evidence is presented by the plaintiff in support of his position, summary judgment is appropriate only if the defendant has an ironclad defense.

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412. *Id.* at 530 (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 692-94 (1973)).

413. *Id.* at 531.

414. TENN. R. CIV. P. 56.05; *see* 547 S.W.2d at 531.

415. 547 S.W.2d at 531.

Even if the plaintiff offers no contrary expert proof, summary judgment may be denied on the ground that the plaintiff should be given additional time to obtain the necessary evidence.[416] Only if the plaintiff offers no expert proof as required and is not deserving of additional time to obtain it, is summary judgment appropriate, at least if the defendant's motion is supported by expert proof of persons not parties to the litigation.

The appealability of a denial of summary judgment was the dispositive issue, or at least the supreme court so held, in *Williamson County Broadcasting Co. v. Williamson County Board of Education*.[417] The underlying dispute involved the applicability of the Tennessee Open-Meeting Act[418] to the Williamson County Board of Education, defendant board and its members asserting that the meetings involved were informal assemblages not covered by the Act. Plaintiffs, insisting that the meetings were covered, moved for summary judgment, supported by depositions. After a hearing on the motion, the chancellor held that there were no genuine issues of material fact but decided the questions of law adversely to plaintiffs. The motion for summary judgment was therefore denied. The chancellor also concluded his findings of fact and conclusions of law with the statement: " 'If plaintiffs elect to *stand upon their motion* for summary judgment, as indicated by plaintiffs' counsel in the course of argument, the complaint in this case will be dismissed at plaintiffs' cost.' "[419] Shortly thereafter defendants moved for summary judgment and plaintiffs moved to amend the findings. The chancellor never expressly acted on defendants' summary judgment motion but, after overruling plaintiffs' motion to amend, entered a decree dismissing the action. The court of appeals considered an ensuing appeal on the merits, but the Tennessee Supreme Court held that the case "is simply not ripe for appellate review."[420]

Had the chancellor sustained defendants' motion for summary judgment, there would have been a final judgment.[421] However, the chancellor only denied plaintiffs' motion for summary

416. *See* TENN. R. CIV. P. 56.06.

417. 549 S.W.2d 371 (Tenn. 1977).

418. TENN. CODE ANN. §§ 8-4401 to 4406 (Cum. Supp. 1978).

419. 549 S.W.2d at 372 (quoting the chancellor's findings of fact and conclusions of law) (emphasis added by the supreme court).

420. *Id.*

421. *Id.*

judgment. "When a plaintiff's motion for summary judgment has been overruled, he has simply lost a preliminary skirmish and must proceed to trial."[422] If the plaintiff " 'stands' on his unsuccessful motion for summary judgment, the proper procedure is for the trial judge to dismiss for want of prosecution."[423] Since appeals generally lie only from final judgments and since overruling a motion for summary judgment is an interlocutory ruling, an appeal as of right did not lie.[424] The supreme court recognized that denial of summary judgment might be appealable by permission under the interlocutory appeals statute,[425] but, on the facts presented, that statute "was neither pursued nor pursuable . . . ."[426] Accordingly, the court reversed and remanded with instructions that the chancellor rule on defendants' summary judgment motion or direct plaintiffs to prosecute their action. The court then concluded its opinion with a perplexing statement:

> In the event, this action is fully and finally terminated on defendants' motion for a summary judgment, the additional record thus made may be certified to the Court of Appeals for such action as it may deem appropriate, and that Court may then forward the record to us for consideration on the merits. If terminated after a trial on the merits the usual procedure on appellate review shall govern.[427]

Nothing in Tennessee rule 56 specifically discusses the power of the trial court to grant summary judgment in favor of the nonmoving party. Federal rule 56 is equally silent:

> A few [federal] courts, expressing a reluctance to enter a judgment in the absence of a motion requesting the court to do so, have refrained from disposing of the original motion in order to allow a cross-motion to be made. However, the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56.[428]

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422. *Id.*
423. *Id.* at 373.
424. *Id.*
425. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).
426. 549 S.W.2d at 373.
427. *Id.*
428. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720, at 467-68 (1973).

Professors Wright and Miller contend:

> The practice of allowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate. It is in keeping with the objective of Rule 56 to expedite the disposition of cases and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant the relief to which a party is entitled "even if the party has not demanded such relief in his pleadings." Indeed, in 1955 the Advisory Committee proposed an amendment to Rule 56(c), which was not adopted, codifying the power of the court to grant summary judgment without waiting for a cross-motion and some states have provisions to that effect in their summary judgment rules.[429]

If the state supreme court was unwilling to recognize the power of a trial court to enter summary judgment in favor of the nonmoving party—an unwillingness that might be justifiable, at least in some circumstances[430]—it would have been helpful if the court had explained why the trial court's decree dismissing the action was not construed as a grant of defendants' summary judgment motion. Certainly the chancellor's admonition in his findings and conclusions put plaintiffs on notice that judgment would be entered against them unless they demonstrated there were genuine issues of fact and that defendants were not entitled to judgment as a matter of law. Perhaps the key to the decision in *Williamson County* lies in the court's observation, tucked away in its rendition of the facts, that plaintiffs' motion to amend "shows conclusively that there were unresolved and genuine issues of material facts."[431] If so, reversal was appropriate not because the case was unappealable but because the standard for granting summary judgment was not met. Moreover, reversal on the ground that summary judgment is inappropriate avoids the wastefulness that otherwise ensues if the chancellor subsequently, but erroneously, grants defendants' summary judgment motion.

Reference has already been made to the perplexing last paragraph of the court's opinion in which the court stated that if defendants' motion for summary judgment is granted, the additional record may be certified to the court of appeals for whatever

429. *Id.* § 2720, at 470 (footnotes omitted).

430. *Id.* § 2720, at 471.

431. 549 S.W.2d at 372.

action it deems appropriate, "and that Court may then forward the record to us for consideration on the merits. If terminated after a trial on the merits the usual procedure on appellate review shall govern."[432] The paragraph is perplexing because, while the law in other jurisdictions authorizes the highest court to review cases decided or pending in the intermediate appellate court upon certification of that court or on the highest court's own motion,[433] no comparable procedure is expressly authorized in Tennessee. Instead, existing law places the initiative for seeking review by the supreme court in the hands of the parties.[434] To be sure, cases appealed to the wrong appellate court may be transferred to the proper court,[435] but, as the supreme court itself noted in *Bowman v. Henard*,[436] "where a motion for summary judgment is supported by 'evidentiary matters, such as depositions, affidavits, or exhibits,' the appeal is to the Court of Appeals."[437] According to the supreme court's statement of the facts in *Williamson County*, defendants' summary judgment motion was supported by depositions,[438] thus rendering the court of appeals, under the law then in effect, the proper court to which to appeal.[439] Perhaps the supreme court simply wanted to ensure compliance with its disposition of the case and desired to relieve the parties of the burden of preparing further petitions for certiorari and briefs in case of noncompliance on remand. Perhaps it had some other good reason in mind for employing the procedure outlined in its concluding statement, but for now that statement remains somewhat of a mystery.

Only two published opinions of the court of appeals involved summary judgment. One of them, *Small World, Inc. v. Industrial Development Board*,[440] does not meaningfully elaborate upon the procedural law of summary judgment and will not therefore be

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432. *Id.* at 373. *See also* 16 C. WRIGHT, A. MILLER, F. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937 (1977).

433. *E.g.*, COLO. APP. R. 50(b); MASS. APP. R. 11(a); N.M. STAT. ANN. § 16-7-14(c) (1953); N.C. R. APP. P. 15.

434. *See* TENN. CODE ANN. §§ 16-452, 27-819 (Cum. Supp. 1978).

435. *See id.* §§ 16-409, -450.

436. 547 S.W.2d 527 (Tenn. 1977).

437. *Id.* at 528 n.1 (quoting Allstate Ins. Co. v. Hartford Accident & Indem. Co., 483 S.W.2d 719, 720 (Tenn. 1977)) (emphasis omitted).

438. 549 S.W.2d at 372.

439. *But see* text accompanying notes 598-600 *infra*.

440. 553 S.W.2d 596 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

discussed. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[441] however, is deserving of discussion.

Merrill Lynch obtained a judgment in federal district court against Lambert and, in order to satisfy its judgment, had garnishments served on Cas and Virginia Walker to reach any property in the possession of the Walkers belonging to Lambert. About a year before entry of the federal judgment, the Walkers and Lambert had entered a written agreement, the terms of which required the Walkers to pay Lambert royalties for the use of a rock quarry. As a result of the garnishment the Walkers paid the royalties due Lambert to Merrill Lynch.

The crux of the substantive law issue raised in *Union Livestock* stemmed from the fact that prior to levy of the garnishment Merrill Lynch had knowledge that Lambert assigned his royalties to Union Livestock Yards, though the assignment had not been recorded. The Walkers, on the other hand, "had no notice or knowledge of the assignment of these royalties by Lambert to [Union Livestock Yards]."[442] Union Livestock commenced an action against Merrill Lynch and the Walkers alleging that as a result of the assignment it had priority over Merrill Lynch. The chancellor granted defendants' motions for summary judgment and the court of appeals affirmed.

As one of its grounds for reversal, Union Livestock contended that the chancellor erred "in accepting and considering on the day of the hearing of motions for summary judgment [Merrill Lynch's] sole affidavit in support of their motions, as the affidavit was not filed together with the motions for thirty (30) days before time for a hearing."[443] The motion for summary judgment itself had been filed more than thirty days prior to the hearing on the motion, but the affidavit in support of the motion was filed the day of the hearing. In support of its argument Union Livestock relied on that portion of Tennessee rule 6.04(2) requiring affidavits to be served with the motion,[444] and on the decision of the Tennessee Supreme Court in *Craven v. Lawson*.[445]

In *Craven* plaintiff settled his case against one of two defen-

441. 552 S.W.2d 392 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

442. *Id.* at 393.

443. *Id.*

444. TENN. R. CIV. P. 6.04(2) provides in part: "When a motion is supported by affidavit, the affidavit shall be served with the motion . . . ."

445. 534 S.W.2d 653 (Tenn. 1976).

dants a few days before trial was to begin. On the day of trial the other defendant moved to amend his answer and for summary judgment on the ground that the release extinguished his derivative or vicarious liability. Plaintiff in turn moved to amend his complaint to allege other independent acts of negligence, and also moved to vacate summary judgment that had been granted the same day defendant's motion was filed and presented to the trial court. Vacation was urged on the ground that the motion itself was not filed thirty days prior to the hearing on the motion as required by Tennessee rule 56.03.[446] The supreme court held that the thirty-day period prescribed by rule 56.03 "is mandatory and not discretionary,"[447] but went on to state:

> In this case the facts as pleaded bearing on the issue made on defendant's summary judgment motion are undisputed and the question presented is one of law only. In the interest of the orderly and expeditious disposition of litigation and to serve the manifest interest of the parties in this case we must finally decide that legal issue on this appeal, the effect of which is to render harmless the error of the trial judge. However, it should be apparent that where there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a thirty (30) day interval following the filing of the motion, it will be necessary to remand the case to cure such error.[448]

Relying on this portion of the opinion in *Craven*, the court of appeals in *Union Livestock* held that, while the party moving for summary judgment is required to file supporting affidavits with the motion, on the facts presented this error was harmless.

> The purpose of the affidavit filed on the date of the hearing was to affirm that the Walkers had no knowledge or notice of the assignment of these royalties from Lambert to [Union Livestock] prior to the service of the garnishment on the Walkers. [Union Livestock] makes no claim it has been prejudiced by this late affidavit or has been denied in any way an opportunity

446. TENN. R. CIV. P. 56.03 provides in part: "The motion [for summary judgment] shall be served at least thirty (30) days before the time fixed for the hearing."

447. 534 S.W.2d at 655.

448. *Id.*

> to counter same. To reverse on this assignment would serve the interest of neither party and in fact impede the disposition of the litigation for no purpose.[449]

On the merits of the substantive law question the court held that Merrill Lynch had gained priority by serving its garnishment prior to the time Union Livestock perfected its assignment by notifying the Walkers.[450] The court concluded its opinion by rejecting Union Livestock's argument that a question of fact existed as to whether the assignment by Lambert was intended as a security instrument. That question would be relevant only if the assignment were governed by the Commercial Code, but the Code, the court held, is inapplicable to the kind of payments involved in *Union Livestock*.[451] Accordingly, the judgment of the trial court was affirmed.

The thirty-day period prescribed in rule 56.03 for serving a motion for summary judgment, along with the requirement of rule 6.04(2) that affidavits be served with the motion, is designed to afford the party opposing the motion ample time to prepare himself to demonstrate that summary judgment should not be granted. The period is substantially longer than the five-day period prescribed in rule 6.04(1) for the service of other motions because of the drastic consequence to the opposing party of the grant of summary judgment and because of the difficulties often encountered in adequately opposing such a motion.[452] On the facts presented in *Union Livestock* plaintiff was given the full time required by the rules to ascertain the state of the law since the motion itself was filed thirty days prior to the hearing. On the other hand, filing the affidavit on the day of the hearing deprived plaintiff of a meaningful opportunity to inquire into the accuracy of its factual assertion that the Walkers had no knowledge or notice of the assignment by Lambert. In all probability, however, plaintiff could have readily come forth with the evidence if it had given notice to the Walkers of Lambert's assignment of his royalty payments. The court of appeals, therefore, was probably correct in holding the assigned error harmless; still, great caution needs to be exercised lest summary judgment become a mecha-

449. 552 S.W.2d at 394.

450. *Id.* at 397.

451. *Id.*

452. *See also* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2719, at 449-52 (1973).

nism to deprive the nonmoving party of his right to a trial of disputed questions of fact.

D. Obtaining Information: Discovery

In most modern procedural systems, procedural rules are designed in a way to ensure that lawsuits will be disposed of on their merits.[453] "Obviously, for this to occur, the merits of the case must be made known to the court. Since pleadings are not required to do this and motions are not able to do it, the work of uncovering the merits of a claim or defense has to be done by other tools."[454] The mechanism used to serve this function is pretrial discovery.[455]

Somewhat paradoxically, the most notable development during the survey period concerning discovery may be what did not happen: the proposed amendments to the Tennessee discovery rules were not even submitted to the General Assembly for its approval. Given the fact that the Advisory Committee on Civil Rules has recommended further amendments to the federal discovery rules,[456] it may be some time before a set of proposed amendments to the Tennessee Rules is again submitted for legislative approval.

On the more positive side, there were two additions to the Tennessee Code related to discovery. One of the additions provides that nonresident motorists who are served with process pursuant to the nonresident motorist statute are required to appear in the county in which the action is pending to give pretrial discovery depositions.[457] No sanction is specified in the statute for noncompliance; presumably, the sanctions available are those specified in Tennessee Rule of Civil Procedure 37.[458]

The other addition to the Code involves the use of subpoenas

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453. *See, e.g.*, TENN. R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy and inexpensive determination of every action."); *id.* R. 8.06 ("All pleadings shall be so construed as to do substantial justice.").

454. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 756.

455. *See* TENN. R. CIV. P. 26-37.

456. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-36 (Mar. 1978).

457. TENN. CODE ANN. § 20-224 (Cum. Supp. 1978).

458. *See* TENN. R. CIV. P. 37.02, .04.

duces tecum for hospital records,[459] whether the subpoena is issued for discovery, trial, or other purposes.[460] Under this addition to the Code, if a subpoena is served on the custodian of the records of any hospital "in an action or proceeding in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen . . .,"[461] the custodian within five days after service may file, either in person or by certified or registered mail, a "true and correct" copy of all records described in the subpoena.[462] Parties utilizing this addition to the Code must "furnish the adverse party or his attorney a copy of the subpoena duces tecum not less than ten (10) days prior to the date set for trial of the matter for which the records may be introduced."[463] Further sections specify the procedure to be followed in sealing, identifying, and mailing the records[464] as well as the procedure for opening of the sealed envelopes.[465] The records must be accompanied by an affidavit of the custodian attesting to their authenticity and other matters rendering them admissible as an exception to the hearsay rule.[466] "The copy of the record shall be admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit."[467] Similarly, "[t]he affidavit shall be admissible in evidence and the matters stated therein shall be presumed true in the absence of a preponderance of evidence to the contrary."[468] Another section specifies how personal attendance of the custodian and production of the original records can be procured.[469] If the originals are produced and introduced into evidence, copies may be substituted "unless otherwise directed for good cause by the court, officer, body, or tribunal conducting the hearing."[470] Virtually all "hospital records" as de-

459. *See* TENN. CODE ANN. §§ 53-1501 to 1508 (Cum. Supp. 1978).
460. *Id.* § 53-1503.
461. *Id.* § 53-1502.
462. *Id.*
463. *Id.*
464. *Id.* § 53-1503.
465. *Id.* § 53-1504.
466. *Id.* § 53-1505.
467. *Id.* § 53-1506.
468. *Id.*
469. *Id.* § 53-1507.
470. *Id.* § 53-1508.

fined by the Medical Records Act of 1974[471] are covered by this addition to the Code.[472]

V. TRIAL PROCEDURE

A. Trial by Jury: Selection and Composition

Once discovery is complete and assuming the action has not otherwise been terminated, it is ready for trial. If the action is to be tried by a jury, one of the initial steps in the trial process is the selection of the jury from among those eligible for jury service.

Under rule 47.01 of the Tennessee Rules of Civil Procedure, the trial court determines the method and scope of the examination of prospective jurors. The rule authorizes the court to conduct the examination itself or to permit the parties or their attorneys to do so. The rule also provides that if the court examines the prospective jurors, "the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

By virtue of a new section added to the Tennessee Code, the parties or their attorneys in both civil and criminal cases are given "an absolute right to examine prospective jurors . . . notwithstanding any rule of procedure or practice of court to the contrary."[473] The extent to which this section affects the trial court's discretion under rule 47.01 is not free from doubt. Construed most narrowly, this section is merely a legislative affirmation of the right accorded the parties under rule 47.01 to supplement the court's examination of prospective jurors. Somewhat more broadly, this section might eliminate only that much of the trial court's discretion as empowers the court itself to submit to the jurors questions propounded by the parties or their attorneys. Even more broadly, this section might also affect the trial court's authority to limit the scope of the examination of prospective jurors. The last two interpretations might result in abuse by some counsel.[474] It seems likely, therefore, that the most narrow inter-

471. *Id.* § 53-1320(B) (1977).

472. *Id.* § 53-1501 (Cum. Supp. 1978).

473. *Id.* § 22-501.

474. *See, e.g.*, 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶¶ 4107.03-.06 (1977); Note, *Voir Dire—Prevention of Prejudicial*

pretation will commend itself to the courts.

The Tennessee Code was also amended to exempt all practicing certified public accountants and public accountants from jury service.[475] As the editors of a leading casebook on civil procedure have noted: "Needless to say, exemptions [from jury service] may be founded on little more than a particular lobby's effectiveness in the legislature."[476]

B. Withdrawing the Case from the Jury

After the jurors have been selected and sworn, and after the opening statements, the parties present their proof in support of their respective positions. While the jury acts as the trier of disputed questions of fact disclosed by the evidence, the trial court retains a significant amount of power to keep the jury in check. "Of the means of withdrawing a case from the jury's consideration the directed verdict is the most dramatic and emphatic."[477]

1. Directed Verdict

In only one case decided during the survey period did the procedural law of directed verdicts receive extensive and explicit attention. Although *State v. Thompson* was a criminal case, it afforded the Tennessee Supreme Court an opportunity to say a good deal, by way of dictum, about directed verdicts in civil actions.

Defendant in *Thompson* was indicted and convicted for counseling or procuring the burning of a building, a conviction the supreme court held should have been simply for arson.[478] At the conclusion of the state's largely circumstantial case, defendant moved for a directed verdict pursuant to the rather vague provisions of the Tennessee Code authorizing directed verdicts in criminal cases.[480] The trial court overruled this motion, finding

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Questioning, 50 MINN. L. REV. 1088, 1093 (1966).

475. TENN. CODE ANN. § 22-103 (Cum. Supp. 1978).

476. D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE STATE AND FEDERAL 983 (3d ed. 1973).

477. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 1008.

478. 549 S.W.2d 943 (Tenn. 1977).

479. *Id.* at 944.

480. TENN. CODE ANN. § 40-2529 (1975) provides: "In a criminal prosecution the trial judge shall direct the jury to acquit the defendant if at the close

that there was sufficient evidence to take the case to the jury. Although defendant did not testify in her own behalf, she did offer other testimony in her defense. On cross-examination of defendant's witnesses, the state elicited testimony favorable to its position. At the conclusion of all the proof, defendant did not renew her directed verdict motion and the case was submitted to the jury, which found defendant guilty. On appeal, the court of criminal appeals reversed defendant's conviction on the ground the trial court erred in overruling defendant's directed verdict motion made at the close of the state's case-in-chief. The state supreme court reversed the intermediate appellate court and reinstated the judgment of the trial court, holding that defendant, by introducing evidence in her own behalf, waived her right to obtain appellate review of the trial court's denial of her directed verdict motion.[481]

In discussing the law of directed verdicts as it has evolved in civil actions, the court emphasized that the purpose of the motion, like its predecessor the demurrer to the evidence, is to test the legal sufficiency of the facts in evidence.[482] The court continued:

> [N]o party has an absolute right to have a directed verdict granted until the close of all of the evidence. If a motion made at the conclusion of the plaintiff's proof is overruled, the defendant must stand upon his motion, and rest his case without offering proof, in order to have the record at that point preserved for appellate review. If the motion is overruled and the defendant does not stand upon the motion, but rather proceeds to offer evidence, then it is necessary for the defendant to "renew" his motion—actually to make another motion—at the end of all of the evidence in order to have the same considered. Both the trial and appellate courts then review the entire record, not just the plaintiff's case-in-chief, in determining whether the defense motion should be granted.[483]

While admitting there were some differences between criminal and civil cases "which prevent complete adaptation of civil proce-

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of the evidence for the prosecution, or at the close of all the evidence, the court is of the opinion that the evidence is insufficient to warrant a conviction."

481. 549 S.W.2d at 945-46.

482. *Id.* at 945.

483. *Id.*

dure on directed verdicts into criminal trials,"[484] the court nonetheless concluded that the test for granting directed verdicts in criminal cases is generally similar to the test utilized in civil cases.[485] The test in criminal actions, as developed by the court of criminal appeals and expressly approved by the supreme court,

> requires the trial judge and the reviewing court on appeal to look at all of the evidence, to take the strongest legitimate view of it in favor of the opponent of the motion, and to allow all reasonable inferences from it in its favor; to discard all countervailing evidence, and if then, there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied.[486]

Moreover, the supreme court was of the further opinion that

> under the present statute the practice used in civil cases should be used in criminal cases with respect to the times when a motion for directed verdict may appropriately be made on behalf of a defendant in a criminal trial. The trial judge should not be placed in error for overruling a motion at the conclusion of the State's proof when the defendant has not then rested his case, but has gone forward with the evidence in his own behalf.[487]

Applying this law to the facts of *Thompson*, the court held that the action taken by the trial court on defendant's directed verdict motion was no longer open to review.[488] The court also held, based upon a review of all the evidence, that even if a timely motion for a directed verdict had been made at the conclusion of all the evidence, it would not have been proper for the trial court to grant such a motion and the judge was correct in submitting the case to the jury.[489] Accordingly, the supreme court found error in the "implicit conclusion" of the court of criminal appeals "that the verdict is contrary to the preponderance of the evidence . . . ."[490]

The court concluded its opinion with a comparison between the trial court's role in directing a verdict of acquittal and the

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484. *Id.*

485. *Id.* at 946.

486. *Id.* (quoting Jones v. State, 533 S.W.2d 326, 329 (Tenn. Crim. App.), *cert. denied*, *id.* (Tenn. 1975)). *See also* text accompanying notes 512-13 *infra*.

487. 549 S.W.2d at 946.

488. *Id.*

489. *Id.* at 946-48.

490. *Id.* at 948.

appellate court's function in reviewing the adequacy of the evidence to sustain a conviction. "The directing of a verdict . . .," the court stated, "is entirely different from reviewing the preponderance, particularly in criminal cases, where well-settled rules . . . govern the role and function of an appellate court."[491] A conviction will be set aside by an appellate court on the inadequacy of the evidence only if the evidence preponderates against the guilty verdict and in favor of the accused's innocence.[492] This limited scope of appellate review is based on recognition of the fact that:

> In this state, a trial judge has a unique function with respect to jury verdicts, in criminal cases as well as in civil cases. He is commonly referred to in the reported cases as a "thirteenth juror", and is required either to approve or disapprove the findings of the jury. If he fails to exercise this function, the case will be reversed and remanded for a new trial.
>
> Where, as in the present case, the trial judge has approved a jury verdict, an appellate court should be reluctant to overturn that verdict on the basis of a preponderance of the evidence. That it has the authority to do so, in criminal cases unlike jury verdicts in civil cases, however, is well settled, and this function is an entirely different one from that of directing a verdict of acquittal.[493]

The supreme court did not delineate precisely in what respect the function of the trial judge acting as the thirteenth juror differs from the appellate court reviewing the adequacy of the evidence. Nor did the court expressly indicate whether a similar difference exists in civil actions. The scope of review by the trial court of a jury verdict should be broader than that of the appellate court reviewing the same case. The trial court and jury are in a position to take note of a number of factors affecting the probative value of testimony that cannot be adequately conveyed in the record on appeal.[494] It is quite sensible, therefore, for an

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491. *Id.*

492. *Id. But see* PROPOSED TENN. R. APP. P. 13(e) & Advisory Comm'n comment. The text of this proposed rule and the Advisory Commission comment are set forth in *Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 271, 300, 302 (1978).

493. 549 S.W.2d at 948 (citation omitted).

494. *See, e.g.*, ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.11, at 23 (1977) [hereinafter cited

appellate court in both civil and criminal actions to affirm a verdict approved by the trial court if there is a conflict in the testimony as long as there is evidence to support by the required degree of persuasion whatever matters must be proven to obtain the judgment entered below.[495] Similarly, as the test approvingly cited by the supreme court provides,[496] the trial court in passing upon a motion for a directed verdict of acquittal must take the strongest legitimate view of the evidence in favor of the nonmoving party, including all reasonable inferences that might be drawn from the evidence. This much of the test is equally applicable to civil actions.[497] If strictly adhered to, it would preclude the trial court from weighing the evidence or passing on the credibility of the witnesses.[498] Thus, both the appellate court in reviewing the adequacy of the evidence to support the judgment[499] and the trial court in determining whether the evidence is sufficient to create an issue of fact for the jury[500] should be viewed as deciding solely a common question of law. It is, therefore, somewhat unclear how appellate review of the evidence differs from the directing of a verdict of acquittal, and whether this differentiation is also to be observed in civil actions.

On the other hand, the holding in *Thompson* that defendant waived her right to appellate review of the trial court's denial of her directed verdict motion made at the close of the state's case-in-chief by introducing evidence in her own behalf is in accord with the equivalent holding made in the earlier civil case of *Sadler v. Draper*.[501] The practical effect of this holding is to encourage adjudications based on all the evidence and not merely

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as APPELLATE COURT STANDARDS]; R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 20-21 (1970).

495. *See* Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161, 203-04 (1978).

496. *See* text accompanying note 486 *supra*.

497. *See* text accompanying notes 512-13 *infra*.

498. *See* text accompanying note 514 *infra*. *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 (1971).

499. *See* R. TRAYNOR, *supra* note 494, at 27.

500. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 541 (1971).

501. 46 Tenn. App. 1, 326 S.W.2d 148, *cert. denied, id.* (Tenn. 1959). The state supreme court in *Thompson* cited *Sadler* as "[a]n excellent discussion of the nature and use of the motion for directed verdict, particularly that made at the close of the plaintiff's evidence." 549 S.W.2d at 945.

a part of it since only rarely will a defendant forego an opportunity to introduce favorable evidence, particularly if, as seems likely, by standing on his motion defendant is precluded from urging successfully on appeal that he should be given a new trial to present evidence in his own behalf. Besides, by introducing evidence, defendant does not waive his right to renew his motion for a directed verdict at the close of all the evidence and, if unsuccessful, to renew his motion yet again under rule 50.02 after entry of judgment or discharge of the jury if a verdict was not returned.

2. Judgment Notwithstanding the Verdict

Typically a motion for judgment notwithstanding the verdict under rule 50.02[502] will be joined in the alternative with a motion for a new trial, since "[i]f the losing party thinks that there is insufficient evidence as a matter of law to support the verdict, he will, in most situations, also think that the verdict is against the weight of the evidence."[503] In *Holmes v. Wilson*[504] the Tennessee Supreme Court discussed the duty of the trial court if an alternative motion is made, as well as the complex problems of appellate review that arise when a party has moved in the alternative for judgment notwithstanding the verdict or for a new trial.

At the close of all the evidence, defendant in *Holmes* moved for a directed verdict on the ground the evidence was insufficient to establish his liability. The trial court overruled the motion and the jury returned a verdict for plaintiff. At this point defendant made an alternative motion for a judgment notwithstanding the verdict or a new trial. The trial court granted the judgment but did not rule upon the new trial motion. Pursuant to rule 50.03,

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502. Rule 50.02 does not speak of a motion for judgment notwithstanding the verdict, but rather a motion "to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with [the] motion for a directed verdict." TENN. R. CIV. P. 50.02. The motion for judgment notwithstanding the verdict that was a recognized part of Tennessee practice prior to adoption of the Tennessee Rules of Civil Procedure had a different purpose than that specified in rule 50.02. *See* CARUTHERS' HISTORY OF A LAWSUIT § 391 (8th ed. 1963). However, the state supreme court in *Holmes* referred to a motion under rule 50.02 as a motion for judgment notwithstanding the verdict, and the text of the present article also speaks of a rule 52.02 motion in those terms.

503. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2539, at 608 (1971).

504. 551 S.W.2d 682 (Tenn. 1977).

which provides that the trial court must also rule on the new trial motion if he grants a judgment notwithstanding the verdict, the court of appeals remanded the case to the trial court with directions that he review the verdict in his role as the thirteenth juror[505] and specify the grounds for granting or denying the new trial motion.[506] On remand the trial court conditionally granted the new trial because he disagreed with the jury's verdict. On plaintiff's second appeal to the court of appeals, that court reversed both the judgment and the conditional grant of a new trial and reinstated the verdict of the jury.

The state supreme court began its review of the second appeal by emphasizing the trial judge's duty to rule on an alternative motion for a new trial and to specify his grounds for granting or denying the motion, even if he grants a judgment notwithstanding the verdict.[507] The grant of the new trial is conditional and becomes effective only if the judgment is thereafter vacated or reversed.[508] In addition, the grant of the new trial motion does not affect the finality of the judgment for the purpose of seeking immediate appellate review.[509] Because of the conditional nature of the grant of the new trial motion, the case is at an end if the appellate court affirms the judgment.[510] If, however, the judgment is reversed, "the grant of the motion for a new trial springs to life, and the case is remanded for a new trial, 'unless the appellate court has otherwise ordered.' "[511]

In passing upon the court of appeals' reversal of the judgment, the supreme court noted that a judgment notwithstanding the verdict is governed by the same standard as that utilized for directing a verdict.[512] That standard requires

> the trial judge, and the appellate courts, [to] take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where

505. *See* text accompanying notes 543-62 *infra*.

506. The requirement that the trial court specify the gounds for granting or denying a new trial is also contained in TENN. R. CIV. P. 50.03.

507. 551 S.W.2d at 684.

508. *Id.*; *see* TENN. R. CIV. P. 50.03.

509. 551 S.W.2d at 684; *see* TENN. R. CIV. P. 50.03.

510. 551 S.W.2d at 684.

511. *Id.* (quoting TENN. R. CIV. P. 50.03).

512. *Id.* at 685.

> there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.[513]

Without elaboration, the court concluded the judgment notwithstanding the verdict was erroneously granted, particularly since "[n]either the trial judge nor the reviewing court is privileged to weigh the preponderance of the evidence when passing upon a motion for a directed verdict or for a judgment [notwithstanding the verdict]."[514]

Having determined the judgment notwithstanding the verdict should not have been granted, the supreme court was required to pass on the lower courts' rulings with respect to the alternative motion for a new trial. Different standards govern granting a judgment notwithstanding the verdict and granting a new trial.

> On motion for judgment [notwithstanding the verdict], the sole concern of the trial judge is the existence of material evidence in accordance with the [standard previously set out] whereas on motion for a new trial he has a substantially wider, though not unbridled, latitude and may set the verdict aside when it is against the weight of the evidence or when the interests of justice would be served thereby. Thus the trial judge consistently may overrule a motion for directed verdict or judgment [notwithstanding the verdict] and grant or deny a new trial. If he or she should sustain the motion for a directed verdict, consistency demands that there be a conditional award of a new trial.[515]

If the appellate court holds that the judgment notwithstanding the verdict was erroneously granted, it has the option of either remanding for a new trial or reinstating the jury's verdict.[516] Generally speaking, the case should be remanded,[517] and such will always be true if the trial court acting as the thirteenth juror expresses his dissatisfaction with the verdict because "his action in awarding a new trial is not reviewable . . . ."[518] However,

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513. *Id.*
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.* at 684.

"[a]ppellate courts . . . may exercise a sound judicial discretion in the matter and may, under exceptional circumstances and in the interest of justice, reinstate the verdict of the jury where the trial judge erred in ruling on a controlling conclusion of law and has approved the verdict of the jury."[519] Finding no exceptional circumstances justifying departure from the general rule,[520] the supreme court affirmed the court of appeals' reversal of the grant of the judgment notwithstanding the verdict but reversed its reinstatement of the jury verdict and remanded for a new trial.

The opinion in *Holmes*, which is consistent with the interpretation given to federal rule 50 by the federal courts,[521] is a useful reminder of the wholly distinct standards that govern allowance of a motion for judgment notwithstanding the verdict and a motion for a new trial. In passing on a motion for judgment notwithstanding the verdict, as well as the equivalent motion for a directed verdict, both the trial and appellate court consider only the purely legal question of whether the evidence is sufficient to make out a jury question. A new trial motion, by contrast, may be granted by the trial court more freely and, as *Holmes* makes clear, the exercise of the trial court's discretion will seldom be set aside on appeal when it is based on the trial court's evaluation of the weight of the evidence.

Holmes and cases like *Sadler v. Draper*[522] illustrate some of the procedural intricacies that must be observed in order to secure a directed verdict or judgment notwithstanding the verdict. They also illustrate the difficulty that arises in obtaining subsequent appellate review of rulings on those motions and a new trial motion joined in the alternative with a motion for judgment notwithstanding the verdict. Much, though not all, of the complexity of this area of procedural law is attributable to matters of historical significance alone.[523] The law in this area, therefore, would only profit from simplification, but until then a thorough knowledge of the complexities is indispensable.

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519. *Id.* at 687.

520. *Id.*

521. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2537-2540 (1971).

522. 46 Tenn. App. 1, 326 S.W.2d 148, *cert. denied, id.* (Tenn. 1959).

523. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2522 (1971).

C. *Putting the Case to the Jury: Instructions*

If the evidence is sufficient to make out a jury question, the trial court must instruct the jury on the law.[524] In *Haddock v. Lummus Cotton Gin Co.*,[525] plaintiff sought damages for personal injuries sustained when his head and arm were caught in a bale press manufactured and sold by defendant. Although plaintiff's complaint contained allegations based on negligence and breach of warranty, the case was tried exclusively on a theory of strict liability. After the trial court completed its charge, plaintiff noted that the charge contained instructions that related to a claim based on negligence. Plaintiff at that time did not object to the instructions as given but instead moved that the pleadings be amended to conform to the court's instructions. The court of appeals noted that if plaintiff had made no comment on the instructions, under rule 51.02 he could assign error to any portion of the given instructions.

> However, since the Plaintiff took affirmative action by asking for permission to amend his theory of the case to conform to the charge of the Court and approved the charge, we hold that Plaintiff's assignment of error in this Court is not authorized by [Tennessee Rule of Civil Procedure] 51.02.[526]

VI. Motions After Trial

A. *Nunc Pro Tunc*

After the jury has returned its verdict or the trial court has heard the evidence, judgment should be entered. Under rule 58.02, "[t]he filing with the clerk of a judgment, signed by the judge, constitutes the entry of such judgment, and, unless the court otherwise directs, no judgment shall be effective for any

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524. *See* Tenn. R. Civ. P. 51.

525. 552 S.W.2d 390 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1976).

526. *Id.* at 392. After *Haddock* and beyond the period covered in this survey, the state supreme court in Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978), held:

> Rule 51.02 of the Tennessee Rules of Civil Procedure has not abolished or altered the rule . . . that in order to predicate error upon an alleged omission in the instructions given to the jury by the trial judge [the litigant assigning error] must have pointed out such omission to the trial judge at trial by an appropriate request for instruction.

Id. at 554.

purpose until the entry of same." Occasionally a judgment will not be entered as required by rule 58.02, and important interests may be adversely affected as a result. Entry of judgment *nunc pro tunc* serves the purpose of alleviating the harsh consequences that might otherwise ensue by permitting entry of a judgment now that is effective from some earlier date. *Gillis v. Eggelston*[527] is a good example of the valuable purpose served by entry of judgment *nunc pro tunc.*

Gillis grew out of the administration of the estate of Georgia Gillis, who died intestate. In 1925, Georgia and her husband filed a petition seeking to adopt their nephew, Andrew Gillis, one of the claimants to decedent's estate. The adoption was contested, and a decree entered paroling Andrew to his aunt and uncle for a three-month period. The decree also retained the adoption petition for further action and granted petitioners the opportunity to apply for adoption again at the expiration of the three-month period. In his petition to the probate court of Shelby County for entry of a decree of adoption *nunc pro tunc*, Andrew alleged that after this three-month period his aunt and uncle successfully petitioned for his adoption but that, due to inadvertence or oversight on the part of their attorney or the clerk of the court, the decree was not signed by the judge or entered on the court's minutes. The other claimants to the decedent's estate sought dismissal of Andrew's petition, contending that no official record demonstrated the trial court ever signed an adoption decree. The state supreme court reversed the probate court's dismissal of the *nunc pro tunc* petition. The supreme court relied upon its earlier decision in *Rush v. Rush*[528] in which the court stated:

> It is equally clear that a party whose rights are injuriously affected by a clerical omission to extend upon the record a judgment of the court regularly pronounced may present the matter to the court, and upon a proper showing have the judgment entered nunc pro tunc.
>
> All courts have the right, and it is their duty, to make their records speak the truth, and a court, therefore, in a proper case, of its own motion, may order a nunc pro tunc entry to be made; and no sound reason can be suggested why they should not exercise this right and discharge this duty upon the suggestion of one whose rights are impaired by the failure of the record to

527. 543 S.W.2d 846 (Tenn. 1976).
528. 97 Tenn. 279, 37 S.W. 13 (1896).

> state the truth. . . . And the lapse of time between the announcement of judgment and the making of this motion is of no importance; *that which is important is, that the proof be clear and convincing that the judgment which it is sought to have entered is the one pronounced in the cause.*[529]

The supreme court held that Andrew's allegations, that the court permitted his adoption and that the failure to have the decree signed and entered on the minutes was due to the inadvertence or oversight of the attorney or clerk, "if proven by clear and convincing evidence, would justify the entry of the decree of adoption nunc pro tunc."[530] Since Andrew had stated a claim for relief, the supreme court concluded that the trial court erred in dismissing Andrew's petition without affording him an opportunity to introduce evidence in support of his claim.[531]

There are limits to the notion that a judgment may be entered *nunc pro tunc*, however, as *Zeitlin v. Zeitlin*[532] demonstrates. In that case, the trial court entered a final decree of divorce in September 1973, that approved a separation agreement requiring defendant to pay $200 per week in alimony and child support. The very next month plaintiff filed a petition seeking to have defendant held in contempt for failure to make the agreed-upon payments. Defendant sought to have his payments reduced. Apparently no action was taken by the court with regard to either the contempt petition or defendant's petition for reduction of his payments. Plaintiff filed a second petition for contempt approximately one year after her first petition, and defendant again sought reduction. Plaintiff also sought a judgment for the delinquent payments. Although the statement of the facts is confusing, it appears that defendant alleged that the parties entered into an agreed order after plaintiff's first contempt petition and that through inadvertence this order was never entered. Defendant sought to have the agreed order entered *nunc pro tunc* to take effect from October 1973. The trial court refused *nunc pro tunc* entry of the agreed order and, although "in sympathy with his situation insofar as the Order not having been filed as it, of course, should have been . . . ,"[533] the court also entered judg-

529. *Id.* at 281-82, 37 S.W. at 14 (citation omitted) (emphasis added).
530. 543 S.W.2d at 848.
531. *Id.*
532. 544 S.W.2d 103 (Tenn. Ct. App. 1976).
533. *Id.* at 105.

ment against defendant for an amount in excess of $14,000. That judgment, apparently based on the payments specified in the original divorce decree, was "to be held in abeyance, at least until the financial activity of [defendant] increases to a reasonable extent where [*sic*] this arrearage could be paid."[534] The court of appeals affirmed in an opinion affording defendant reason to believe that he might yet obtain the relief he sought.

The intermediate appellate court rejected defendant's reliance on various subsections of rule 60.02 as authority for entry of the agreed order *nunc pro tunc*.[535] Essentially the court reasoned that rule 60.02 is available only to afford relief from judgments that have previously been entered and not to permit entry of a judgment not previously entered.[536] Although the parties may have intended that the agreed order be entered, there was no evidence that the trial judge ever intended that the order be entered,[537] a fact that distinguishes *Zeitlin* from *Gillis*. For substantially the same reason, the court of appeals also held relief was unavailable under rule 58.02,[538] which defines precisely when a judgment is entered, or rule 60.01,[539] which permits relief from clerical mistakes. Having rejected defendant's arguments in support of entry of judgment *nunc pro tunc*, the court stated that it too was not without sympathy for defendant's plight.[540] Noting that the judgment for the delinquent payments was not immediately enforceable, the court concluded its opinion by intimating the trial court could still "retroactively forgive or modify delinquent installments of alimony or support."[541]

The concluding point made by the appellate court in *Zeitlin* is fundamental both in the sense of its obvious importance and in the sense that it should not be overlooked. Orders for the support of a spouse or a child are apparently modifiable retroactively in Tennessee.[542] If the trial court had kept this fact in mind, it

534. *Id.*
535. *Id.* at 106-07.
536. *Id.* at 106.
537. *Id.*
538. *Id.* at 108.
539. *Id.*
540. *Id.*
541. *Id.* at 109.
542. *See, e.g.*, Morton v. Morton, 223 Tenn. 491, 448 S.W.2d 69 (1969); Mayer v. Mayer, 532 S.W.2d 54 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1975);

seems unlikely that it would have felt compelled to enter judgment for the past due installments, which it appears it thought was for a fixed, unmodifiable amount. While it might have been preferable for the appellate court to reverse with directions that the trial court determine whether the payments should be modified retroactively, it seems highly likely that the trial court's sympathy for defendant's plight will cause it to do so.

B. New Trial

In addition to the power of a trial court to direct a verdict or enter judgment notwithstanding the verdict, "[t]he power of the trial judge to grant a new trial is one of his most effective devices to control the jury."[543] As *James E. Strates Shows, Inc. v. Jakobik*[544] and *Sherlin v. Roberson*[545] make clear, the power to grant a new trial is more than an effective power—it is a power that must be exercised if the trial court is not satisfied with the jury's verdict.

Jakobik was a personal injury action in which the trial court granted plaintiff's motion for a new trial. Thereafter, in response to defendants' motion to reconsider, the trial court reinstated the jury verdict in defendants' favor. In its initial order granting a new trial, the trial court, acting as the thirteenth juror, expressed its dissatisfaction with the jury's verdict. In its order reinstating the jury's verdict, the court stated it was "of the opinion that there was evidence to support the verdict of the jury in its finding for the defendants and . . . [could not] say that the verdict was unreasonable in light of the evidence presented by both sides in this case."[546]

In affirming the court of appeals' reversal, the state supreme court emphasized that "[w]here the motion for a new trial asserts that the verdict was contrary to the weight of the evidence it is the duty of the trial judge to weigh the evidence and determine whether it preponderates against the verdict, and if so, to

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Daugherty v. Dixon, 41 Tenn. App. 623, 297 S.W.2d 944 (1956), *cert. denied, id.* (Tenn. 1957).

543. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 976.

544. 554 S.W.2d 613 (Tenn. 1977).

545. 551 S.W.2d 700 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

546. 554 S.W.2d at 615.

grant a new trial."[547] In acting as the thirteenth juror when passing upon the verdict, the trial court is not required to state the reasons for its action, "[b]ut . . . if it appears from reasons assigned or statements made, that the trial judge was not satisfied with the verdict, it is the duty of the appellate courts to grant a new trial."[548] Here, the court's initial unequivocal expression of dissatisfaction with the verdict "was an implicit adjudication that the evidence preponderated against the verdict."[549] The court's later reinstatement of the verdict was not based on a weighing of evidence to "determine whether it preponderated in favor of the plaintiff or defendants or was equally balanced, but merely determined that there was some evidence to support the verdict."[550] It is improper to sustain a verdict, however, merely because there is some evidence to support it,[551] and accordingly the case was remanded for a new trial.

The opinion in *Jakobik* placed extensive reliance on *Sherlin v. Roberson*.[552] There, the trial court in overruling the plaintiffs' motion for a new trial stated that it could not say whether the jury verdict was right or wrong. The court also stated that before it would set aside the verdict "it would have had to have been a verdict that I couldn't have lived with . . .,"[553] but here the case was so close "I can't say I can't agree with what the jury did."[554] The court of appeals reversed.

The intermediate appellate court in *Sherlin* reasoned that the trial court's inability to say the jury verdict was right "was a clear disavowal of approval."[555] Taking all the trial court's statements together, "they would indicate that the judge had no opinion either way."[556] Accordingly, the appellate court concluded that the trial court "was deferring to the verdict of the jury and disclaiming any opinion of his own. When he stated he could not say the verdict was right he failed to do precisely what he must

547. *Id.*
548. *Id.*
549. *Id.* at 616.
550. *Id.*
551. *Id.* at 615-16.
552. 551 S.W.2d 700 (Tenn. Ct. App. 1976), *cert. denied*, *id.* (Tenn. 1977).
553. *Id.*
554. *Id.* at 701.
555. *Id.*
556. *Id.*

do before rendering judgment on the verdict."[557] The court continued:

> The . . . remarks of the judge make it appear he disassociated himself from the deliberative process which is the peculiar and exclusive province of the jury of which the presiding judge is as much a member as jurors sitting in the jury box. Indeed, it must be said that, by reason of his training as a lawyer and his experience in weighing testimony, he is the most important member of the jury.
>
> To say, as the trial judge did in this case, that before the trial judge, acting as the thirteenth juror, should set aside a verdict it would have to be a verdict that he could not live with would be to adopt a standard relieving the judge of the duty to take an unbiased and dispassionate view of the evidence, weigh it and determine whether the evidence preponderates in favor of the plaintiff or defendant or is equally balanced.
>
> If the trial judge abdicates this important duty justice could often miscarry. On appeal the evidence cannot be weighed as in the trial court. As has been said so often, a verdict in a civil case approved by the trial judge cannot be overturned if there is any credible material evidence to support it. In view of the finality of his determination of the weight of the evidence as the thirteenth juror, it will not do to weaken the rule by implying [*sic*] approval by the trial judge from countervailing and irreconcilable remarks. To do so would be to strike at the very foundation of our judicial system as it pertains to jury trials.[558]

In order to shore up the foundation of the judicial system, the action was remanded for a new trial.

Certainly the court of appeals in *Sherlin* could have taken a more sympathetic view of the trial court's ruling on the new trial motion. In light of the trial court's statement that the case "could have gone either way,"[559] it seems more realistic to say that the trial court concluded the evidence was evenly balanced rather than to conclude, as the appellate court did, that he "disclaim[ed] any opinion of his own"[560] and "disassociated himself from the deliberative process"[561] thereby "abdicat[ing]"[562] his

557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.*
561. *Id.*
562. *Id.*

duty to weigh the evidence. Taken together, however, *Jakobik* and *Sherlin* leave little doubt as to the importance the appellate courts place on the trial judge's role as thirteenth juror.

An entirely different sort of problem, one related to the right to trial by jury itself, was involved when the trial court passed on plaintiff's new trial motion in *Welch v. T.F.C. Marketing Service, Inc.*[563] *Welch* involved an action for breach of contract in which the jury returned a verdict for damages in defendant's favor on its counterclaim. In ruling on plaintiff's new trial motion, the trial court granted a new trial and at the same time entered judgment for defendant but in an amount less than that awarded by the jury. Both parties appealed, defendant contending that the trial judge should have ordered a new trial before a new jury and plaintiff contending that the trial judge properly decided the case himself but should not have awarded defendant damages. The court of appeals held that at no time did defendant waive his right to a jury trial[564] and that, while the trial judge acting as the thirteenth juror may grant a new trial before a new jury, he cannot enter judgment based on his opinion as to who should prevail on the facts.[565] The appellate court also noted in passing that the fact that plaintiff, not defendant, initially demanded the jury was quite irrelevant[566] since under trial rule 38.05 a party may not withdraw his demand for a jury "without the consent of all parties as to whom issues have been joined."

C. *Relief from Judgment*

Even after judgment has finally been entered either on a jury verdict or otherwise, the trial court retains the power for some time to relieve a party from the judgment.[567] In *Brown v. Brown*[568] the state supreme court held that relief from a judgment under rule 60.02 is available to amend a final judgment after the expiration of thirty days from its entry. The court's opinion is so clearly correct that the only regrettable aspect of the case is that the

563. 554 S.W.2d 643 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).
564. *Id.* at 646.
565. *Id.*
566. *Id.*
567. *See* TENN. R. CIV. P. 60.
568. 548 S.W.2d 660 (Tenn. 1977).

appellant had to appeal all the way to the state supreme court after the intermediate appellate court failed to vindicate his right to attempt to secure relief from the judgment.

In *Campbell v. Archer*[569] the state supreme court emphasized that rule 60.02 is designed to afford relief only from final judgments and that a rule 59 motion for a new trial is the appropriate vehicle for remedying errors affecting a judgment not yet final. The difficulty involved in *Campbell* arose because the case had to be reset for trial on three separate occasions. When the case was set for trial the third time, the clerk sent notice of the new trial date to defendants' attorney approximately one month before the scheduled trial date. Four days before trial, defendants employed new counsel and their original attorney agreed to withdraw. Defendants' original attorney denied that he was aware of the new trial date until trial had actually begun, and neither defendants nor their new counsel had notice or knowledge the case was set for trial until the day of the trial itself. After learning on the day of trial that defendants' original counsel had withdrawn and would not appear, the trial court nonetheless determined to proceed with the trial. The court also refused to sign an order brought to its attention in the midst of the trial permitting defendants' original counsel to withdraw. Upon learning from defendants' first attorney on the day of trial that the trial was proceeding, defendants' new counsel and defendants themselves went to court and requested permission to approach the bench but permission was denied. Plaintiffs completed presenting their proof, and after the jury retired, one of the defendants and his new counsel explained to the trial court what had happened. The jury returned verdicts for substantial damages against defendants for wrongfully diverting surface waters. After judgments were entered on the verdicts, defendants moved for a new trial alleging, among other matters,[570] that they had a meritorious defense and no notice or actual knowledge of the trial date. Defendants further alleged that their failure to appear amounted, at most, to excusable neglect. The trial court denied the new trial motions, and the court of appeals affirmed.

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569. 555 S.W.2d 110 (Tenn. 1977).

570. Defendants also argued that the judgments entered against them were default judgments within the meaning of rule 55.01, and invalid because five-days notice of application for the entry of judgment had not been served upon them. The supreme court pretermitted this question. *Id.* at 112.

Before the state supreme court, defendants relied on the portion of rule 60.02 that permits the court to relieve a party from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. However, the supreme court held that "[t]he function of this Rule is to give relief from *final* judgments; Rule 59, providing for motion for new trial, is the appropriate remedy for asserting alleged errors affecting a judgment which has not yet become final."[571] On the merits of the new trial motions, the court further held that a new trial may be granted for the mistake, inadvertence, surprise or excusable neglect of a party's attorney.[572] Here it was clear the parties themselves were not at fault either in the initial choice of counsel or otherwise and that the fault rested primarily with defendants' original counsel in not taking note of the notice of the trial date forwarded to him by the clerk.[573] The court also determined that other than the additional expenses incident to a retrial, plaintiffs would not suffer any prejudice if a new trial were awarded.[574] Accordingly, the supreme court remanded for a new trial on condition that defendants tender into court all court costs accrued to date and reasonable attorney's fees for plaintiffs' representation at the trial.[575] It seems likely defendants would willingly pay these incidental expenses in order to make out a meritorious defense.

VII. Appellate Review of the Disposition

If relief cannot be obtained in the trial court, redress may be sought in an appellate court. As the numerous decisions handed down in this area demonstrate, the paths of the parties in obtaining a decision on the merits are strewn with a number of obstacles. The proposed Tennessee Rules of Appellate Procedure, which seek to simplify existing law and which are discussed more fully elsewhere,[576] were not submitted for legislative approval in 1978 but will be submitted to the 1979 session of the General

571. 555 S.W.2d at 112 (emphasis in original).
572. *Id.*
573. *Id.* at 112-13.
574. *Id.* at 113.
575. *Id.*
576. *See* Sobieski, *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1 (1978); Sobieski, *supra* note 495.

Assembly. Until they take effect, the requirements of existing practice remain a vital area of concern.

A. The Timing of Appellate Review

An appeal as of right lies only upon entry of a final judgment.[577] In *Frayser Assembly Christian School v. Putnam*[578] and *Highland Construction Co. v. K.I.T. Coal Co.*[579] the state supreme court dealt with the problem of the meaning of finality in the context of civil actions involving multiple claims or multiple parties.

Putnam was a workers' compensation action in which plaintiff sought recovery for medical expenses and temporary and permanent disability. The trial court entered a decree that awarded plaintiff accrued medical expenses and benefits for temporary disability. The decree expressly reserved for a future hearing any claim for further medical expenses and permanent disability. After an appeal was taken by defendant from this decree to the supreme court and after the assignments of error and briefs were filed, but prior to oral argument, plaintiff moved to have the appeal remanded to the trial court for its consideration whether an appeal by permission should be allowed pursuant to the interlocutory appeal statute.[580] Defendant also moved for a remand but for the purpose of entry of a final decree adjudicating all issues and claims for relief. The state supreme court reiterated its earlier[581] holding that

> a decree in a workmen's compensation case which, like this one, adjudicates compensability and awards benefits for temporary total disability but reserves to a future date the determination of the employee's claim of permanent disability [is] not a final decree and, therefore, [is] not appealable to this court in the absence of a statute conferring jurisdiction of such an interlocutory decree or judgment.[582]

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577. *See, e.g.*, Cockrill v. People's Sav. Bank, 155 Tenn. 342, 347, 293 S.W. 996, 997-98 (1927) (writ of error); Carrol v. Caldwell, 8 Tenn. (1 Mart. & Yer.) 78, 79 (1827) (appeal in the nature of a writ of error); Moore v. Churchwell, 27 Tenn. App. 443, 446, 181 S.W.2d 959, 961, *cert. denied*, *id.* (Tenn. 1942) (appeal).

578. 552 S.W.2d 746 (Tenn. 1977).

579. 557 S.W.2d 67 (Tenn. 1977).

580. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

581. Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85 (Tenn. 1973).

582. 552 S.W.2d at 747 (citing Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85 (Tenn. 1973)).

Without expressing an opinion, the supreme court noted that an interlocutory appeal might be permitted under the interlocutory appeal statute.[583] However, such an appeal requires strict compliance with the certification requirements prescribed in that statute. "A compliance with such requirements is an absolute prerequisite to an appeal under this statute."[584] Since a proper certification "is essential to confer jurisdiction upon the appellate court"[585] and since no such certification was in the record, the supreme court dismissed the appeal and remanded the case to the trial court for such further action as deemed appropriate on the parties' suggested courses of proceeding.

Highland Construction Co. v. K.I.T. Coal Co. was disposed of in a cryptic opinion in which the state supreme court noted that the action among the multiple parties involved multiple claims, all of which apparently had not been adjudicated. The action was therefore remanded to the trial court since there had been no compliance with the certification requirements of the interlocutory appeal statute. Interestingly, the court went on to suggest certain issues that should be addressed upon remand, and offered the further opinion that another issue probably could not be determined from the face of the complaint.[586] These gratuitous suggestions were probably prompted by an understandable desire to avoid a later reversal, and they also intimate that, contrary to the holding reiterated in *Putnam*, certification is not as essential to confer jurisdiction as might otherwise be supposed. In any event, *Putnam* and *Highland Construction Co.* reaffirm the principle that if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not appealable of right before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.[587]

B. The Availability of Appellate Review by Way of Writ of Error

The intricacies of existing appellate practice have been remedied to some extent by the writ of error, which serves as a salutary device permitting review otherwise unavailable because of non-

583. *Id.*
584. *Id.*
585. *Id.*
586. 557 S.W.2d at 67.
587. *See* TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

compliance with the technical requirements of review by way of appeal or appeal in error.[588] There are limits, however, on the extent to which the writ of error can be so used, as *Hamby v. Millsaps*[589] illustrates.

At the conclusion of an action awarding death benefits under the workers' compensation law,[590] defendant prayed for and was granted an appeal in the nature of a writ of error to the supreme court. Defendant timely filed an appeal bond and bill of exceptions, but did not file assignments of error and brief within the time specified in rule 14 of the supreme court rules.[591] On plaintiff's motion defendant's appeal was dismissed for failure to comply with rule 14. Defendant then sought review by writ of error and the supreme court held that review was unavailable.

The Tennessee Code provides that review by writ of error is available "in all cases where an appeal in the nature of a writ of error would have lain."[592] This language, the supreme court noted, "implies that the remedy of an appeal in the nature of a writ of error, although available, has not been perfected or utilized."[593] Thus, the court stated in a summary of previous decisions, the writ of error is available if the appealing party has not perfected an appeal in the nature of a writ of error by failing to file in timely fashion an appeal bond or oath in forma pauperis or a transcript of the record.[594] However,

> if the appeal in the nature of writ of error is fully perfected by timely filing of appeal bond or pauper's oath *and* transcript of the record, the remedy of writ of error is no longer available. This is true even though a review of the merits of the appeal is not obtained, whether due to voluntary abandonment of the appeal by the appellant . . . or to the dismissal of the appeal by the appellate court because the appellant fails to file assign-

588. *See, e.g.*, Ward v. North Am. Rayon Corp., 211 Tenn. 535, 366 S.W.2d 134 (1963); Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949).

589. 544 S.W.2d 360 (Tenn. 1976).

590. TENN. CODE ANN. §§ 50-901 to 919, -1001 to 1029, -1101 to 1109, -1201 to 1211 (1977 & Cum. Supp. 1978).

591. Under supreme court rule 14 a party has 25 days after the date of the filing of the transcript of the record to file his assignment of errors and supporting brief.

592. TENN. CODE ANN. § 27-601 (1955).

593. 544 S.W.2d at 361.

594. *Id.*

> ments of error and brief within the time required by law or rules of the court or for other good cause.[595]

Since defendant had perfected his appeal in the nature of a writ of error by timely filing of the appeal bond and transcript of the record,

> he has had the benefit of the remedy of appeal in the nature of a writ of error, even though he lost the right to a review of the merits of his appeal by reason of the dismissal thereof because of his failure to file assignments of error and brief within the time required . . . . He, therefore, is not entitled to review now by writ of error.[596]

There is something odd about saying that defendant had the benefit of an appeal in error even though he lost the right to a review of the merits. It seems equally as odd to deny access to the writ of error to litigants more diligent than those to whom the writ is available. An appellate court should finally dismiss an appeal if appellant fails to prosecute his appeal diligently, but it seems somewhat mechanical to refuse a writ of error to a litigant merely because he timely filed his appeal bond and transcript but failed to file his assignments of error and brief in timely fashion. If, as may have been the case,[597] appellant's dereliction were egregious and inexcusable, refusal to afford review on the merits would be understandable, but nothing in the court's opinion indicates the outcome would have been any different if appellant's assignments and brief had been filed only a day or two late and for an unavoidable reason. *Hamby*, therefore, sounds a warning that cannot safely be ignored.

C. Choosing the Correct Appellate Court

If an appeal is taken at the appropriate time and in the correct fashion, problems still may arise in determining the court to which to appeal. Unlike the allocation of subject-matter jurisdiction in criminal appeals, the allocation of subject-matter jurisdiction between the supreme court and court of appeals is a

595. *Id.* (citations omitted) (emphasis in original).

596. *Id.* at 361-62.

597. The transcript of the record on the first appeal in error was filed on December 3, 1975. The opinion in *Hamby* was handed down December 6, 1976. These dates, separated by over a year, suggest appellant may have delayed seeking a writ of error for a considerable time.

hodgepodge.[598] One of the most troublesome provisions of the Code allocating subject-matter jurisdiction in civil appeals has been that which permits direct review by the supreme court of cases "which have been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts, or in which all the facts have been stipulated."[599] The legislature eliminated this provision during the survey period and all such cases are now appealable to the court of appeals.[600] The legislature also significantly lessened the burden that otherwise would have been placed on the supreme court by amending the Uniform Administrative Procedures Act to provide for appellate review in the court of appeals[601] and not in the supreme court as that Act originally provided.[602]

Finally, in *Ezell v. Buhler*[603] the state supreme court held that the circuit court did not err in holding it had no jurisdiction over an appeal from a county court judgment overruling exceptions to a claim filed against an estate being probated in the county court. After the county judge dismissed the exceptions of the executrix and awarded judgment against the estate, the executrix appealed from county court to circuit court, which dismissed the appeal on the ground that jurisdiction was exclusively in either the court of appeals or the supreme court. The supreme court affirmed. In so doing, it reiterated a prior holding[604] that the relevant statute provided for review of judgments of a county or probate court concerning exceptions to a claim against an estate only in the court of appeals or supreme court.[605] Whether review is to one or the other appellate court depends on the statutes allocating subject-matter jurisdiction between them.[606] The supreme court also held it was not in a position to review the merits of the county court judgment because "no appeal from that court was prayed and granted to this Court; only the judgment of the Circuit Court was appealed to this Court."[607]

598. *See* Sobieski, *supra* note 495, at 182 n.114.
599. 1925 Tenn. Pub. Acts ch. 100, § 10.
600. *See* TENN. CODE ANN. § 16-408 (Cum. Supp. 1978).
601. *Id.* § 4-524.
602. 1974 Tenn. Pub. Acts ch. 725, § 18.
603. 557 S.W.2d 62 (Tenn. 1977).
604. Rowan v. Inman, 207 Tenn. 144, 338 S.W.2d 578 (1960).
605. TENN. CODE ANN. § 30-518 (1977).
606. 557 S.W.2d at 63; *see* TENN. CODE ANN. § 16-408 (Cum. Supp. 1978).
607. 557 S.W.2d at 63.

Since the purpose of praying for and granting an appeal is to provide a record of the intent to appeal,[608] it seems overly technical to deny appellate review altogether because the executrix appealed to the wrong court. In cases appealed to the supreme court that should have been appealed to the court of appeals, and vice versa, the case is simply transferred to the appropriate appellate court, not dismissed.[609] The same procedure would seem equally appropriate in cases like *Ezell*.

D. Who May Appeal

The standing of a party, who has otherwise properly taken an appeal, to seek review before the appropriate appellate tribunal seldom raises problems since typically a party has no incentive to appeal unless he is disappointed with the trial court's judgment in some way, and generally any aggrieved party may appeal. *Cole v. Arnold*[610] and *Carey v. Jones*,[611] both of which dealt with the identical question of who may appeal, are therefore somewhat unusual. In those cases the supreme court and the court of appeals independently arrived at the conclusion that a defendant with the right of contribution is an aggrieved party who may appeal a judgment in favor of his codefendant.

Plaintiffs in *Cole* brought an action for damages to their building sustained as a result of a collision between defendants' vehicles. Neither defendant offered evidence at the trial of the action in general sessions court and a judgment was entered in favor of one of the defendants and against the other. Defendant against whom judgment was entered appealed to circuit court both the judgment against him and the judgment in favor of his codefendant. The circuit court held defendant had no right to appeal the judgment exonerating his codefendant from liability, but the supreme court disagreed.

The supreme court conceded that prior to enactment of the Uniform Contribution Among Tortfeasors Act[612] a defendant could not appeal the dismissal of his codefendant because he was not aggrieved nor was his liability affected, since the substantive

608. *See* Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 674 (1943).

609. *See* TENN. CODE ANN. §§ 16-408, -450 (Cum. Supp. 1978).

610. 545 S.W.2d 95 (Tenn. 1977).

611. 546 S.W.2d 814 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

612. TENN. CODE ANN. §§ 23-3101 to 3106 (Cum. Supp. 1978).

law did not recognize a right of contribution.[613] However, under the Act a defendant has a right of contribution from a co-defendant whose negligence contributed to a plaintiff's injury,[614] and therefore a defendant's liability is affected by a judgment in favor of his codefendant.[615] Accordingly, the defendant in such circumstances is an aggrieved party having the right to appeal the judgment exonerating his codefendant.[616] The issue presented in *Carey* was the same as in *Cole* and the court of appeals, in an opinion initially handed down before *Cole*, reached the same result.[617]

The opinion in *Carey* does not indicate whether defendants cross-claimed against each other, but it seems reasonably clear from the opinion in *Cole* that no claims had been asserted between defendants there.[618] Presumably the rule of law announced in these two cases is therefore applicable even in the absence of claims for contribution being asserted by the defendants against one another. The availability of appellate review also seems to leave little doubt that issues actually and essentially litigated between the defendants are precluded from relitigation,[619] assuming the rules of collateral estoppel are otherwise fully satisfied. The question after *Cole* and *Carey*, therefore, is not whether a defendant may appeal a judgment in favor of her codefendant but whether she can afford not to.

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613. *See, e.g.*, Yellow Cab Co. v. Pewitt, 44 Tenn. App. 572, 316 S.W.2d 17 (1958).

614. *See* TENN. CODE ANN. §§ 23-3102(b), -3103 (Cum. Supp. 1978).

615. 545 S.W.2d at 97.

616. *Id.*

617. 546 S.W.2d at 817.

618. After plaintiffs commenced their general sessions court action and during the time that that action was appealed to circuit court, one of the defendants instituted an independent action against the other. 545 S.W.2d at 97. It seems unlikely that this second action would have been brought if defendants had asserted claims against one another in the first action.

619. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(a) (Tent. Draft No. 1, 1973), which provides in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action . . . .

The belatedly reported opinion in *Gouger v. American Mutual Insurance Co.*,[620] an opinion rendered by the state supreme court in 1974, involved a distinguishable but equally vital question concerning who may appeal. *Gouger* was a workers' compensation case in which the successful plaintiff accepted payment of the judgment—voluntarily and not under protest, according to the appellees—at some point prior to rendition of the supreme court's opinion. The supreme court denied appellees' motion to dismiss the appeal, holding that an appellant could accept payment under a judgment he deems inadequate and still obtain appellate review. Appellant took the chance that on appeal he might end up with a less favorable judgment and therefore might be required to make restitution, but such was his right.[621] The court in *Gouger* did not indicate whether a defendant against whom judgment is entered may pay the judgment in full and still appeal, and there is authority that he may not.[622] It seems somewhat artificial to distinguish between these two situations, but the matter deserves more careful attention than can be given here.

E. Security on Appeal

Perhaps the occasional arbitrariness of the current law of appellate procedure in Tennessee is nowhere better illustrated than by the bonding requirement on appeal of a money decree. In *Ligon v. Ligon*[623] the circuit court entered a divorce decree that awarded $600,000 in lump-sum alimony and a $60,000 attorney fee. On an appeal by the husband, the wife moved to dismiss the appeal on the ground that the $250 cost bond filed by the husband was insufficient. The wife argued that under the Code decrees for a specific sum of money require a bond for the amount of the decree, damages, and costs, and not just costs alone.[624] The intermediate appellate court did not deny that the wife's argument would have been well founded if the action had been tried in chancery court, but the court held the statute was inapplicable

620. 548 S.W.2d 296 (Tenn. 1974) (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

621. *Id.* at 297.

622. Metropolitan Dev. & Hous. Agency v. Hill, 518 S.W.2d 754 (Tenn. Ct. App. 1974), *cert. denied, id.* (Tenn. 1975).

623. 556 S.W.2d 763 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

624. *See* TENN. CODE ANN. § 27-313 (1955).

to actions tried to a circuit court.[625] The historical distinction between actions tried at law and actions tried in equity thus remains, even though there is no sensible contemporary reason in this area to distinguish between the two.

F. Informing the Appellate Court of the Proceedings Below

The impact of history on the current law of appellate procedure is also strikingly evident with regard to preparation of the appellate record. For example, the bill of exceptions can be traced back to the Statute of Westminster of 1285.[626] Given this ancient lineage, it is not surprising that highly technical questions concerning preparation of the bill of exceptions continue to beset the participants in the appellate process. Of all the areas of appellate procedure that received explicit consideration in the reported opinions during the survey period, that pertaining to the bill of exceptions generated the greatest number of opinions.

1. Preparation of the Bill of Exceptions

The most significant opinion concerning preparation of the bill of exceptions was the state supreme court's opinion in *Arnold v. Carter*.[627] The opinion in that case disposed of two separate appeals that presented the same basic question of appellate procedure. In *Arnold* itself, the bill of exceptions, which consisted of a transcript of the evidence and exhibits and which had previously been approved and signed by counsel for all parties, was taken directly to the chancellor instead of being filed with the clerk as specified in the relevant statute.[628] The chancellor examined the bill and signed, approved, and dated each of the exhibits, but he inadvertently did not sign the transcript itself. The bill was filed in that condition only four days after entry of the judgment appealed from, well within the time for filing the bill.[629] The chancellor's missing signature was not detected by the parties, and the appeal was duly docketed and briefed in the court of appeals. That court noted the omission and called the matter to the attention of counsel for appellant, who obtained an affidavit

625. 556 S.W.2d at 765-66.
626. 13 Edw. 1, c. 31; *see* Sobieski, *supra* note 495, at 242-43.
627. 555 S.W.2d 721 (Tenn. 1977).
628. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).
629. *See id.* § 27-111.

from the chancellor in which he stated he had examined and approved the bill but inadvertently had failed to sign the transcript. The court of appeals, however, held that the bill had to be signed within ninety days of judgment and, since the bill had not been signed within that time, it could not consider the bill but only the technical record.[630] The court of appeals, therefore, did not consider those assignments of error directed to the evidence contained in the transcript.

In *Flynn v. Jenkins*, the other appeal decided in the same opinion, the bill, as in *Arnold*, had been approved by counsel for the parties and timely filed with the clerk. Unlike *Arnold*.the bill was signed by the trial judge, but, again as in *Arnold*, more than ninety days after judgment. This bill too was held fatally defective by the intermediate appellate court.

Reversing and remanding both cases, the state supreme court held that nothing in the current version of the Code requires the trial court to sign the bill of exceptions within thirty days or, if an extension has been timely sought and granted, within ninety days after entry of the judgment being appealed.[631] The Code simply requires that the bill be filed within the designated time,[632] and the bill may be filed by the clerk when it is lodged with him bearing the "certificate of approval of the parties or the certificate of the court stenographer . . . ."[633] If, however, the bill has not been approved by all the parties, then the filing party must also certify that notice of the filing has been given to all other interested parties.[634] Notice need not be given if all the parties have previously approved the bill because, in the indisputably sensible opinion of the supreme court, "it would be redundant indeed to require that notice be given to the other parties of the filing of the bill of exceptions, in order that they might make objections, when they have already previously approved its contents."[635] The Code also provides that if notice must be given to the other parties, they have ten days from filing of the bill (not, it needs to be emphasized, ten days from receipt of notice of the

630. For a discussion of the distinction between the bill of exceptions and the technical record, see Sobieski, *supra* note 495, at 242-43.

631. 555 S.W.2d at 723.

632. *Id.*; *see* TENN. CODE ANN. § 27-111 (Cum. Supp. 1978).

633. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).

634. 555 S.W.2d at 723.

635. *Id.*

filing) to file written objections with the clerk.[636] Once the record has been timely filed, the Code directs the trial court to affix his certificate of approval to the bill "as soon as practicable after the filing"[637] or as soon as practicable after the ten-day notice period.[638] The action of the trial court in affixing his certificate of approval to the bill of exceptions comprises the requisite authentication.[639]

These provisions, which were initially incorporated into the Code in 1972,[640] simplify prior law, but as *State v. Williams*[641] illustrates, the bill of exceptions must still be timely filed and signed by the trial court. The importance of these requirements is highlighted by the fact that the supreme court left little doubt that it wanted very much to decide the issue presented. "The time is opportune,"[642] the court stated, to decide the question whether a non-lawyer juvenile judge may constitutionally incarcerate a juvenile or deprive him of his liberty, a question the court characterized as "of far-reaching significance"[643] and "of vital public importance."[644] But the court concluded that it could not reach the merits because the bills in the consolidated cases were fatally defective.[645] This was so for two reasons. First, the trial judge never signed the bills.[646] Second, the bills were not filed within thirty days after judgment and no motion for an extension was made until after expiration of the thirty-day period.[647] Limiting itself to a review of the technical record, the court also found it insufficient since the record did not indicate whether the juvenile judge was or was not a lawyer.[648] Accordingly, the supreme court reversed the court of appeals, which held due process was not satisfied by nonlawyer juvenile judges,[649] and affirmed the trial court's judgment.

636. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).
637. *Id.*
638. *Id.*
639. *Id.*
640. 1972 Tenn. Pub. Acts ch. 497, §§ 2-3.
641. 547 S.W.2d 895 (Tenn. 1976).
642. *Id.* at 896.
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.*
647. *Id.* at 896-97.
648. *Id.* at 897.
649. *Id.* at 895-96.

Williams was decided before *Arnold* and the court in *Arnold* did not overrule *Williams*.[650] Nevertheless, the continued precedential value of *Williams* is certainly open to some doubt. In criminal cases the Code empowers the appellate courts for good cause to order at any time the late filing of the bill of exceptions.[651] The appeal in *Williams* was taken to the court of appeals,[652] and the statute authorizing the late filing of the bill of exceptions does not expressly include the court of appeals.[653] It is somewhat more than simply discomforting to think, however, that a juvenile's interest in obtaining review of his conviction is valued less dearly than that of an adult similarly situated. It seems only fair, therefore, to permit the late filing of a bill of exceptions in a juvenile appeal like that in *Williams*. If this difficulty can be surmounted, then the remaining defect with the bill in *Williams*—the absence of the trial court's signature—can also be remedied pursuant to the rationale of *Arnold* by remanding the appeal to the juvenile judge for the affixing of his certificate of approval on the bill of exceptions.

Gouger v. American Mutual Insurance,[654] which was previously discussed in connection with the parties entitled to appeal,[655] also involved a question concerning the timeliness of the filing of the bill of exceptions. The decree from which the appeal was taken was entered on December 12, 1972. A few days earlier appellant filed a motion in which he excepted to the decree prepared by appellees because it did not contain a provision granting an appeal. On December 27, 1972, the court entered an order allowing appellant ninety days within which to perfect his appeal, and the bill of exceptions was filed within ninety days of the order. The supreme court held that appellant's motion that resulted in the order of December 27, 1972, suspended the effective date of the decree until the motion was ruled on,[656] and since the

650. *See* 555 S.W.2d at 723-24.

651. TENN. CODE ANN. § 27-111 (Cum. Supp. 1978).

652. *See* 547 S.W.2d at 895.

653. TENN. CODE ANN. § 27-111 (Cum. Supp. 1978) provides in part: "[I]n criminal cases the Court of Criminal Appeals or the Supreme Court . . . shall be empowered at any time to order the filing of the bill of exceptions . . . so as to give the appellate court jurisdiction to consider the same . . . ."

654. 548 S.W.2d 296 (Tenn. 1974) (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

655. *See* text accompanying notes 620-22 *supra*.

656. *See* TENN. CODE ANN. § 27-111 (Cum. Supp. 1978), which provides

bill was filed within ninety days from the order, the court denied appellees' motion to dismiss the appeal.[657]

Appellee's motion to dismiss was equally unavailing in *Zeitlin v. Zeitlin*,[658] which also has been discussed previously.[659] Appellee in *Zeitlin* sought dismissal of the appeal on the ground that appellant failed to give him notice of the filing of the bill of exceptions, a requirement discussed in connection with *Arnold*.[660] However, appellee admitted to the court of appeals that, after learning that the bill had been filed, he filed no objections and made no other effort to reform the bill of exceptions. While authentication of the bill by the trial court prior to expiration of the notice period is generally invalid, the court held that under the circumstances it would consider the bill.[661] The fact that the court found no reversible error "from an informal examination"[662] of the bill of exceptions was offered as an additional reason for the court's decision to deny appellee's motions to strike the bill and to dismiss the appeal.

2. Incomplete Bill of Exceptions

Even if the bill of exceptions is timely filed and properly authenticated, difficulties arise if the bill does not contain "the mandatory recitation that 'this was all the evidence heard in this case', or words of like import."[663] In *State v. Williams*[664] the supreme court held that this "historic requirement"[665] and "matter of universal knowledge"[666] does not preclude consideration of the bill of exceptions if it is signed by counsel for all the parties and the trial judge.

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in part: "The period of pendency of any motion or other matter, having the effect of suspending . . . final judgment or action, shall be excluded in the computation of the period [for filing the bill of exceptions] . . . ."

657. 548 S.W.2d at 297 (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

658. 544 S.W.2d 103 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1976).

659. *See* text accompanying notes 532-41 *supra*.

660. *See* text accompanying note 634 *supra*.

661. 544 S.W.2d at 106.

662. *Id.*

663. State v. Williams, 547 S.W.2d 895, 896 (Tenn. 1976).

664. 547 S.W.2d 895 (Tenn. 1976).

665. *Id.* at 896.

666. *Id.*

Similarly, in *Yett v. Smoky Mountain Aviation, Inc.*,[667] the court of appeals held that appellate review is not precluded simply because a partial bill of exceptions is filed. All the evidence bearing on the purely legal issue presented for review appeared in the partial bill; a transcript of all the evidence, in the court's opinion, would have been superfluous.[668] Finding the procedure employed by appellant "commendable,"[669] the court denied appellee's motion to dismiss the appeal and to affirm the judgment below.

Failure to include all the evidence in the bill of exceptions proved surprisingly beneficial in *Fischer v. Cromwell Co.*[670] Plaintiff prevailed in general sessions court and moved to dismiss defendant's appeal to circuit court on the ground that defendant had not timely filed the appeal bond under the provision of the Code allowing ten days to appeal a judgment of a sessions court.[671] In a written response to this motion, defendant contended the sessions court judgment was entered *nunc pro tunc* on a date later than that appearing in the record and that the appeal bond was filed within ten days from the date of actual entry of the sessions court judgment. In a hearing pursuant to rule 43.05 of the Tennessee Rules of Civil Procedure, a circuit court judge overruled the motion, his order reciting that he had considered defendant's response to the motion. The bill of exceptions also disclosed that when the case came on for trial before a special judge of the circuit court, plaintiff's motion to dismiss was renewed orally and again denied. The court of appeals reversed, and in a rather cryptic and uninformative opinion, the supreme court affirmed the court of appeals' reversal. The basis for the supreme court's holding was that the appeal to circuit court from sessions court was untimely and that the appropriate remedy for an untimely appeal is by certiorari.[672]

In a persuasive dissent, Justice Harbison joined by Justice Brock noted that matters outside the appellate record were considered by at least one of the circuit court judges and possibly by

667. 555 S.W.2d 867 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1977).

668. *Id.* at 868.

669. *Id.*

670. 556 S.W.2d 749 (Tenn. 1977). The facts set forth in the text are taken from the dissenting opinion. *Id.* at 749-50 (Harbison, J., dissenting).

671. TENN. CODE ANN. § 27-509 (Cum. Supp. 1978).

672. 556 S.W.2d at 749.

both. This evidence, however, was not included in the record by plaintiff who sought reversal of the circuit judge's findings that the appeal to circuit court was timely. Absent a complete bill of exceptions, the dissent argued, the supreme court "should presume that there was sufficient evidence before them to sustain their respective findings that the appeal bond was in fact timely filed."[673] This presumption applied even though defendant took the appeal to the court of appeals. Plaintiff was the party attacking these particular findings, and "it was incumbent upon plaintiff, not upon the defendant, to preserve a proper bill of exceptions, including all matters considered by the trial judges, and this simply has not been done."[674] The dissent, therefore, was of the opinion the case should have been remanded to the court of appeals for consideration of the merits of defendant's assignment of errors that were properly supported by a transcript of the evidence heard at the trial.[675]

3. Wayside Bill of Exceptions

In addition to the ordinary bill of exceptions, Tennessee law, unlike the common law,[676] recognizes a wayside bill of exceptions, the unique purpose of which was discussed in *Overturf v. State*.[677] Although *Overturf* was a criminal appeal, the law set forth therein is equally applicable to civil appeals.[678]

Defendant Overturf was indicted with a codefendant for larceny of an automobile and joyriding. He offered no evidence on his own behalf and moved for a directed verdict both at the close of the state's case-in-chief and at the close of his codefendant's case. His motions were denied, and he was convicted and sentenced to not less than three nor more than five years in the penitentiary. The trial court, however, granted Overturf a new trial on the ground the evidence was insufficient to sustain the conviction. A timely filed and duly authenticated wayside bill of exceptions was made of these proceedings. Defendant was convicted at his retrial, and his motion for a directed verdict or, in the alterna-

673. *Id.* at 750 (Harbison, J., dissenting).
674. *Id.* (Harbison, J., dissenting).
675. *Id.* (Harbison, J., dissenting).
676. *See* Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 659 (1943).
677. 547 S.W.2d 912 (Tenn. 1977).
678. *Id.* at 914.

tive, for a new trial made at the conclusion of the second trial was overruled. On his appeal to the court of criminal appeals, defendant assigned as error the failure to direct a verdict in his favor at the first trial. The intermediate appellate court held that issue was not properly before it because the issue had not been included in defendant's new trial motion made after the second trial. The state supreme court reversed.

The form and content of the wayside bill of exceptions, the court noted, are virtually the same as those of an ordinary bill of exceptions, the distinction being that the wayside bill refers to an earlier stage of the proceedings or a former trial.[679] "Essentially, the purpose of a wayside bill of exceptions is to preserve a record of the first trial proceedings, in the event that a party is unsuccessful after a subsequent trial and desires to seek appellate review with respect to specific action taken by the trial court in the previous trial."[680] By utilizing a wayside bill, errors in the first trial can be assigned as error upon an appeal after the second trial, including errors such as the failure to direct a verdict or the granting of a new trial.[681] If a wayside bill of exceptions is properly before the appellate court, the wayside bill and the assigned errors relating to it must be considered prior to consideration of errors relating to the subsequent bill of exceptions.[682] If the trial court committed no error in granting a new trial, the appellate court will then consider the bill of exceptions concerning the second trial.[683] If, however, the trial court erred in granting a new trial, the appellate court will enter judgment on the results of the original trial and will not consider the succeeding trial.[684]

Applying these principles to the facts of *Overturf*, the supreme court held the court of criminal appeals was incorrect in concluding defendant could not obtain appellate review of errors that occurred at his first trial.

> By filing a wayside bill of exceptions with respect to the first trial, [defendant] preserved and made a part of the proceedings in this case on appeal his assignments of error relevant to that previous trial. His original motion for new trial relating to

679. *Id.*
680. *Id.*
681. *Id.* at 915.
682. *Id.*
683. *Id.*
684. *Id.*

> the wayside bill of exceptions remains just as viable on the present appeal as his subsequent motion for new trial relating to the bill of exceptions of his second trial.[685]

Since the question of whether the trial court erred in not directing a verdict after the first trial was open to appellate review but undecided by the court of criminal appeals, the supreme court remanded the case to that court for its consideration of the question.

4. Matters Includable in the Technical Record

The only remaining reported opinion concerning the appellate record concerned the matters includable in the technical record. In *Farrar v. Farrar*,[686] a divorce action discussed earlier in regard to amendments to the pleadings,[687] the husband assigned as error before the court of appeals the trial court's decree dated May 24, 1976, awarding his wife's attorneys a $5,000 fee for their representation of her on appeal to be paid by him. The technical record had been filed in the court of appeals on May 18, and on May 24 a judge of that court remanded the case to the trial court so that it could set an award of counsel fees for the appeal. It was in response to the appellate court's order that the trial court ordered the disputed attorneys' fees. That order was entered on June 1, though dated and signed earlier, and was filed with the court of appeals the next day. The supreme court held that the decree awarding fees was properly before the court of appeals "notwithstanding the fact that no appeal therefrom was prayed. The sole purpose of the remand was for the fixing of attorneys' fees. Certainly the amount so fixed, and certified, is a legitimate issue on appeal."[688]

G. Discretionary Review by the State Supreme Court of Judgments of the Intermediate Appellate Courts

1. Assignment of Errors and Supporting Brief

As cases like *Farrar* and others discussed in this survey illustrate, the state supreme court hears not only cases appealed di-

685. *Id.* at 916.
686. 553 S.W.2d 741 (Tenn. 1977).
687. *See* text accompanying notes 344-58 *supra*.
688. 553 S.W.2d at 745.

rectly to it from the trial court but also cases that have been considered by the intermediate appellate courts.[689] Review of final determinations of the intermediate appellate courts is sought by petitioning for certiorari.[690] The supreme court during the survey period modified its rules governing the procedure for so petitioning. Supreme court rules 11 and 12 were amended, first, to make clear that they govern petitions for certiorari (or certiorari and supersedeas) to review judgments of both intermediate appellate courts and not just those of the court of appeals.[691] In addition, rule 11 as amended eliminates the five-days notice of the intent to file the petition for certiorari that previously had to be given opposing counsel.[692] The most extensive changes, however, were in supreme court rule 12. Verification by affidavit of the petition is no longer necessary.[693] Also, while rule 12 still permits use of briefs filed in the intermediate appellate court, the rule now requires that the assignment of errors be redrafted to indicate specifically in what respects the opinion of the intermediate appellate court is in error.[694] The brief in support of the assignments must also be redrafted along similar lines.[695]

> It is not . . . acceptable . . . to attach a copy of the brief filed in the intermediate court to a skeleton petition for the writ of certiorari, making a single reference to said brief, as a substitute for assignment of errors and brief in support thereof, which must be directed to alleged error by the intermediate court, rather than the trial court.[696]

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689. *See* TENN. CODE ANN. §§ 16-452, 27-819 (Cum. Supp. 1978).

690. *Id.*

691. This was accomplished by deleting reference to the "court of appeals," Tenn. Sup. Ct. R. 11, 12, 218 Tenn. 811-12 (1967), and substituting the phrase "intermediate court[s]." TENN. SUP. CT. R. 11, 12.

692. Tenn. Sup. Ct. R. 11, 218 Tenn. 811-12 (1967), provided in part for "five days' notice of the filing of the petition being first given opposite counsel . . . ."

693. *Compare* Tenn. Sup. Ct. R. 12, 218 Tenn. 812 (1967), *with* TENN. SUP. CT. R. 12 (as amended, effective Jan. 1, 1977).

694. TENN. SUP. CT. R. 12 provides in part: "[A]ssignments of error in this Court must be redrafted expressly directed to error in the judgment or decree of the intermediate court, showing specifically wherein the opinion of that court is erroneous."

695. TENN. SUP. CT. R. 12 provides in part: "Each section of a brief in support of the assignment of errors . . . must also be redrafted . . . ."

696. TENN. SUP. CT. R. 12.

Reply briefs must respond to each section of petitioner's assignment of errors and supporting brief, and are subject to the same requirements as those governing petitioner's assignment and brief.[697]

2. Effect of Denial of Review

Many petitions for certiorari are not granted, and in *Adams v. State*[698] the state supreme court reaffirmed its previously expressed view that the mere denial of certiorari " 'does not commit us to all the views expressed in a particular opinion. *We are primarily concerned on such application with the result reached.*' "[699] The effect of denial of certiorari accompanied by an opinion, however, proved to be a far more difficult question for the state supreme court to resolve.

Pairamore v. Pairamore[700] was a divorce action in which the supreme court denied a first petition for certiorari in 1974. The court accompanied its denial of certiorari with a memorandum opinion suggesting that the wife's claim for homestead be given consideration on remand. Though the wife had not expressly asked for homestead in her complaint, she had asked that her husband's interest in the family residence be vested in her. The supreme court in an earlier unrelated case held that request to be a sufficient prayer for relief to support an award of homestead.[701] Neither the trial nor intermediate appellate court considered the wife's homestead claim. The decree of the court of appeals simply awarded nominal periodic alimony and remanded the case for enforcement of its decree and retention of the case in the trial court for any modification required by changed circumstances.

On remand after the denial of certiorari, the general sessions court determined that it did not have jurisdiction to order the sale of the family residence in order to award homestead, and the court of appeals affirmed, reasoning that the supreme court's memorandum opinion denying certiorari had no force or effect whatever on its earlier decree. The supreme court granted a second petition for certiorari and affirmed.

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697. *Id.*

698. 547 S.W.2d 553 (Tenn. 1977).

699. *Id.* at 556 (quoting Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 611, 130 S.W.2d 85, 88 (1939)) (emphasis added by *Adams* court).

700. 547 S.W.2d 545 (Tenn. 1977).

701. Trimble v. Trimble, 224 Tenn. 571, 458 S.W.2d 794 (1970).

Three separate opinions were voiced by the state supreme court. In one, Justice Fones, speaking for himself and Justice Harbison, noted that there are two inconsistent lines of cases, one suggesting the court acquires jurisdiction upon timely filing of a petition for certiorari and another suggesting jurisdiction attaches only if certiorari is granted.[702] Justices Fones and Harbison concluded jurisdiction exists when the petition for certiorari is filed.[703] The denial of certiorari accompanied by a published opinion means the supreme court agrees only with the result but not the disposition of the issues by the intermediate appellate court.[704] Any principles of law enunciated in a published opinion of the supreme court upon the denial of certiorari are entitled to stare decisis effect.[705]

In a second opinion Justice Brock, with the concurrence of Justice Cooper, distinguished between the lawful authority of the supreme court to grant or to deny a petition for certiorari and its authority to pass on the merits.[706] In their opinion, authority to pass on the merits is acquired only if certiorari is granted.[707] An opinion filed on the denial of certiorari "should be limited to a statement of reasons for refusal to take jurisdiction of the merits of the case; anything more is dictum and amounts to an advisory opinion which we are not authorized to give."[708]

Finally, in a third opinion Justice Henry argued that upon the filing of a petition for certiorari, the court acquires jurisdiction to determine whether certiorari should be granted.[709] However, Justice Henry was also of the view that the denial of certiorari accompanied by an opinion "becomes the law of the case and is conclusive in subsequent proceedings."[710] Justice Henry also appears to agree that any principles of law enunciated in an opinion accompanying the denial of certiorari are entitled to stare decisis effect.[711]

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702. 547 S.W.2d at 546-47.

703. *Id.* at 547.

704. *Id.* at 548.

705. *Id.*

706. *Id.* at 549 (Brock, J., concurring).

707. *Id.* (Brock, J., concurring).

708. *Id.* at 550 (Brock, J., concurring).

709. *Id.* (Henry, J., now C.J., concurring in part & dissenting in part).

710. *Id.* at 551 (Henry, J., now C.J., concurring in part & dissenting in part).

711. If the supreme court denies certiorari but accompanies the denial

Two conclusions seem justified by the views expressed by the respective justices in *Pairamore*. First, the denial of certiorari leaves the judgment of the intermediate appellate court unimpaired; only Justice Henry thought otherwise. Second, opinions issued on the denial of certiorari are entitled to stare decisis effect although Justices Brock and Cooper disagree. The desirability of giving these opinions such an effect would certainly be open to question if the proposed Tennessee Rules of Appellate Procedure were adopted by the General Assembly. Under those rules, appellant's request for supreme court review will be just that, a request and demonstration to the supreme court that the case is of such extraordinary importance that it is an appropriate one for granting review.[712] Such a request will typically give only incidental consideration to the correctness of the intermediate appellate court's opinion since the supreme court cannot realistically be expected to correct every error made by the intermediate appellate courts.[713] If the proposed appellate rules are adopted, the most desirable approach to the question raised in *Pairamore*, therefore, would appear to be that of Justices Brock and Cooper.

H. The Scope of Appellate Review

1. Administrative Proceedings

If the parties have successfully avoided the obstacles strewn along their path to a review on the merits, they must next concern themselves with the appropriate scope of appellate review. In

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with an opinion, "[t]his means," in Justice Henry's view, "that the Court has elected to decide the controversy, *or clarify the law*, or considers it desirable to outline procedure on remand *or that it has used this means of advising the trial court and counsel of the Court's views on a controlling principle of law . . . .*" *Id.* at 550-51 (Henry, J., now C.J., concurring in part & dissenting in part) (emphasis added). Later in his opinion Justice Henry speaks of "the right to hand down a binding opinion on certiorari denials." *Id.* at 552 (Henry, J., now C.J., concurring in part & dissenting in part). While Justice Henry's views on the matter are not unambiguously clear, he does appear to agree with Justices Fones and Harbison that principles of law enunciated in an opinion accompanying the denial of certiorari are entitled to stare decisis effect.

712. *See* PROPOSED TENN. R. APP. P. 11(b).

713. *See* Sobieski, *supra* note 576, at 19-20; Sobieski, *supra* note 495, at 231-35. The supreme court and the litigants are also deprived of oral argument if questions of law are decided upon the denial of certiorari. *See* Pairamore v. Pairamore, 547 S.W.2d 545, 551 (Tenn. 1977) (Henry, J., now C.J., concurring in part & dissenting in part).

Metropolitian Government of Nashville v. Shacklett[714] the Tennessee Supreme Court clarified the law concerning the scope of appellate review of the action of administrative agencies subject to the Uniform Administrative Procedures Act.[715]

Shacklett arose as the result of a municipal ordinance adopted by the Metropolitan Government of Nashville and Davidson County that restricted the location of retail liquor stores to a specified area of the Urban Services District. The Metropolitan Government refused to issue certificates of good moral character and retail liquor licenses to certain applicants solely because their proposed outlets were outside the specified area. Based on an evidentiary record made before it, the Tennessee Alcoholic Beverage Commission on review held the municipal ordinance to be arbitrary and unreasonable and granted the applications of twelve of the nineteen applicants who had been denied licenses by the Metropolitan Government. On review before the chancery court of Davidson County the chancellor also held the ordinance arbitrary and unreasonable but reversed the denial of the seven applications on the ground that the Commission established no satisfactory criteria or standard for the granting of some of the applications and the denial of others.

The state supreme court initially held that judicial review of orders of the Alcoholic Beverage Commission was properly sought in chancery court by way of a petition for review under the Uniform Administrative Procedures Act.[716] The court also thought it "clear from the language of the statute that the review provided in the chancery court is in no sense a broad, or de novo, review."[717] Instead, review is limited to the record made before the agency unless, as provided by statute, there are "alleged irregularities in procedure before the agency not shown in the record . . . ."[718] Moreover, review is confined to the purely legal issues of

> whether the agency acted within the scope of its statutory authority, and in conformity generally with statutory and constitutional provisions, whether it followed proper procedures, whether its decisions were arbitrary, capricious or in abuse of

714. 554 S.W.2d 601 (Tenn. 1977).
715. TENN. CODE ANN. §§ 4-507 to 527 (Cum. Supp. 1978).
716. 554 S.W.2d at 602-04.
717. *Id.* at 604.
718. *Id.*; *see* TENN. CODE ANN. § 4-523(g) (Cum. Supp. 1978).

discretion, and whether its conclusions are supported by material and substantial evidence in the record.[719]

It is against this background that the court then discussed the appropriate scope of appellate review. The Uniform Administrative Procedures Act itself provides for appellate review "as in chancery cases."[720] "This language," the court stated, "is not without difficulty."[721] The difficulty arises because review of chancery cases on appeal is ordinarily governed by a statutory standard that entitles the appealing party in an equity case to "a reexamination . . . of the whole matter of law and fact appearing in the record."[722] In nonjury cases the Code specifies that such a reexamination "of any issue of fact or of law in the appellate court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the judgment or decree of the trial court, unless the preponderance of the evidence is otherwise."[723]

The court quite sensibly held that the Uniform Administrative Procedures Act was not intended to permit broad or de novo appellate review of the chancellor's decision "when his action, initially, is confined to a narrow and statutorily prescribed review of the record made before the administrative agency."[724] It would not be practicable, the court stated, "to afford any broader or more comprehensive review to cases arising under the Act than is afforded to them by the trial court in the first instance . . . ."[725] Therefore, the court construed the language in the Act providing for appellate review "as in chancery cases" as referring only to the general procedures to be followed in taking a case from chancery court to the appellate court if that procedure is not otherwise specified in the Act itself.[726]

The appropriate scope of review by the chancellor of administrative action was also considered in two later decisions of the state supreme court, *United Inter-Mountain Telephone Co. v.*

719. 554 S.W.2d at 604 (citing TENN. CODE ANN. § 4-523(h) (1977)).
720. TENN. CODE ANN. § 4-524 (Cum. Supp. 1978).
721. 554 S.W.2d at 604.
722. *Id.*; *see* TENN. CODE ANN. § 27-301 (1955).
723. TENN. CODE ANN. § 27-303 (Cum. Supp. 1978).
724. 554 S.W.2d at 604.
725. *Id.*
726. *Id.*

Public Service Commission[727] and *Public Service Commission v. General Telephone Co.*[728] Both were telephone rate cases. In *United Inter-Mountain*, review of the rate fixed by the Public Service Commission was sought in chancery court by way of a complaint and petition for certiorari. The record made before the Commission was certified to the chancery court, which received substantial additional evidence and affirmed the action of the Commission. On appeal the state supreme court held that the Uniform Administrative Procedures Act applied to the Commission and that the only available method of judicial review of a contested case is by way of a petition for review.[729] In addition, the court emphasized, as it had in *Shacklett*,[730] that judicial review is limited to the record made before the agency unless there are alleged irregularities before the agency and that factual determinations may be set aside only if unsupported by material and substantial evidence.[731] It was error, therefore, for the chancellor to receive additional evidence. While normally it would be appropriate to decide the appeal on the basis of the record before the Commission, the supreme court concluded that in the interest of justice the case should be remanded to the Commission since both counsel and the chancellor had proceeded under the old, superseded statutes.[732]

In the *General Telephone Co.* case, the company argued that if a constitutional issue of confiscation is presented in a rate case, the appropriate scope of review is that established by the United States Supreme Court in *Ohio Valley Water Co. v. Ben Avon Borough*.[733] In that case the Supreme Court stated that in rate cases "if the owner claims a confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment . . . ."[734] The authors of one leading administrative

727. 555 S.W.2d 389 (Tenn. 1977).
728. 555 S.W.2d 395 (Tenn. 1977).
729. 555 S.W.2d at 391-92.
730. *See* text accompanying note 718 *supra*.
731. 555 S.W.2d at 391-92.
732. *Id.* at 392.
733. 253 U.S. 287 (1920).
734. *Id.* at 289 (citations omitted).

law casebook state that "[p]robably no administrative law decision ever gave rise to more instant, voluminous, or steadily critical comment by legal writers."[735] Moreover, the Tennesee Supreme Court's review of subsequent decisions of the United States Supreme Court as well as the decisions of the courts of other states led it to the conclusion that *Ben Avon*'s independent judgment rule was no longer good law and that the substantial evidence rule satisfied federal constitutional law.[736] "We reject the independent judgment rule as controlling Tennessee constitutional law and hold that the scope of review articulated in [the Uniform Administrative Procedures Act] provides adequate standards within constitutional limits, for judicial determination of the issue of confiscation in rate cases."[737] Most significantly, the state supreme court also stated that if the rates prescribed by the Public Service Commission are confiscatory, its order can be set aside because it would be "in violation of constitutional provisions, and arbitrary, capricious and an abuse of discretion."[738] In short, the state supreme court seems to have arrived at the proper conclusion that determinations of fact by the Public Service Commission will not be set aside if supported by substantial evidence. The further question, however, of whether the rate fixed on those facts is confiscatory raises a question of constitutional law that is subject to plenary review in the courts.

2. County Court to Circuit Court

In administrative review cases like those just discussed, the trial court functions like an appellate court, initially reviewing the action of the administrative agency pursuant to the limited review provisions of the Uniform Administrative Procedures Act. There are other cases, however, appealed to the trial court from inferior tribunals in which the trial court exercises plenary powers of review. *Delffs v. Delffs*[739] is a case in point.

The dispute in *Delffs* was between an intestate's widow and his eldest son over the right to administer decedent's estate. The county court issued letters of administration to the son, and intes-

735. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 409 (6th ed. 1974).

736. 555 S.W.2d at 399-402.

737. *Id.* at 402.

738. *Id.*

739. 545 S.W.2d 739 (Tenn. 1977).

tate's widow sought revocation of the letters on the ground that as decedent's widow she had a superior statutory right to administer the estate.[740] The county court denied the petition, and she appealed the order of denial to the circuit court. Decedent's son sought dismissal of the appeal on the grounds that the record did not show an appeal was prayed and granted, that the transcript was not timely filed, and that no bill of exceptions of the county court hearing was made and filed in circuit court. The circuit court overruled the motion to dismiss and heard the case, without receiving additional proof, on the technical record. That court concluded that the letters had been issued without notice to the widow and remanded the case with directions that the widow be appointed administratrix unless an evidentiary hearing, on notice to all parties, demonstrated she was unfit to serve in that capacity. On appeal to the court of appeals, decedent's son renewed his arguments that the appeal to circuit court should have been dismissed. The court of appeals reversed on the ground that a bill of exceptions was essential to review but had not been made or filed. Accordingly, the intermediate appellate court held the circuit court did not have authority to entertain the appeal and ordered that the widow's petition be dismissed. The state supreme court reversed.

The supreme court initially distinguished the earlier court of appeals decision in *Griffitts v. Rockford Utility District*.[741] In that case the intermediate appellate court held that an appeal in the nature of a writ of error, and not an appeal, was the proper method of review to circuit court from a county court order establishing a utility district. In those kinds of proceedings, the supreme court in *Delffs* reasoned, the county judge acts as an administrative agency, and therefore the narrower review of appeal in error, rather than the de novo review of an appeal, is appropriate.[742] There was dictum in *Griffitts* that all appeals from county court to circuit court should be reviewed as appeals in error,[743] except in jury and chancery cases. The supreme court denied certiorari in *Griffitts*, but that denial of certorari "must not be considered as approval of the dictum . . . but only as approval

740. *See* TENN. CODE ANN. § 30-109 (1977).
741. 41 Tenn. App. 653, 298 S.W.2d 33, *cert. denied, id.* (Tenn. 1956).
742. 545 S.W.2d at 741.
743. 41 Tenn. App. at 655-58, 298 S.W.2d at 34-35.

of the narrow holding . . . ."[744] The court then construed the statute that authorized an "appeal" from county court to circuit court of orders appointing executors and administrators[745] as being intended to permit a de novo hearing. "[U]pon review by an appeal of an order of the county court appointing an administrator or executor, the case is to be heard *de novo* in the circuit court."[746] Since the hearing in circuit court is de novo, no bill of exceptions is required, and the court of appeals decision to the contrary was in error.[747] Besides, the court stated, a bill of exceptions is never required if the error complained of appears in the technical record, and the error raised by the widow in circuit court—failure of the county court to give notice to her of its initial hearing—was an error found in the technical record.[748] The court concluded its opinion by noting that all other requirements for an appeal from county court to circuit court had been met.[749]

3. Interlocutory Review

As many of the previous cases demonstrate, the proper scope of appellate review is a multifaceted concept. No single, all-inclusive rule exists to guide an appellate court in its review of proceedings below. Rather, the scope of review depends on the kind of legal controversy and the particular lower-court (or agency) function upon which the appellate court must pass.[750] In *Cumberland Capital Corp. v. Patty*,[751] the Tennessee Supreme Court indicated that the scope of review also depends, at least to some extent, on whether the appeal is being taken from an interlocutory order.

Patty is best known for its holding concerning the permissible rate of interest that may be charged on the loan of money. However, in its petition to rehear, Cumberland Capital sought to have the state supreme court rule on matters not within the scope of the issues certified by the trial court for interlocutory review.[752]

744. 545 S.W.2d at 741; *see* text accompanying notes 698-99 *supra*.
745. *See* TENN. CODE ANN. § 30-110 (1977).
746. 545 S.W.2d at 742.
747. *Id.*
748. *Id.*
749. *Id.* at 742-43.
750. *See* APPELLATE COURT STANDARDS, *supra* note 494, § 3.11, at 19.
751. 556 S.W.2d 516 (Tenn. 1977).
752. *See* TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

The supreme court refused to consider the merits of a due process and commerce clause argument made by Cumberland Capital in its rehearing petition because "the nature of the appeal and the established principles of appellate review have combined to produce a narrow consideration of limited issues . . . ."[753] Without any explanation for the difference, however, the court proceeded to consider whether its holding should be given retroactive effect, even though that issue also was not expressly certified for interlocutory review.[754]

In dissent, Justice Harbison noted that Cumberland Capital and the other lending institutions as amici curiae emphasized in their principal briefs that the only issues open for review were those certified by the trial court.[755] These issues were fully and completely addressed in the court's principal opinion.[756] Moreover, in Justice Harbison's opinion, the earlier case of *Tennessee Department of Mental Health and Mental Retardation v. Hughes*[757] established that "in dealing with interlocutory appeals the Court requires the exact and precise questions to be reviewed to be stated in the order granting the appeal, and limits its decision to those specific questions."[758] Accordingly, he thought it was inappropriate to consider any additional questions pertaining to the court's opinion in light of the incomplete and undeveloped record before the court. "Interlocutory appeals, no doubt, serve a useful purpose, but parties utilizing this special appellate procedure, occurring, as it were, in the midst of the handling of the case in the trial court, should not expect the Court to respond to any issues except those certified here."[759]

The proper scope of appellate review on an interlocutory appeal presents a difficult question.[760] Whatever the appropriate scope of review, an appellate court, as Justice Harbison correctly noted, should not pass upon an issue that raises questions of fact upon which the parties have not been heard. Consideration of

753. 556 S.W.2d at 538.

754. *Id.* at 538-42.

755. *Id.* at 543 (Harbison, J., concurring in part & dissenting in part).

756. *Id.*

757. 531 S.W.2d 299, 300 (Tenn. 1975).

758. 556 S.W.2d at 543.

759. *Id.*

760. *See* Sobieski, *supra* note 495, at 192-94. *See also* 16 C. WRIGHT, A. MILLER, F. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937 (1977).

such an issue raises a serious due process problem. Besides, the purpose of a petition to rehear is to point out errors in the opinion of the appellate court, not to raise for the first time a question of law not raised on the first argument, especially when the question has not been raised in the trial court and turns on disputable matters of fact.[761]

4. Assignment of Errors

On the other hand, an appellate court may appropriately rest its decision concerning an issue raised by the parties on any available grounds.[762] For example, in *State ex rel. Polin v. Hill*,[763] four realtors brought a mandamus action to compel the issuance to them of licenses pursuant to the Business Tax Act.[764] The realtors filed a motion for judgment on the pleadings,[765] but the motion was overruled. No specific assignment of error was directed toward the failure to grant judgment on the pleadings. However, the state supreme court sensibly reversed the judgment of the trial court on the ground that the motion should have been granted. The assignments of error that were made, the court observed, "adequately invoke the same legal principles upon which said motion should have been decided in favor of realtors."[766]

I. Relief; Waiver

Not all errors occurring at a trial justify relief on appeal. "[A]n appellant who has failed to take whatever action is available to him to nullify any harmful effect runs the risk that his passivity may be deemed a waiver of the error."[767] The doctrine of waiver, however, cannot be mechanically applied. For example, in *Tennessee State Board of Education v. Cobb*,[768] the Board contended that plaintiff had not complied with the appropriate method of notification in his suit challenging his discharge. The

761. *See* Louisell & Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627, 635 (1956).

762. *See* Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 479-81 (1959).

763. 547 S.W.2d 916 (Tenn. 1977).

764. TENN. CODE ANN. §§ 67-5801 to 5829 (1976 & Cum. Supp. 1978).

765. *See* TENN. R. CIV. P. 12.03.

766. 547 S.W.2d at 917.

767. R. TRAYNOR, *supra* note 494, at 76.

768. 557 S.W.2d 276 (Tenn. 1977).

state supreme court held, as noted previously,[769] that the Board's position was without merit. However, the court also held that there was no waiver of the issue by the Board,[770] which had raised its objection to the method of service utilized by a motion to dismiss and a later prayer for an interlocutory appeal. Apparently the trial court and court of appeals suggested that the Board waived its right to appellate review by filing an answer and participating in the trial. "From a practical standpoint," the supreme court stated, "a defendant who has properly raised the question of the sufficiency of process and its service has no alternative, after being overruled, except to answer and defend or suffer judgment by default."[771] Although the court did not expressly say so, it apparently thought requiring defendant to suffer a default in order to obtain appellate review was unreasonable.

On the other hand, it has previously been noted that as long as a defendant has timely and complete notice of the action against him, no due process problem is presented,[772] and it is certainly questionable whether the results of an otherwise error-free trial should be set aside to ensure strict compliance with the prescribed method of giving notice. Any error, though open to review under the rationale of *Cobb*, would therefore appear to be harmless.

J. Frivolous Appeals

Perceived abuses of the appellate process can be remedied in a number of ways. All too often the remedy employed is to penalize the offender, rather than to modify the system that encourages such abuse.[773] Whatever the proper remedy in the long run, *Davis*

769. *See* text accompanying notes 180-87 *supra*.

770. 557 S.W.2d at 277.

771. *Id.* at 278. The doctrine of waiver, however, was invoked against defendant in State v. Thompson, 549 S.W.2d 943 (Tenn. 1977). *See* text accompanying notes 478-500 *supra*. Based on the reasoning of *Cobb*, it could be argued defendant in *Thompson* had no practical alternative other than to defend or forfeit her right to present evidence in her own behalf. The different results in these two cases may be justifiable, but it is difficult to distinguish the cases on the basis of the reasoning utilized in *Cobb*.

772. *See* text accompanying note 134 *supra*.

773. "The way to insure prompt and proper disposition of appellate work is not to penalize abuse of an unworkable system but to insure efficiency and dispatch in the system itself." Louisell & Degnan, *supra* note 761 at 642 (quoting Roscoe Pound).

v. Gulf Insurance Group[774] sounds a clear warning that, for the present, certain kinds of abuse will be penalized.

Davis, a tractor-trailer driver, brought a workers' compensation action, alleging that he injured his back on May 14, 1973. He further alleged that on suffering the injury he visited his family physician and that on the day following his injury he was forced by the pain to stop driving and leave his truck. Davis continued hauling for his employer, however, making three long distance trips in the next four weeks. In mid-June he was fired and, on June 19, 1973, he notified his employer of the alleged injury. The notification was beyond the thirty-day period for notification specified in the Workers' Compensation Act.[775] In a deposition, Davis claimed he had been unable to work since the accident, although at trial he admitted working full time for two different employers since the accident. He also admitted at trial that he told one employer he had never filed a workers' compensation claim or suffered a back injury. The chancellor dismissed the action on the ground Davis had not carried the burden of proof, finding " 'plaintiff's explanation of the events surrounding the alleged occurrence [of the injury] not entirely plausible' and his testimony 'impeached on the record.' "[776]

On appeal the state supreme court affirmed. "This court has repeatedly pointed out that on factual issues in workmen's compensation appeals it is concerned solely with whether any material evidence supports the findings below."[777] In light of this well-settled law, the court found Davis' arguments on appeal—which went to the sufficiency of the evidence—"obviously without merit."[778] Moreover, "a careful examination of the record"[779] convinced the court that no other error could legitimately have been raised on appeal. The court then went on to observe:

> [T]his case goes beyond mere meritlessness, however. It has no reasonable chance for success, for reversal of the decision would require revolutionary changes in fundamental standards of appellate review . . . . There is no basis for believing such revolu-

774. 546 S.W.2d 583 (Tenn. 1977).

775. TENN. CODE ANN. § 50-1001 (1977).

776. 546 S.W.2d at 585 (quoting chancery court opinion) (brackets in original).

777. *Id.*

778. *Id.*

779. *Id.* at 586.

> tionary changes might take place . . . .
>
> . . . [T]his appeal is recognizable on its face as devoid of merit. It presents no justiciable questions—neither debatable questions of law nor findings of fact not clearly supported. It is difficult to believe that such an appeal could serve any purpose other than harassment. It is equally difficult to believe that counsel could honestly believe in its merits . . . .[780]

On its own motion, the court ordered that expenses incurred in defending the appeal, including court costs and reasonable attorneys' fees, be assessed as damages against appellant.[781]

The reach of *Davis* is probably quite narrow. The supreme court itself correctly noted that too strict an interpretation of the statute permitting the awarding of damages for frivolous appeals might discourage legitimate appeals.[782] The court also noted that workers' compensation suits are particularly susceptible to the abuse of frivolous appeals.[783] These considerations, along with the difficulty of formulating a satisfactory definition of a frivolous appeal, suggest that damages will be awarded only in the clearest of cases.

K. Publication of Opinions

Perhaps one of the most controversial and difficult questions concerning appellate practice that has generated a significant amount of recent legal writing is the question of which opinions of an appellate court should be published. These difficulties have been explored in an earlier article on certain aspects of the proposed Tennessee Rules of Appellate Procedure[784] and will not be reexamined here. However, some attention needs to be given two developments that occurred during the survey period. First, the state supreme court modified its rule 31 on the publication of opinions to provide that no opinion designated not for publication "shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel." Second, the General Assembly, apparently dissatisfied with the court's rule on the publication of opinions, enacted a statute that requires all opinions of the supreme court to be published, as well as the opinions

780. *Id.*
781. *Id.*; *see* TENN. CODE ANN. § 27-124 (Cum. Supp. 1978).
782. 546 S.W.2d at 586.
783. *Id.*
784. Sobieski, *supra* note 495, at 265-68.

of the court of appeals if certiorari has been denied by the supreme court.[785] The statute exempts from its mandatory publication requirement

> appeals from any state boards or commissions, including public service commission, appeals involving revenue matters and/or taxes, and appeals where the only grounds for a new trial were that there was no evidence to support the verdict and/or that the verdict of the jury was contrary to the weight and preponderance of the evidence.[786]

Nothing in this addition to the Code speaks to publication of the opinions of the court of criminal appeals.

The statute differs from the supreme court's rule in several respects. Most notably, the court's own rule does not require publication of all its opinions but only those that establish a new rule of law or alter or modify an existing rule, involve a legal issue of continuing public interest, criticize existing law, resolve an apparent conflict of authority, or update, clarify, or distinguish a principle of law.[787] Also, the court's rule does not permit publication of the opinions of the intermediate appellate courts in which the supreme court grants or denies certiorari but concurs in the result only.[788] Presumably, the statute supersedes the court's rule to the extent the two are inconsistent, unless the statute invades the court's inherent rulemaking power.

VIII. The Binding Effect of Adjudications

After an action has been finally adjudicated, the law of res judicata steps in with its command that one judicial contest of a claim or issue is generally enough.[789] Traditionally res judicata is broken down into three categories. "Merger" arises when a judgment is rendered in favor of the plaintiff. The plaintiff's cause of action is deemed to merge in the judgment and is extinguished, being replaced by the plaintiff's right to sue on his judgment.[790] "Bar" refers to the situation in which a judgment is rendered in

785. Tenn. Code Ann. § 8-612(b)-(c) (Cum. Supp. 1978).
786. *Id.* § 8-612(b).
787. Tenn. Sup. Ct. R. 31(2).
788. *Id.* R. 31(4).
789. *See* Restatement (Second) of Judgments § 45 (Tent. Draft No. 1, 1973).
790. *Id.* §§ 45(a), 47.

defendant's favor, the judgment operating as a bar to a subsequent action on the same cause of action.[791] Under modern terminology, the merger and bar effect of a prior adjudication are collectively referred to as claim preclusion. "Collateral estoppel," or issue preclusion, prescribes that issues actually litigated and determined in one action are precluded from relitigation in subsequent litigation on a different cause of action if their determination was essential to the first judgment.[792] Both claim preclusion (merger and bar) and issue preclusion (collateral estoppel) also require some identity of parties, as both *Grundy County v. Dyer*[793] and *Usrey v. Lewis*[794] illustrate.

A. Persons Affected

Dyer was arrested for public drunkenness by two deputy sheriffs of Grundy County, who, in route to the county jail, allegedly beat him without justification. As a result of this incident, Dyer instituted suit in federal district court against the deputies, the county sheriff, and the county. That court dismissed the action against the county, apparently on the ground the county could not be sued in federal court.[795] A judgment for damages was awarded against the deputies but not against the sheriff. Dyer then filed suit in state court against the county seeking recovery of the balance of the federal court judgment that remained unsatisfied. Apparently the trial court in the state action entered judgment against the county based on the earlier federal judgment. The state supreme court held that in so doing the trial court erred.

The county argued that entry of judgment against it based on the earlier adjudication to which it was not a party deprived it of its day in court. The state supreme court quite correctly

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791. *Id.* §§ 45(b), 48.

792. *Id.* §§ 45(c), 68.

793. 546 S.W.2d 577 (Tenn. 1977). The court in *Dyer* also overruled Dyer's motion to dismiss because the motion for a new trial and appeal bond were filed prematurely. "It would be manifestly unjust, absent prejudice to the complaining party, to dismiss this appeal and penalize a lawyer and his client for promptness." *Id.* at 579.

794. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

795. *See* Moor v. County of Alameda, 411 U.S. 693 (1973). *But see* Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978) (a city is a person under 42 U.S.C. § 1983 (1970), but is not vicariously liable for the torts of its employees).

agreed. Noting that an action like Dyer's could be brought directly against the county, the court nonetheless stated it "cannot conceive of the county being held liable on a judgment rendered in a case in which it did not participate fully and as an adversary."[796] Accordingly, the supreme court remanded the case so that the county "may litigate liability and damages to the same manner and to the same extent as if the Federal Court judgment had not been awarded."[797]

This last-quoted statement must be construed in light of the facts before the state supreme court. Because the county was not a party to the earlier litigation, the judgment could not fairly be used against it. However, Dyer was a party to the previous litigation, and it would be appropriate to limit him to no more than the amount of damages he recovered in the first action unless the measure of damages in the two actions differs.[798] Similarly, if Dyer had not prevailed in the first action, he might well be prevented from bringing an action against the county if the county's liability depends solely on the wrongdoing of its deputies.[799]

The extent to which a party, who would be precluded from relitigating an issue with an opposing party, should also be precluded from relitigating that issue with another person not a party to the first action raises a difficult and controversial question.[800] But, even though a nonparty to the first action may be able to take advantage of the judgment in the previous litigation against a party to that litigation, *Dyer* demonstrates that the result of the first action cannot be used against someone not a party (or in privity with a party) to the previous litigation. *Usrey v. Lewis*[801] is another example.

The litigation in *Usrey* arose out of a two-car automobile accident, in which all the occupants of the automobiles were either killed or injured. Apparently eight separate actions were instituted, six of which were tried together. In each of those six

796. 546 S.W.2d at 581.

797. *Id.* at 582.

798. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 99(2) (Tent. Draft No. 4, 1977).

799. *See id.* § 99(3).

800. *Compare, e.g., id.* § 88 (Tent. Draft No. 2, 1975), *with, e.g.*, Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977).

801. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

actions, Barbara Usrey, the driver of one of the vehicles, had judgments entered against her. The other driver, Phyllis Lewis, had judgments entered in her favor in those actions to which she was a party, including a judgment in her favor against Barbara Usrey. The two actions before the court of appeals in *Usrey* involved plaintiffs who were not parties (or in privity with any of the parties) to the previously tried actions. The defendants in the untried actions included Barbara Usrey and Phyllis Lewis, who moved to have plaintiffs' actions dismissed on a plea of res judicata. The court of appeals quite properly held that the trial court erred in dismissing plaintiffs' actions.

The intermediate appellate court reasoned that while the issue of liability was the same, the parties were different and "[i]dentity of parties is required."[802] This statement by the court of appeals appears to be referring to the mutuality requirement under which one who invokes the conclusive effect of a prior judgment must have been bound if the judgment had gone the other way.[803] Many courts have relaxed the requirement of strict mutuality[804] but, as noted previously, not to the extent of completely depriving a litigant of his day in court. The court of appeals also rejected the argument that because plaintiffs did not participate in the consolidated trial of the other actions, they were bound by the results of that trial. Such a result, the court reasoned, would defeat one of the purposes of granting a severance or separate trial, which is to try an action "unhindered by other cases."[805] Finally, the court conceded that the verdicts in the action yet to be tried may turn out to be inconsistent with the verdicts previously rendered, "but no known legal principle prohibits a plaintiff from seeking his remedy because another plaintiff has been unsuccessful before a previous jury upon the same or similar evidence."[806]

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802. *Id.* at 615.

803. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 862 (1952).

804. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note, at 98-99 (Tent. Draft No. 2, 1975).

805. 553 S.W.2d at 616.

806. *Id.* The court of appeals also held defendant's reliance on the presumption of correctness that arises if there is no bill of exceptions was misplaced. "Such presumption relates only to findings of fact and not to conclusions of law." *Id.*

B. *Issue Preclusion*

Issue preclusion may also be denied for reasons other than those going to the identity of the parties. Generally speaking, an issue is conclusive in a subsequent action only if that issue was actually litigated and determined in the prior adjudication.[807] If several issues are litigated in an action, it sometimes cannot be ascertained which issue was determinative in the prior action. *Cole v. Arnold*[808] illustrates that in such a situation none of the issues are precluded from being relitigated.

Plaintiffs in *Cole*, it will be recalled,[809] sought to recover for damages to their building sustained as a result of an accident between Cole and Medic Ambulance Service. After plaintiffs' suit had been appealed from general sessions court to circuit court, Cole brought an action in circuit court for personal injuries and property damage against Medic. That action resulted in a general verdict for defendant. The trial court held in plaintiffs' action against Cole and Medic that the effect of the circuit court verdict was to establish Cole's negligence, and accordingly the trial court awarded plaintiffs a judgment against him. The state supreme court quite rightly held this to be error. Essentially the state supreme court reasoned:

> [T]he general verdict in favor of Medic in the tort action brought by [Cole] was not necessarily predicated upon a finding of negligence on the part of [Cole]. It is just as likely to have been predicated upon a finding that [Cole], as plaintiff in the circuit court action, failed to carry the burden of proof, which would not make [Cole] liable to [plaintiffs] in the sessions court case.[810]

Since it could not be ascertained whether the jury found Medic not negligent or whether it found Cole contributorily negligent, no issue preclusion effect was given the jury's general verdict.[811]

C. *Law of the Case*

Thus far this discussion has been concerned with the effect

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807. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 45(c), 68 (Tent. Draft No. 1, 1973).

808. 545 S.W.2d 95 (Tenn. 1977).

809. *See* text accompanying notes 610-17 *supra*.

810. 545 S.W.2d at 97.

811. *Id.*

that an adjudication in one case has on a subsequent case. "Issues previously decided recur, however, not only in successive suits but in successive stages of a single suit, and the principles that underlie the rules of res judicata are not without force in the latter situation."[812] *Rogers v. Ware*[813] provides a good example.

Various heirs of decedent brought an action to have a deed declared void and to have the land conveyed by the deed resold and the proceeds distributed among the heirs. Named as defendants were the purchasers, the successor trustee who sold the land at a public auction, a life tenant, and other heirs. At the first trial the chancellor held the successor trustee was properly appointed and that plaintiffs were estopped to attack the deed. On a first appeal, the court of appeals disagreed with the first holding but agreed that plaintiffs were estopped to deny the validity of the deed. However, the appellate court also concluded that not all the persons with an interest in the litigation were parties and remanded to permit them to be brought into the action, and to permit the rights of the life tenant to be settled. A petition for certiorari was not sought from the state supreme court. On remand, the trial court held that all persons with an interest were before the court, ratified the deed subject to the life estate, and ordered the proceeds from the sale distributed to the heirs. On a second appeal, the court of appeals affirmed.

The assigned errors, the court observed, appeared directed primarily to errors in the first trial, especially the holding that plaintiffs were estopped from challenging the validity of the deed.[814] That assigned error, however, had been decided on the first appeal. "Our previous holding has become final and is now the law of the case and may not be reargued and relitigated."[815] Moreover, no error was assigned on the second appeal that the trial court erred in holding that all parties were before the court.[816] Finally, since plaintiffs were estopped to deny the validity of the

812. J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 359, at 1153.

813. 555 S.W.2d 409 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1977).

814. *Id.* at 410. The court of appeals found it difficult to determine exactly what plaintiffs thought was error since the assignments of error did not refer to the pages of the record where the alleged errors appeared. *Id.*; *see* TENN. CT. APP. R. 12(2).

815. 555 S.W.2d at 410.

816. *Id.*

deed, the court also did not consider an assigned error relating to the life estate.[817]

IX. MISCELLANEOUS

By way of a conclusion to this survey only two other miscellaneous matters need to be mentioned. First, the Code was amended to provide that "any person who is required to deposit a bond for any reason by this state or any political subdivision of this state may deposit an amount of cash or a certified or cashier's check equal to the amount of the required bond in lieu of such bond."[818] This provision is inapplicable to appearance bonds in criminal cases.[819] Second, the Uniform Enforcement of Foreign Judgments Act[820] was amended to correct a drafting error.[821]

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817. *Id.*

818. TENN. CODE ANN. § 8-1958 (Cum. Supp. 1978).

819. *Id.* The statutes governing release in criminal cases are TENN. CODE ANN. §§ 40-1201 to 1247 (Cum. Supp. 1978), -3405 (1975), -3406, -3407 (Cum. Supp. 1978), -3408 (1975).

820. *See* TENN. CODE ANN. §§ 26-801 to 807 (Cum. Supp. 1978).

821. *Id.* § 26-803(c). The word "creditor" was substituted for the word "debtor." *See* 1977 Tenn. Pub. Acts ch. 50, § 1.