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COUNTERCLAIMS AND STATUTES OF LIMITATIONS: A CRITICAL COMMENTARY ON PRESENT TENNESSEE LAW

JOHN L. SOBIESKI, JR.*

Under rule 13 of the Tennessee Rules of Civil Procedure, defendant is required in some cases, and permitted in all others, to assert whatever claims he has against plaintiff as counterclaims in the same suit.¹ The rule also authorizes defendant to request and receive any relief to which he is entitled on his counterclaim, even if his relief is different in kind or exceeds in amount that sought by plaintiff.² Like its federal prototype,³ however, rule 13 is silent as to whether defendant may assert his counterclaims after the statute of limitations period applicable to them has run.⁴ This question arises because the statutes setting forth the limitations periods contain no indication that they were intended to prohibit the assertion of otherwise untimely claims asserted as counterclaims, and because a statute of limitations

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1. Rule 13.01 requires a party to assert

any claim, other than a tort claim, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be stated as a counterclaim if at the time the action was commenced the claim was the subject of another pending action. This rule shall not be construed as requiring a counterclaim to be filed in any court whose jurisdiction is limited either as to subject matter or as to monetary amount so as to be unable to entertain such counterclaim.

TENN. R. CIV. P. 13.01. Rule 13.02 permits the assertion of any other claim a party has against an opposing party.

The rule, it will be noted, does not speak in terms of defendants, but of parties asserting claims against opposing parties. Thus, plaintiff may be required to assert compulsory counterclaims against defendant. However, typically defendant, not plaintiff, is asserting counterclaims, and that situation is used as a model throughout this article. The rule of law which is advocated herein, however, applies with equal force to plaintiff's counterclaims.

2. *Id.* 13.03.

3. FED. R. CIV. P. 13.

4. To be distinguished is the question of whether the pleading itself setting forth the counterclaim has been served and filed in timely fashion. These matters are governed by the rules of procedure. See TENN. R. CIV. P. 5.05, 6.02, 12.01, 15.01.

objection is a waivable affirmative defense.⁵ Thus, the more precise question the courts have been called upon to resolve is whether plaintiff, by instituting his action, thereby waives a statute of limitations defense to a counterclaim asserted by defendant after the limitations period on the counterclaim has run.⁶

The Tennessee cases addressing this question provide various answers⁷ which cannot be reconciled when viewed from the perspective of the purposes served by statutes of limitations. Indeed, not one of the reported cases analyzes the question expressly in terms of those purposes. Instead, the current case law⁸ employs an analysis which improperly relies upon procedure at common law. This approach often produces uncertain results—uncertainty capable of siring mischievous offspring. Alternatively, the common law approach may lead to results which appear certain, but are rationally indefensible. The most recent decision of the Tennessee Supreme Court addressing this problem, *Lovejoy v. Ahearn*,⁹ will serve as the focal point to illustrate these propositions.

In *Lovejoy* plaintiff, Ahearn, commenced a negligence action to recover for personal injury and property damage suffered in a collision with a vehicle operated by Lloyd Lovejoy and owned by James Lovejoy, a passenger. Both were named defendants. Ahearn's action was commenced on the last day of the one-year limitations period for personal injury actions.¹⁰ Defendants answered, denying liability, and James Lovejoy filed a cross declaration, the ancestor of the present-day counterclaim, for property damage. This initial cross declaration was filed within the three-year limitations period applicable to injuries to personal property.¹¹ Thereafter, both defendants filed cross declarations seeking recovery for their personal injuries. The trial court struck

5. *Id.* 8.03.

6. For a discussion of the federal cases, see 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1419 (1971) [hereinafter cited as WRIGHT & MILLER].

7. Compare *Lovejoy v. Ahearn*, 223 Tenn. 562, 448 S.W.2d 420 (1969); *Stone v. Duncan*, 38 Tenn. (1 Head) 102 (1858), with *Lewis v. Turnley*, 97 Tenn. (13 Pickle) 197, 36 S.W. 872 (1896); *Paducah & M.R.R. v. Parks*, 86 Tenn. (2 Pickle) 553, 8 S.W. 842 (1888); *Dunn v. Bell*, 85 Tenn. (1 Pickle) 580, 4 S.W. 41 (1887), and *Williams v. Lenoir*, 67 Tenn. (8 Baxter) 395 (1875).

8. *Lovejoy v. Ahearn*, 223 Tenn. 562, 448 S.W.2d 420 (1969).

9. *Id.*

10. See TENN. CODE ANN. § 28-304 (Supp. 1974).

11. *Id.* § 28-305 (1955).

these cross declarations on the ground that they were not filed within the applicable one-year limitations period. On an interlocutory appeal the supreme court affirmed.

In deciding whether to permit adjudication of the Lovejoys' untimely asserted personal injury claims, the supreme court properly concluded that the statute pursuant to which the Lovejoys filed their cross declarations "in no way alludes to any statute of limitations."¹² Finding no statutory language permitting the assertion of untimely claims, the court then noted that the statute's purpose in authorizing assertion of claims by defendant was to avoid multiplicity of suits. Faced with nothing in the language or policy of the cross declaration statute which would compel adjudication of the untimely personal injury claims, the supreme court held that the cross declarations were properly stricken, because "cross declarations in tort actions [were] unknown to the common law."¹³

Although the supreme court did not expressly discuss the significance of the cross declaration statute's purpose of avoiding a multiplicity of actions, it is correct to conclude that that purpose is wholly unaffected regardless of whether defendant's claim is deemed barred by the statute of limitations.¹⁴ Also noticeably absent from the *Lovejoy* opinion is any discussion of the reasons for its holding in light of the purposes served by statutes of limitations. Consideration of those purposes demonstrates that they too would not be frustrated by permitting adjudication of defendant's claims which, like the Lovejoys', arise out of the transaction or occurrence sued upon by plaintiff.

Generally speaking, statutes of limitations seek to provide

12. 223 Tenn. at 568, 448 S.W.2d at 422. The Tennessee Code under which the cross declarations were filed provided:

In any action for tort where the defendant claims a cause of action, against the suing plaintiffs, or any of them, growing out of the same act, accident or transaction (such, for example, as collision of vehicles), the defendant may, along with his pleas and within the time limit allowed therefor, and in no case later than the issue term, file a cross declaration setting forth his cause of action, upon his executing a bond for costs, or otherwise complying with the law, in lieu thereof.

Code of 1932, § 8745 (codified at Tenn. Code Ann. § 20-1007 (1955) (repealed 1972)). The phrase in the statute which states that defendant may file a cross declaration "within the time limit allowed therefor" refers to the time in which the cross declaration itself must be filed, not to the timeliness of assertion of the underlying claim for statute of limitations purposes. See note 4 *supra*.

13. 223 Tenn. at 567, 448 S.W.2d at 422.

14. 6 WRIGHT & MILLER § 1419, at 109.

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 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.

It is of course true that defendant can prevent operation of the statute to bar his claim by commencing his own action within the limitations period. But the failure of defendant to assert his claim promptly in an independent action does not mean that his claim lacks merit. Defendant's inaction may reflect merely an uncounseled ignorance of the law or a sincere and honest intention to lay matters to rest, an intention not surprisingly altered upon receipt of plaintiff's complaint. Thus, if none of the policies served by statutes of limitations would be subverted by permitting adjudication of defendant's counterclaim, it seems unjust to prohibit adjudication of a potentially meritorious counterclaim on the ground that the statute of limitations has run.

The court in *Lovejoy* offered the proposition that "cross declarations in tort actions [were] unknown to the common law"¹⁵ as the only reason for its result. As an initial matter, the relevance of this observation is not readily apparent, since the unavailability at common law of a procedural device by which the Lovejoys

15. *Id.* The term "common law" as used in *Lovejoy* does not appear to be aimed at drawing a distinction between law as opposed to equity courts. An examination of cases decided prior to *Lovejoy* reveals that the type of court in which the action proceeded has not been deemed a relevant consideration for purposes of determining whether defendant may assert claims after the limitations period has run. Compare *Lovejoy v. Ahearn*, 223 Tenn. 562, 448 S.W.2d 420 (1969) (circuit court; untimely claim not permitted), and *Lewis v. Turnley*, 97 Tenn. (13 Pickle) 197, 36 S.W. 872 (1896) (chancery court; untimely claim permitted), with *Paducah & M.R.R. v. Parks*, 86 Tenn. (2 Pickle) 554, 8 S.W. 842 (1888) (circuit court; untimely claim permitted), and *Stone v. Duncan*, 38 Tenn. (1 Head) 102 (1858) (chancery court; untimely claim not permitted).

could assert their claims is quite distinct from the question of whether defendant's counterclaims may be asserted after the expiration of the limitations period. *Lewis v. Turnley*¹⁶ illustrates this distinction.

Lewis involved the sale of land which contained valuable improvements. Defendant vendee gave a note for a one-half undivided interest in the land. The administrator of the vendor's estate brought suit to recover a balance of approximately \$500 due on the note. Although admitting his indebtedness,¹⁷ the vendee affirmatively alleged that the vendor agreed, as part of the inducement to contract, to transfer to the vendee \$1600 worth of insurance on the improvements or to be bound for that amount of insurance. Before the insurance could be transferred, the improvements were destroyed by fire. Accordingly, defendant sought to recover \$800, one-half of the insurance coverage, against plaintiff's claim on the note. Plaintiff in turn argued that at the time defendant asserted his claim, the statute of limitations had run, thus barring his recovery. The supreme court held, however, that while the statute had run, defendant would be permitted to recover the difference between the amount of insurance coverage and the balance due on defendant's note.¹⁸

The court in *Lewis* noted initially that the governing provision of the Tennessee Code permitted assertion of defendant's claim.¹⁹ The court then suggested that it would be the "highest injustice" ²⁰ to allow plaintiff to recover on defendant's note while denying defendant the insurance money owed to him. After citing with approval its earlier decision in *Williams v. Lenoir*²¹ for the proposition that "upon a proper plea of set-off the statute of limitations will not operate as a bar against defendant's claims,

16. 97 Tenn. (13 Pickle) 197, 36 S.W. 872 (1896). See also *Paducah & M.R.R. v. Parks*, 86 Tenn. (2 Pickle) 553, 8 S.W. 842 (1888); *Williams v. Lenoir*, 67 Tenn. (8 Baxter) 395 (1875); *Wood v. Cannon County*, 25 Tenn. App. 600, 166 S.W.2d 399 (1942); A. CARUTHERS, HISTORY OF A LAWSUIT § 242, at 289 (8th ed. S. Gilreath & B. Aderholt 1963).

17. Curiously, if defendant proved that plaintiff's claim was without merit, setoff was not permitted. *East Tenn. & Va. R.R. v. Galbraith*, 48 Tenn. (1 Heiskell) 482 (1870); *Martin v. M'Alister*, 10 Tenn. (2 Yerger) 111 (1825); see also text accompanying note 36 *infra*.

18. 97 Tenn. (13 Pickle) at 205, 36 S.W. at 874.

19. *Id.* at 202-03, 36 S.W. at 873.

20. *Id.* at 204, 36 S.W. at 873, quoting *Ord v. Ruspini*, 170 Eng. Rep. 458 (K.B. 1797) (Lord Kenyon, J.).

21. 67 Tenn. (8 Baxter) 395 (1875).

nor run at all after the commencement of plaintiff's suit, in cases of mutual accounts arising between the parties about the same time,"²² the court held that "the set-off pleaded in this case, being evolved from the original consideration, is not barred, for the reason that the principal claim sought to be enforced is not barred"²³

By parity of reasoning, it would seem to have followed that defendants' personal injury claims should have been entertained in *Lovejoy*. As in *Lewis*, the Tennessee Code in effect at the time *Lovejoy* was decided unequivocally permitted assertion of defendants' claims²⁴ and authorized relief in excess of that sought by plaintiff.²⁵ Moreover, the reasoning in *Lewis* that defendant could assert his untimely claim because the principal claim is not barred applies with equal force to the Lovejoys' claims. Even if *Lewis* is read as holding only that the statute is tolled when plaintiff commences his action, the Lovejoys' claims should have been considered timely since on the day Ahearn commenced his action the statute of limitations had not yet run on them. Finally, while the facts in *Lewis* required the court to refer to defendant's claim in contract terms as one which evolved from the original consideration, the only limitation this language should be construed to impose is that defendant's claim must bear some " 'relation to the principal claim.' "²⁶ While the nexus between defendant's and plaintiff's claims in *Lewis* arguably is more apparent

22. 97 Tenn. (13 Pickle) at 204, 36 S.W. at 873-74.

23. *Id.* at 205, 36 S.W. at 874.

24. See note 12 *supra*. The repeal of the section of the Code under which the Lovejoys asserted their claims does not appear to have any significance for this discussion. That section was repealed along with numerous other sections of the Tennessee Code Annotated which were superseded by or inconsistent with the current Tennessee Rules of Civil Procedure. The repealing legislation thus seems to have been intended as a house-cleaning measure, and not as an expression of legislative disapproval of the judicial construction of the repealed provisions.

25. The controlling section of the Tennessee Code Annotated provided: "[I]f the cross plaintiff's damages or established demand exceed those of the plaintiff, he shall be awarded judgment for the excess" Code of 1932, § 8749 (codified at Tenn. Code Ann. § 20-1011 (1955) (repealed 1972)).

26. 97 Tenn. (13 Pickle) at 204, 36 S.W. at 873, quoting 2 H. WOOD, LIMITATION OF ACTIONS § 281, at 723 (1893). If defendant's claim arises out of a different transaction or occurrence than that being sued upon, commencement of plaintiff's action does not toll the statute on defendant's claim. *Wood v. Cannon County*, 25 Tenn. App. 600, 166 S.W.2d 399 (1942). Similarly, if defendant fails to assert his claim, he may not commence a subsequent independent action after the limitations period has run. *Mann v. Smith*, 158 Tenn. 463, 14 S.W.2d 722 (1929).

than that in *Lovejoy*, still the Lovejoys' claims had a sufficient relation to Ahearn's in the sense that they arose out of the same occurrence upon which the latter was suing.

Nonetheless, as indicated earlier, the court in *Lovejoy* refused to permit adjudication of defendants' personal injury claims because, according to the court, the common law did not recognize cross declarations in tort actions. This approach is rather startling since the court in *Lewis* never discussed the question of whether defendant in that case could have asserted his claim at common law. It was sufficient for the *Lewis* court that the Tennessee Code authorized assertion of defendant's claim and that it would constitute the "highest injustice" not to permit its adjudication. Since, however, *Lovejoy* did bottom its holding on the types of claims assertable by defendant at common law, it is essential to examine that law in order to ascertain how the Lovejoys' cross declarations differed from those which could be asserted at common law, and thus to understand the present state of the law in Tennessee.

Recoupment and setoff were doctrines developed at common law²⁷ based on the commonsense notion that defendant "should not be compelled to pay one moment what he will be entitled to recover back the next."²⁸ Recoupment was available regardless of the liquidated or unliquidated character of defendant's claim.²⁹ Recoupment at common law could be utilized, however, only for the purpose of defeating plaintiff's claim; defendant could not

27. Historically, setoff was a doctrine initially developed in equity. See generally C. CLARK, *THE LAW OF CODE PLEADING* § 100, at 635 (2d ed. 1947) [hereinafter cited as CLARK]; J. KOFFLER & A. REPPY, *COMMON LAW PLEADINGS* § 278, at 516 (1969) [hereinafter cited as KOFFLER & REPPY]. The doctrine of setoff was made applicable in common law courts by statute in England and is considered part of the common law in Tennessee. *Flint v. Tillman*, 49 Tenn. (2 Heiskell) 202 (1870); see also KOFFLER & REPPY § 278, at 516.

A note of caution is in order concerning the statements in the text setting forth the common law. The cases themselves do not at all times appear to utilize a consistent definition of the term "common law," and the decisions are not entirely consistent. The generalizations in the text represent what appears to be the weight of, or the better, authority. This difficulty in ascertaining the common law is itself a basis upon which *Lovejoy* is subject to criticism. Moreover, even if the common law can be ascertained, its application is not without difficulty.

28. J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* 505 (2d ed. 1974).

29. *Mack v. Hugger Bros. Constr. Co.*, 153 Tenn. 260, 283 S.W. 448 (1926); *Pettee v. Tennessee Mfg. Co.*, 33 Tenn. (1 Sneed) 380 (1853); *C.B. Voncannon & Co. v. Burleson & Laws*, 6 Tenn. App. 369 (1927).

invoke recoupment to recover relief in excess of that demanded by plaintiff.³⁰ Moreover, recoupment was available only if "the claims of plaintiff and defendant involve the same 'subject matter,' or arise out of the 'same transaction.'"³¹ Unlike recoupment, setoff allowed defendant to recover a balance³² and to assert claims in certain circumstances which arose out of a different transaction than that sued upon.³³ Setoff was unavailable for unliquidated claims, however.³⁴

Two additional observations concerning common law setoff and recoupment are pertinent. Both doctrines, at least in terms of the Tennessee decisions, appear to have been invoked only in cases where plaintiff sued in debt or contract for money damages.³⁵ Moreover, common law recoupment is generally considered to be a species of defense available only if plaintiff has a valid claim against defendant. If, however, "the cross claims are totally destructive of each other so that only plaintiff or only defendant can prevail, neither claim could possibly go in reduc-

30. *Mack v. Hugger Bros. Constr. Co.*, 153 Tenn. 260, 283 S.W. 448 (1926); *Overton v. Phelan*, 39 Tenn. (2 Head) 445 (1859); *Hogg & Belcher v. Cardwell*, 36 Tenn. (4 Sneed) 150 (1856); *Pettee v. Tennessee Mfg. Co.*, 33 Tenn. (1 Sneed) 380 (1853); *Porter v. Woods, Stacker & Co.*, 22 Tenn. (3 Humphreys) 56 (1842).

31. CLARK § 100, at 635. See also *Mack v. Hugger Bros. Constr. Co.*, 153 Tenn. 260, 283 S.W. 448 (1926); *Arco Co. v. Garner & Co.*, 143 Tenn. 262, 227 S.W. 1025 (1920); *Scatchard v. Barge*, 102 Tenn. (18 Pickle) 242, 52 S.W. 153 (1899); *Brady v. Wasson*, 53 Tenn. (6 Heiskell) 131 (1871); *Hulme v. Brown*, 50 Tenn. (3 Heiskell) 679 (1870); *Hogg & Belcher v. Cardwell*, 36 Tenn. (4 Sneed) 150 (1856); *Wood v. Cannon County*, 25 Tenn. App. 600, 166 S.W.2d 399 (1942); *C.B. Voncannon & Co. v. Burlison & Laws*, 6 Tenn. App. 369 (1927).

32. *Lewis v. Turnley*, 97 Tenn. (13 Pickle) 197 (1896); *Williams v. Lenoir*, 67 Tenn. (8 Baxter) 395 (1875); *East Tenn. & Va. R.R. v. Galbraith*, 48 Tenn. (1 Heiskell) 482 (1870); *McClain v. Kincaid*, 13 Tenn. (5 Yerger) 232 (1833); *McKernon & Demoss v. Hall*, 9 Tenn. (1 Yerger) 397 (1830); KOFFLER & REPPY § 278, at 517.

33. *Arco Co. v. Garner & Co.*, 143 Tenn. 262, 227 S.W. 1025 (1920); *Scatchard v. Barge*, 102 Tenn. (18 Pickle) 242, 52 S.W. 153 (1899); *Paducah & M.R.R. v. Parks*, 86 Tenn. (2 Pickle) 553, 8 S.W. 242 (1888); *Brady v. Wasson*, 53 Tenn. (6 Heiskell) 131 (1871); *Memphis & Little Rock R.R. v. Walker*, 39 Tenn. (2 Head) 467 (1859); *Wood v. Cannon County*, 25 Tenn. App. 600, 166 S.W.2d 399 (1942).

34. *Mack v. Hugger Bros. Constr. Co.*, 153 Tenn. 260, 283 S.W. 448 (1925); *Arco Co. v. Garner & Co.*, 143 Tenn. 262, 227 S.W. 1025 (1920); *Harris v. Harris*, 3 Shannon 57 (Tenn. Sup. Ct. 1878); *Brady v. Wasson*, 53 Tenn. (6 Heiskell) 131 (1871); *Martin v. M'Alister*, 10 Tenn. (2 Yerger) 111 (1825).

35. See generally A. CARUTHERS, HISTORY OF A LAWSUIT § 242 (8th ed. S. Gilreath & B. Aderholt 1963). If plaintiff sought repossession of an item of property, setoff and recoupment were unavailable to defendant. *Julian Eng'r Co. v. R.J. & C.W. Fletcher, Inc.*, 194 Tenn. 542, 253 S.W.2d 743 (1952); *Blair v. A. Johnson & Sons*, 111 Tenn. 111, 76 S.W. 912 (1903).

tion of the other, and the notion of recoupment is altogether inapplicable."³⁶

The cross declarations of the Lovejoys seeking recovery for their personal injuries represented a departure from the common law in several respects. Because of the unliquidated character of the Lovejoys' claims, recoupment would have been the only common law doctrine available for their assertion. But recoupment would probably not have been permitted for two distinct reasons. First, considering the substantive law governing the case, defendants' claims could prevail only if plaintiff's claim failed. Ahearn based his claim on a negligence theory. In Tennessee, plaintiff's contributory negligence is a total bar to his recovery in negligence.³⁷ Thus, the same alleged negligent conduct which would have given rise to recovery on the Lovejoys' cross declarations also would have constituted a complete defense to Ahearn's recovery in negligence. Recoupment was probably unavailable for the additional reason that Ahearn sued on an unliquidated tort claim, not in debt or contract. Moreover, even if recoupment was available, defendant at common law could utilize recoupment only for the limited purpose of netting-out plaintiff's claim. The Tennessee Code authorizing assertion of the Lovejoys' claims, however, permitted defendant to recover any amount to which he was entitled on his unliquidated claims, even if his relief exceeded that demanded by plaintiff.³⁸

The court in *Lovejoy* did not delineate which of the several differences between the common law and the cross declarations asserted by the Lovejoys it deemed controlling. As a result, two constructions can be placed on the court's opinion. On the one hand, *Lovejoy* can be read broadly as precluding defendant from asserting any untimely claim, at least where plaintiff sues on an unliquidated tort claim, since both recoupment and setoff appear to have been available only where plaintiff sued in debt or contract.³⁹ On the other hand, *Lovejoy* may be construed more nar-

36. F. JAMES, JR., CIVIL PROCEDURE § 10.17, at 488 (1965). This same concept is expressed in *East Tenn. & Va. R.R. v. Galbraith*, 48 Tenn. (1 Heiskell) 482 (1870).

37. For a comprehensive discussion of this rule of law and a proposal for its modification, see Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423 (1974).

38. See note 25 *supra*.

39. At least one commentator appears to have so read the case. Phillips, *Civil Procedure and Evidence—Tennessee Survey 1970*, 38 TENN. L. REV. 127, 138-39 (1971); see also *Maxwell v. Roark*, 337 F. Supp. 506 (E.D. Tenn. 1971) (*Lovejoy* controlling in federal diversity action).

rowly only as preventing defendant from recovering relief in excess of that demanded by plaintiff where defendant asserts his unliquidated claim after the limitations period has run. Under this narrow reading, defendant could assert his untimely claims for the purpose of netting-out plaintiff's recovery.

The uncertainty surrounding *Lovejoy* is unfortunate, because situations can easily be posited in which the outcome of a particular case will hinge upon its precise holding. For example, assume that immediately following the collision, Ahearn assaulted the Lovejoys. If the court in *Lovejoy* intended only to prevent affirmative recovery on defendants' unliquidated claims, then the defendants' assault claims could be asserted to net-out plaintiff's recovery. But if, on the other hand, defendant may not assert his untimely claims for any purpose where plaintiff is suing on an unliquidated tort claim, then defendants would not be permitted to assert their claims even for the limited purpose of diminishing or defeating plaintiff's recovery.

If a choice between these interpretations must be made, it seems preferable to read *Lovejoy* as permitting assertion of unliquidated claims in order to net-out plaintiff's recovery. This preference becomes at once evident upon examining the harmful consequences which might result from reading *Lovejoy* as prohibiting defendant from asserting any untimely claim where plaintiff sues on an unliquidated tort claim.

In the first place, this latter interpretation of *Lovejoy* may well foment needless litigation. An attorney counseling a client against whom an even arguably meritorious unliquidated tort claim may be asserted must give serious thought to commencing an action if for no other reason than the possibility that the other party might bring a lawsuit at the end of the limitations period when it will be impossible to assert his client's claims in timely fashion. This result certainly seems at odds with the well-considered public policy of discouraging litigation.

More importantly, this interpretation of *Lovejoy* lends itself to conscious manipulation in the hands of unscrupulous attorneys. Can it be said with positive assurance that no attorney would delay bringing a lawsuit solely to prevent timely assertion of defendant's claim? Scrupulous attorneys, too, may be confronted with serious ethical questions. May an attorney ethically delay filing his client's claim knowing that a meritorious counterclaim cannot be timely asserted? To ask this question is not to

imply that the only reason an attorney would delay filing his client's claim would be to prevent timely assertion of defendant's claim, although that possibility clearly exists. For example, in a personal injury case like *Lovejoy*, an attorney might wait to commence an action until the end of the limitations period for the legitimate purpose of being fully informed concerning the extent of his client's injuries. Whatever the reason for delay, however, the effect of delaying suit cannot be ignored.

Furthermore, other ethical questions may arise as a result of broadly interpreting *Lovejoy* as prohibiting the assertion of all untimely claims by defendant if plaintiff sues on an unliquidated tort claim. Because the statute of limitations defense is waivable,⁴⁰ should plaintiff's attorney urge his client not to raise the defense if a claim is filed such that defendant cannot assert his counterclaim in timely fashion?⁴¹ Is an attorney under an ethical obligation at least to advise his adversary well in advance of his intention to commence an action so that the adversary may protect his client's interests by asserting his claim in a timely independent action? Such an ethical obligation would be impossible to discharge if the limitations period on defendant's claim is shorter than plaintiff's, and if plaintiff consults an attorney after the time has run on defendant's claim. Notice to the adversary is thus at best a partial solution. Moreover, it is questionable whether any such ethical obligation could be effectively enforced.

Finally, the harsh results prompted by the broad interpretation of *Lovejoy* invite disrespect for the law by those caught in its snare. The different periods provided in the various statutes of limitations are, after all, somewhat arbitrary if compared with one another; this arbitrariness is highlighted when different limitations periods govern different claims which arise from the same factual setting. Moreover, all limitations periods are arbitrary at their cutting edge. This is not to suggest that statutes of limitations do not promote legitimate goals. But why may the injured owner of a vehicle like James Lovejoy recover for his broken headlights, but not his broken bones? Why is a counterclaim involving the same transaction or occurrence sued upon by plaintiff untimely if asserted one day after plaintiff's complaint is filed?

40. TENN. R. CIV. P. 8.03.

41. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7, ETHICAL CONSIDERATION 7-

These serious consequences certainly counsel that *Lovejoy* be read only as prohibiting affirmative relief on unliquidated claims asserted by defendant after the limitations period has run. A far more satisfactory result may be achieved, however, if the *Lovejoy* approach of delving into the oftentimes murky common law is abandoned completely. In its stead, a rule of law should be adopted which permits defendant to assert his untimely claims for whatever relief to which he is entitled, so long as the claims arise out of the transaction or occurrence being sued upon by plaintiff. Translating this rule of law into the language of rule 13 of the Tennessee Rules of Civil Procedure,⁴² defendant should be permitted to assert untimely compulsory counterclaims. By definition a compulsory counterclaim under rule 13.01 is one, other than a tort claim, which arises out of the transaction or occurrence that is the subject matter of plaintiff's claim. In addition, defendants in Tennessee should be permitted to assert untimely permissive tort counterclaims which arise from the transaction or occurrence being sued upon by plaintiff.

This rule would be more favorable to defendants than the approach adopted in the prior Tennessee decisions like *Lewis* and *Williams*, which permitted assertion of untimely claims properly the subject of setoff. Those cases, it will be recalled, required that defendant's claim be timely at commencement of plaintiff's action.⁴³ The *Lewis* approach has been designated as the tolling theory; the rule of law suggested here embraces a waiver theory.

If plaintiff's claim and defendant's counterclaim are governed by the same limitations period, the result is identical regardless of whether the tolling theory or the waiver theory is adopted. However, if the limitations period on plaintiff's claim is longer than that for defendant's counterclaim, different results may obtain depending on the facts and theory embraced. Once again, if plaintiff commences his action within the shorter limitations period provided for defendant's counterclaim, both the waiver and tolling theories reach identical results. But if plaintiff's action is commenced within the time provided for his claim but after the shorter period provided for defendant's counterclaim has run, significantly different results ensue. Under the tolling theory, defendant's counterclaim would be deemed un-

42. See note 1 *supra*.

43. See cases cited in note 15 *supra*.

timely, because at the time the statute of limitations was tolled—that is, when plaintiff commenced his action—the counterclaim was already barred. On the other hand, if plaintiff is deemed to have waived the statute of limitations defense, defendant could assert his counterclaim even if it were otherwise barred at the time plaintiff commenced his action.

The policies underlying statutes of limitations are not frustrated if defendant is permitted to assert at any time beyond the limitations period his counterclaims which arise out of the transaction or occurrence sued upon. By bringing the action, plaintiff has indicated no desire for repose, and if evidence is available for plaintiff's claim it would seem to be equally available for defendant's counterclaim. Moreover, all the undesirable results which follow from interpreting *Lovejoy* as prohibiting assertion of all untimely claims also ensue if commencement of plaintiff's action merely tolls the statute of limitations where the limitations period is shorter for defendant's counterclaim. The plaintiff could simply sit back and wait to commence his action until the time for assertion of defendant's counterclaim has expired. A waiver approach, therefore, deals more satisfactorily with the problem at hand.

Finally, if it is conceded that commencement of plaintiff's action should be treated as a waiver of the statute of limitations, it is difficult to perceive why defendant should not be permitted recovery on his counterclaim in excess of that demanded by plaintiff as authorized by rule 13.03.⁴⁴ The policies of the statutes of limitations are unrelated to the amount or kind of recovery; those policies reach only the question of the timeliness of assertion of the claim. The Tennessee cases which permitted untimely setoffs for relief in excess of that sought by plaintiff implicitly reflect this notion.

The law in Tennessee concerning the effect that initiation of plaintiff's action has on defendant's ability to assert his counterclaims after the limitations period has run is in need of clarification or, better still, revision. The *Lovejoy* common law analysis is both ambiguous and seemingly incapable of reasoned

44. At least some of the courts which permit assertion of untimely counterclaims nonetheless limit defendant to defeating plaintiff's recovery and do not permit affirmative relief. See the discussion in 6 WRIGHT & MILLER § 1419, at 110; see also *Caldwell v. Powell*, 65 Tenn. (6 Baxter) 82 (1873).

defense in light of prior law and the policies served by statutes of limitations. Moreover, the tolling theory presently followed by the Tennessee decisions in cases involving claims properly the subject of common law setoff should be modified to permit assertion of any untimely counterclaim for any relief to which defendant is entitled, so long as it arises out of the transaction or occurrence being sued upon by plaintiff. These two changes in the present law would result in a more just procedural jurisprudence in Tennessee.