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Article

*251 ABOLISHING LOCAL ACTION RULES: A FIRST STEP TOWARD MODERNIZING JURISDICTION AND VENUE IN TENNESSEE

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***252** I. INTRODUCTION

For over two hundred years, the law of forum selection in civil actions has included a distinction between local and transitory actions. Categorizing an action as local or transitory determines not only the place or places in which the action may be brought, but also whether a particular forum selection provision is treated as a rule of venue or a rule of subject matter jurisdiction. In 2001, the American Law Institute recommended amendments to the federal venue statutes abolishing the local action concept. [FN1] In 2002, the Tennessee Court of Appeals moved in the opposite direction. The court extended the local action concept by holding that a recently-enacted Tennessee forum selection statute constituted a new local action rule, a rule of subject matter jurisdiction. [FN2] The following study of local action rules, focusing on Tennessee law, concludes that the civil justice system would be better served by abolition, not extension, of the confusing and inefficient local action concept and the local/transitory distinction.

Historically, actions categorized as transitory could be brought wherever the defendant may be found and served with

process. [FN3] ***253** Most jurisdictions have expanded the permissible forums for transitory actions to include not only the place where the defendant is found but also, typically, the residence of any defendant and the place where the claim arose. [FN4] Actions historically categorized as local, on the other hand, may be brought in only a single location. The traditional "local action rule" restricts litigation of certain actions involving real property to the situs of the land. [FN5] Some jurisdictions, however, have expanded the category of actions deemed local to include types of cases that have nothing to do with real property. [FN6] There is in fact no single local action rule. Rather, there are sets of cases, varying in composition depending upon the jurisdiction, in which not only is the choice of forum restricted, but the actions are also labeled "local."

Courts often treat forum restrictions in actions labeled "local" as rules of subject matter jurisdiction, rather than as rules of venue. This treatment means that local action objections, unlike ordinary venue objections, may be asserted at any stage of the litigation and may even be grounds for collateral attack upon a judgment. Treating local action restrictions as rules of subject matter jurisdiction also means that the parties may not waive the venue objection or consent to the forum, and courts are obliged to raise the issue *sua sponte*. [FN7]

Most local action rules are anachronisms that can be understood only by examining their origins. To the extent that these rules originally had some rational bases, those rationales have not survived into the modern era. Throughout the evolution of traditional local action rules, courts and scholars have bemoaned their existence, both as illogical restrictions on forum choice and ***254** because of the tendency of courts to treat them as rules of jurisdiction. [FN8] A handful of modern courts and legislatures have abandoned or modified local action rules. [FN9] Nevertheless, local action restrictions have proven remarkably durable. Nowhere is this more true than in Tennessee, where a combination of judicial decisions and legislative enactments have enshrined and elevated the local action concept well beyond its common-law origins.

Tennessee law includes a confusing array of local action restrictions. In some cases, the effect of the restriction is that there is no permissible forum in Tennessee for the controversy even though the defendant would otherwise be subject to the *in personam* jurisdiction of Tennessee courts. For example:

- Actions seeking to directly affect title to or possession of land [FN10] in other states may not be brought in Tennessee. [FN11]
- Actions seeking to indirectly affect title to or possession of land [FN12] in other states may not be brought in Tennessee unless the defendant is a resident of Tennessee and the action is based upon fraud, trust, or contract, or is an action for divorce. [FN13]
- Actions seeking money damages for trespass or injury to land in other states may not be brought in Tennessee unless the act or omission that caused the damage occurred in Tennessee. [FN14]

***255** In other cases, the forum choice is limited to a single county in Tennessee, regardless of the residences of the parties, the locale of the events giving rise to the claim, or the relative convenience of other forums in the state. For example:

- Actions seeking to directly affect title to or possession of land in Tennessee (except suits for partition, for divorce, or to sell a decedent's realty for payment of debts) must be brought in the county in which the land, or a portion of it, is located. [FN15]
- Actions seeking to enforce specific execution of a contract relating to realty located in Tennessee must be brought in the county in which the land, or a portion of it, is located. [FN16]
- Actions seeking money damages for trespass or injury to Tennessee land must be brought in the county in which the land, or a portion of it, is located. [FN17]

• Notwithstanding any of the restrictions listed above, actions against local governments generally must be brought in the county in which the governmental entity is located. [FN18]

In addition, Tennessee courts have held in a variety of contexts that when the legislature eliminates the option of venue wherever the defendant may be found and otherwise specifies venue for an action, the lawsuit becomes a "local action." Thus, in a number of areas, the Tennessee courts have "localized" venue, converting it into a rule of subject matter jurisdiction. [FN19]

Most of the literature about local action rules focuses on actions that concern land outside a forum state. Little attention has been paid to the profound impact of the local action concept on the law governing permissible venues within the forum state. Intrastate forum restrictions can be equally significant, however, both as a matter of convenience, and as a matter of forum character when rural-urban and other demographically different choices would otherwise be available.

***256** The purpose of this article is to provide a comprehensive description and critique of Tennessee's local action restrictions. Part II describes the origins of the local action concept and the traditional rules that have arisen from it. Part III describes Tennessee's adoption of traditional local action rules in both the interstate and intrastate contexts, and also describes Tennessee's extension of local action treatment into non-traditional contexts through the concept of "localized" actions. Part IV offers a critique of both traditional local action rules and of the "localization" doctrine. Part V concludes the article with proposals for modernizing Tennessee's law of venue and for eliminating from Tennessee forum selection law the troublesome and unnecessary local action concept.

II. ORIGINS OF LOCAL ACTION RULES

Several local action rules originated in English common law:

• Actions seeking to directly affect title to or possession of land must be brought at the situs of the land.
• Actions seeking to indirectly affect title to or possession of land must be brought at the situs of the land except in cases of fraud, trust or contract.
• Actions seeking money damages for trespass or injury to land must be brought at the situs of the land.

The sections below discuss the English origins of each of these rules and their adoption by courts in the United States. The final section in Part II of this article discusses the treatment of these rules as issues of subject matter jurisdiction.

A. Actions Seeking to Directly Affect Title to or Possession of Land

Before the fifteenth century, jurors in England were expected to decide cases on the basis of their personal knowledge of the litigants or the circumstances of the case. Consequently, all actions at law were "local" because the jurors summoned to trials at Westminster were chosen from the vicinity of the events at issue. When trials began to be held outside Westminster, the ***257** vicinity of the events became the proper venue for the trial as well as the place from which jurors were chosen. [FN20] When the jurors' role changed to deciding cases on the basis of evidence presented at trial, rather than on personal knowledge, venue continued to require trial at the place where the cause of action arose.

The local/transitory distinction began as a rule of pleading. [FN21] As Blackstone described pleadings in the eighteenth century,

> In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county

> and place that it really did happen; but in *transitory* actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases .... [FN22]

Blackstone went on to explain that if the defendant in a transitory action made an affidavit that the action arose in another county, the court would change the venue to the county in which the injury was done. [FN23] By the end of the eighteenth century, however, venue had become more flexible and actions deemed "transitory" could be brought anywhere the defendant was found and served with process. [FN24] Actions involving land, however, continued to be deemed local and could be brought only where the land was located. [FN25]

***258** The English rule restricting the place of trial for actions at law involving real property became a part of American jurisprudence as early as 1811. [FN26] Scholars who have examined the rule's origins attribute its continuing existence to historical inertia [FN27] and to early English judicial conservatism regarding matters of real property. [FN28] Early cases nonetheless articulated a logical basis for the rule in the dichotomy between actions *in personam* and actions *in rem*. In one usage of this distinction, [FN29] *in personam* actions sought remedies, such as money judgments and specific performance, that imposed a personal liability upon a party to the action. *In rem* actions sought remedies, such as quiet title, partition and ejectment, that sought recovery of particular property, often by creating and extinguishing titles, [FN30] regardless of whether persons whose interests were affected were parties to the action. [FN31] Although the *in rem/in personam* terminology has also been used to refer to the difference between judgments at law and decrees in equity, [FN32] legislatures during the early nineteenth century expanded ***259** equity's enforcement powers by statutes permitting the court's decree itself to operate as a transfer of title, or by authorizing the court to appoint an officer to execute a conveyance on behalf of a contumacious party. [FN33] Whether dispensed at law or in equity, remedies characterized as *in rem* presumably required action by authorities where the subject property was located. [FN34] As a practical matter, therefore, courts declined to act *in rem* with respect to extraterritorial property. [FN35]

Concerns other than the practicality of affording relief most likely influenced early American courts when they rejected the idea of *in rem* judgments affecting title to or possession of land in other states. Nineteenth century notions of territorial jurisdiction were based upon the presence of persons or property within the state. The now-obsolete doctrine of *Pennoyer v. Neff*, [FN36] posited that a state had power to dispose of property within its borders regardless of its lack of power over persons whose rights in that property were thereby affected. [FN37] In other words, on the sole basis ***260** of its power over property, a court may dispense a remedy that operates *in rem*, so long as the court does not impose *in personam* liability in the action. [FN38] This power did not extend to property in other states, which the *Pennoyer* Court declared to be in the exclusive jurisdiction of the situs state. [FN39] And even if persons affected were before the court, the state lacked power to render judgments that operated *in rem* with respect to foreign land. [FN40]

In addition to, and perhaps underlying, nineteenth century notions of state court territorial jurisdiction, courts may have feared loss of local control and ensuing confusion in land titles if judgments were permitted to directly affect land titles in other states. [FN41] Insistence upon a state's exclusive power to dispense remedies respecting land within its borders provided the states with protection from sister state adjudications that refused to apply, or misapplied, situs law. [FN42] Courts also expressed concern about the ***261** difficulty of their task in determining the real property law of another state and in investigating foreign titles. [FN43] In any event, courts throughout the United States came to view the local action restriction as a matter of sovereignty, holding that the state where land is located may refuse to give Full Faith and Credit to sister state judgments purporting to directly affect rights in that land. [FN44]

B. Actions Seeking to Indirectly Affect Title to or Possession of Land

Originating as a matter of juror selection, the local action concept had no application in traditional courts of equity.

[FN45] Consistent with the idea that the local action rule was merely a limitation on a court's *in rem* remedial authority, the rule did not constrain early English courts of equity from entering *in personam* decrees that affected parties' rights in extraterritorial real property. In *Penn v. Lord Baltimore*, [FN46] the court granted specific performance of an agreement settling the boundary between the parties' lands in ***262** the provinces of Maryland and Pennsylvania. [FN47] The Lord Chancellor acknowledged that the court could not enforce its decree *in rem* because the lands were outside England, but held the decree nevertheless appropriate because the "party being in England, I could inforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this court." [FN48] The United States Supreme Court followed the *Penn v. Lord Baltimore* principle in *Massie v. Watts*, [FN49] holding that a Kentucky court did not err in ordering the defendant, a constructive trustee, to convey Ohio land to the plaintiff, even though the court would not have had authority to directly transfer the out-of-state title. [FN50]

The doctrine of *Penn v. Lord Baltimore* and *Massie v. Watts* creates a dichotomy between judgments that operate only *in personam* and those that operate *in rem*. *In personam* decrees respecting extraterritorial land are permitted because they are seen as affecting land only indirectly; *in rem* judgments concerning extraterritorial land are not permitted because they affect the land directly. [FN51]

Chief Justice Marshall's opinion in *Massie v. Watts* also posited a distinction between a case involving a "naked question of title," and a case of "fraud, trust, or contract." [FN52] Marshall suggested that only in the latter case could a court of equity properly order a party to convey foreign land. [FN53] It is likely that all Marshall meant by this distinction was that the principle of *Penn v. Lord Baltimore* applies only to a case appropriate for equitable relief. [FN54] Marshall ***263** wrote at a time when the prevalent doctrine was that equity would not try title to land, in deference to the right of jury trial available in actions for ejectment. Courts honored the adequate remedy at law requirement by refusing to issue permanent injunctions against trespass when the title was disputed. [FN55] Because the local action restriction applied in an action at law for ejectment, Marshall reasoned that if the suit in chancery involved only a "naked question of title," there would be "much reason for considering it as a local action." [FN56] With an independent ground for equitable relief, however, such as fraud, trust or contract, Marshall fully approved of the court determining an issue of title, including title to land outside the forum state. [FN57]

Other than the requirement of initial equitable cognizance, there was nothing inherent in the *Penn v. Lord Baltimore* rule that limited its application to cases of fraud, trust or contract. [FN58] There is no reason for the principle not to apply, for example, to an action seeking to enjoin a trespass when the remedy at law is inadequate, even if the only issue in the case is a "naked question of title." [FN59] ***264** Indeed, modern courts commonly accept the idea of divorce decrees that adjudicate the parties' rights to foreign realty even though these cases fall outside the categories of fraud, trust and contract. [FN60] Nevertheless, judicial opinions frequently take Marshall's dicta literally, and the notion that a court may order conveyance of extraterritorial land only in cases of fraud, trust or contract has become received wisdom. [FN61] To the extent that this limitation is applied, *Massie v. Watts* imported the local action restriction into equity practice, and extended it into cases seeking to affect rights in land only indirectly.

C. Actions Seeking Money Damages for Trespass or Injury to Land

From inception of the local action restriction in England as a rule of venue for selecting jurors with local knowledge, [FN62] law courts did not confine the rule to *in rem* actions seeking title to or ***265** possession of foreign land. Courts applied the local action limitation to actions seeking money damages for trespass to land, [FN63] and to other types of *in personam* actions that involved or were somehow related to the ownership of land. [FN64] The leading case in the United States is *Livingston v. Jefferson*, [FN65] a suit brought in Virginia against former President Thomas Jefferson seeking

damages for trespass to land in Louisiana. [FN66] Chief Justice John Marshall, sitting as a Circuit Judge, joined with District Judge Tyler in holding that the suit could not be maintained in Virginia because the action was local. [FN67] Judge Tyler's opinion enthusiastically embraced application of the local action rule to sustain the defendant's plea to the court's jurisdiction. [FN68] Marshall's opinion, on the other hand, criticized application of the rule to an *in personam* trespass action, [FN69] but concluded that the court was bound to follow “firmly established” law. [FN70]

***266** Ironically, Marshall's opinion contributed to the endurance of the local action rule as a restriction on actions for damages or trespass to land by articulating “as the true declaration of the ancient rule” [FN71] a definition that supported such applications. Marshall defined the local/ transitory distinction by focusing upon the genesis of the action rather than upon the character of the remedy sought. He wrote that “actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local.” [FN72]

***267** Marshall's definition--in terms of the place where the action might have arisen, rather than in terms of remedial necessity--has undoubtedly contributed to the lack of logic and uniformity in judicial decisions about which actions are local and which are transitory. [FN73] For example, the definition justifies the conclusion that the local action rule does not apply to a money damage action for breach of a contract concerning real property (a transaction that might have occurred anywhere), while the rule does apply to a money damage action for trespass to real property (an event that could have occurred only where the property was located). [FN74] ***268** Rationales for the local action rule, however, do not support such a distinction. [FN75] Both the trespass and contract actions seek only an *in personam* remedy that requires no extraterritorial action by the court. Proof of extraterritorial title and boundaries, which may or may not be an issue in either case, is no more difficult in one action or the other. [FN76] Despite its illogic and variance from the original rationales for local action restrictions, Marshall's amorphous definition of the scope of the local action rule unfortunately took hold. [FN77]

D. Local Action Rules and Subject Matter Jurisdiction

The transitory/local distinction arose at a time before courts attempted to delineate the forum selection doctrines of subject matter jurisdiction, personal jurisdiction, and venue [FN78] as they do today. [FN79] Rules and statutes that designate the permissible places for ***269** trial within a state that has proper personal jurisdiction over the defendants are generally categorized as rules of venue, not as jurisdictional rules. Venue, unlike the other two doctrines, [FN80] is not a matter of sovereignty and has not been traditionally found to implicate constitutional limits on judicial power. [FN81] Venue is similar to personal jurisdiction insofar as it concerns whether a court is located in a sufficiently convenient place for the adjudication. [FN82] Also like personal jurisdiction, venue is generally considered a ***270** waivable personal privilege of the defendant. [FN83] Subject matter jurisdiction, on the other hand, may not be waived or conferred by consent of the parties. [FN84] Unlike objections to both subject matter and personal jurisdiction, courts ordinarily do not permit a default judgment to be collaterally attacked on the basis of a venue objection. [FN85] These distinctions among the three doctrines generally render venue a more flexible doctrine than either subject matter or personal jurisdiction. [FN86] So long as local action restrictions are considered matters of venue, therefore, their impact is confined to prescribing waivable, albeit limited, choices of forums.

Even though the local action rule originated as a rule of venue for selecting the proper English county for an action arising within the realm, [FN87] United States courts referred to the rule as jurisdictional as soon as they began to follow it. [FN88] Some concept of ***271** territorial jurisdiction may have accounted for the local action rule when the action was *in rem* seeking to directly affect foreign land. The rule coincided with nineteenth century notions of a court's lack of power to affect land outside the realm [FN89] or, in the United States, outside the state. [FN90] Concern with territorial

power, however, is a less likely explanation for the local action rule in an *in personam* action for damages in which the court has jurisdiction over the parties. [FN91] Indeed, as discussed above, there was never a question that *in personam* equitable relief was proper in a matter involving foreign land so long as the court had jurisdiction of the parties. [FN92]

By the early twentieth century, it became clear that United States courts had subject matter jurisdiction in mind when they referred to a local action rule as jurisdictional. [FN93] In *Ellenwood v. Marietta Chair Co.*, [FN94] the United States Supreme Court found that an Ohio federal court had "no jurisdiction of the cause of action" ***272** for trespass to land in West Virginia. [FN95] The Court held, moreover, that the suit was rightly dismissed on the basis of the local nature of the action even though the defendant had not raised that objection by demurrer or in his answer. [FN96] Had the Court considered the local action rule to be in the nature of territorial jurisdiction, the defendant's appearance in the action without raising the objection would have satisfied that jurisdictional requirement. [FN97]

Treating a local action rule as a matter of subject matter jurisdiction has other significant consequences. *Maguire v. Cunningham*, [FN98] for example, was an action brought in Los Angeles County seeking to quiet title to land in Alameda and San Francisco counties. [FN99] The California appellate court held not only that the objection of "no jurisdiction of the subject matter" could not be waived, [FN100] but that filing an action in a county other than that in which the land is located "is so completely a nullity that the venue cannot be changed to the county in which the property lies." [FN101] In *Jacobus v. Colgate*, [FN102] Judge Cardozo held that a New York statute abolishing the local action rule in damage actions was not retroactive. [FN103] Judge Cardozo reasoned that before the statute, there was no remedy under New York law, and consequently no cause of action or jurisdiction, for a trespass to foreign land. [FN104] Because the statute created a new cause of action, and changed more than a procedural means of enforcing an existing action, it should not be applied retroactively. [FN105]

***273** The idea of the local action rule as a matter of subject matter jurisdiction has not been universally accepted. [FN106] State and federal courts alike disagree about whether the rule is one of subject matter jurisdiction or venue. [FN107]

***274** III. LOCAL ACTIONS IN TENNESSEE

A. Extraterritorial Land

1. Actions Seeking to Directly Affect Title to or Possession of Land

In Tennessee, both circuit and chancery courts have authority to act *in rem* to directly affect title to real property. [FN108] This power has always been restricted, however, to land located within the state. [FN109] Other than occasional comment about the difficulty of ***275** proving foreign titles, [FN110] the Tennessee courts generally announce their lack of authority to affect title to foreign land without explaining why this is so. Tennessee courts have also rejected the suggestion that a court may evade this local action restriction by appointing an officer with authority to execute a conveyance of foreign land. [FN111]

2. Actions Seeking to Indirectly Affect Title to or Possession of Land

Tennessee courts have embraced the *Penn v. Lord Baltimore* concept that a court may order a party properly before it to convey foreign lands. [FN112] One early Tennessee decision, however, limited the court's authority to orders against

parties who were residents of Tennessee; it was not sufficient that the court had personal jurisdiction over the party ordered to convey foreign lands. In *Wicks v. Caruthers*, [FN113] the court reasoned that ordering a nonresident trustee, served with process in Tennessee, to sell Mississippi land

> ***276** would only give authority in Tennessee, and be waste paper, as soon as he crossed the line of Mississippi .... A mere declaration of right which we could not enforce, is what a court could not do; a decree which we have no jurisdiction to execute, would be tristem fulmen, and a useless form, not in accord with the course of judicial proceedings, nor the dignity of such tribunals. [FN114]

Limiting orders to convey foreign land to resident parties appears to be a unique Tennessee addition to the doctrine of *Penn v. Lord Baltimore* and *Massie v. Watts*. Other courts, even in the nineteenth century, were not so fearful of exercising their powers merely because successful execution could not be guaranteed. [FN115] The *Wicks* court also did not consider the option of authorizing a court officer or substitute trustee to execute a deed on behalf of a party who has absconded without complying with the court's order. Even today, Tennessee courts, like most jurisdictions, [FN116] will ***277** not use their appointive authority [FN117] with respect to foreign property. [FN118]

Other than the *Wicks* court's reluctance with respect to nonresident parties, Tennessee courts readily followed the *Penn v. Lord Baltimore* doctrine in ordering parties to convey foreign realty in cases appropriate for equitable relief. [FN119] Tennessee decisions, however, have also followed the dicta in *Massie v. Watts* [FN120] that a court may order conveyance of extraterritorial land only in cases "of fraud, trust, or contract." [FN121] In *Brown v. Dayton* ****278*** *Coal & Iron Co.*, [FN122] the court held that a Tennessee court could not enjoin a Tennessee resident from trespass on Georgia land. [FN123] The plaintiff had sought an injunction from further trespass, an accounting for ore extracted, and damages for the trespass. [FN124] Describing the action as "a mongrel or conglomerated action of ejectment, trespass and a bill of peace," [FN125] the court concluded that,

> It is impossible to determine an action of this kind without an investigation of the title and right of possession and the nature of possession--all purely local questions with which a foreign Court is never presumed to deal or to be equipped to settle. We repeat that the common law has wisely relegated these questions to the *local* forum, and that the fact that suit is brought in a Court of Equity does not change the rule when the suit partakes of the old common law action of trespass for wrongful entry upon or injury to land. [FN126]

The *Brown* court's language suggests hostility to the action not only because the court might be called upon to determine title to foreign land, but also because the court considered the case inappropriate for equitable relief. [FN127]

Another decision applying a local action restriction to a suit seeking *in personam* equitable relief that would indirectly affect title to extraterritorial land is *Robinson v. Johnson*, [FN128] in which creditors of an intestate's estate filed a general administration bill showing insolvency of the estate. [FN129] Heirs of the intestate held lands that he had owned in three states other than Tennessee and ***279** the creditors sought a sale of the real estate to pay debts. [FN130] The bill prayed that the defendant heirs be ordered to convey the lands to a court-appointed special commissioner for sale. [FN131] The Court of Chancery Appeals held that the chancery court correctly declined to grant such a decree because there was no question of fraud, trust or contract among the parties. [FN132] The court viewed the request before it as, "simply an attempt ... to administer upon property in other states; an attempt to infringe upon the civil rights of those states to have such property administered under their own laws, and in accordance with their own regulations." [FN133]

Robinson raises the question of why the creditors should have no remedy from the necessity of litigating their claims in three separate proceedings in three states. [FN134] The creditors might invoke the equitable principle of granting relief to avoid multiplicity of litigation [FN135] and the general proposition that a court may order persons over whom it has authority to convey foreign lands. Tennessee courts accept these principles in divorce cases as the means of fairly

and efficiently disposing of the parties' real property outside Tennessee in a single proceeding, [FN136] but have not done so in the area of decedents' and insolvents' estates. [FN137]

***280** 3. Actions Seeking Money Damages for Trespass or Injury to Land

It was not until 1900 that a Tennessee appellate decision addressed the doctrine of *Livingston v. Jefferson* that actions seeking money damages for trespass or injury to land must be brought at the situs of the land. [FN138] *Ducktown Sulphur, Copper & Iron Co. v. Barnes* [FN139] began when a foreign company engaged in copper mining in Polk County, Tennessee sought a bill of peace in Polk County Chancery Court. [FN140] The mining company sought to enjoin a number of lawsuits filed against it in Polk County Circuit Court by landowners seeking damages for injury to their real property in Georgia, injuries allegedly resulting from the company's Tennessee operations. [FN141] The chancery court held that some of the landowners were entitled to recover damages and referred the matter to a master to ascertain the amount. [FN142] On appeal from that decree, the mining company cited *Livingston v. Jefferson* in support of its contention that the Tennessee court had no jurisdiction to award damages because the landowners' actions were local. [FN143] The Tennessee Supreme Court responded simply and decisively:

> We cannot subscribe or assent to this contention. The actions of appellees for damages do not involve title to land, nor the assertion of a right to an interest in land. The actions are purely actions for damages sustained by virtue of a nuisance operated by the ***281** complainant. The action was personal, and not local. [FN144]

The supreme court's opinion is striking in light of the fact that the mining company in *Ducktown* had in fact challenged the claimants' titles, and the chancellor had directed the master to determine the claimants' estates or interests before considering damages. [FN145]

The Tennessee Supreme Court's rejection of *Livingston v. Jefferson* was short-lived. In 1912, the Court of Chancery Appeals in *Brown v. Dayton Coal & Iron Co.*, [FN146] stated, with no mention of *Ducktown*, that a Tennessee chancery court had no jurisdiction in a trespass action for wrongful entry upon and injury to land located in Georgia. *Brown* may be distinguished from *Ducktown* because the *Brown* court declared the claim for money damages "incidental" to the plaintiffs' demand for a permanent injunction against trespass. The *Brown* court viewed the action as primarily a dispute over title to Georgia land. [FN147] The *Ducktown* court saw the question of title as incidental.

One year after *Brown*, the supreme court revived the spirit, if not the letter, of *Livingston v. Jefferson*. In *Mattix v. Swepston*, [FN148] the plaintiffs had purchased standing timber in Arkansas from Maudlin, who also gave the plaintiffs an easement over adjacent lands for purposes of hauling the timber to a railroad. [FN149] Maudlin, however, leased the adjacent lands to Swepston, who obstructed the roadway and prevented the plaintiffs from removing their timber. [FN150] As a consequence, the plaintiffs defaulted on contracts to ***282** deliver the timber. [FN151] The plaintiffs sued Swepston in Shelby County, Tennessee seeking damages for their losses on the contracts and other consequential damages. [FN152] The trial judge dismissed the suit on the basis that the action was local. [FN153]

While the decisions in *Ducktown* and *Brown* appeared to focus on the nature of the remedy and whether title was in issue or might be affected, the *Mattix* opinion wandered through questions of the nature of the plaintiffs' "cause of action," [FN154] the "'nature of the subject of the injury,"' [FN155] and whether the plaintiffs' rights arose in privity of contract or privity of estate. [FN156] In a version of Justice Marshall's formula in *Livingston v. Jefferson*, [FN157] the *Mattix* court pronounced that, "A true statement of the test between a local and a transitory action is whether the injury is done to a subject matter which, in its nature, could not arise beyond the locality of its situation, in contradistinction to the subject causing the injury." [FN158] The *Mattix* court never cited *Livingston v. Jefferson*, and it is not clear if its restatement of the formula was intended to clarify or to modify its substance. Both versions nevertheless led to the same con-

clusion--if land is injured, the action is local, regardless of the remedy sought or whether title to land is at issue. [FN159]

Having decided that actions for injuries to land are local, the *Mattix* court concluded, in a display of sophistic reasoning, that the cause of action before it was not for injury to land. [FN160] The court explained that Swepston "injured the plaintiffs' business, although he adopted as a means of doing so the obstruction of a road on ***283** Maudlin's land." [FN161] That Swepston deprived the plaintiffs of their easement did not mean that the plaintiffs suffered an injury to land because the easement was merely appurtenant to the contract, which was for timber, not realty. [FN162]

There was nothing equivocal, however, about the Tennessee Supreme Court's subsequent adoption of *Livingston v. Jefferson* in *McCormick v. Brown*. [FN163] The plaintiffs in *McCormick* brought suit in Hamilton County, Tennessee claiming that their home in Walker County, Georgia was damaged by the defendants' operation of a stone quarry near the home. [FN164] Holding that the suit for money damages was a local action and that the Tennessee court had no jurisdiction, the court relied upon *Livingston v. Jefferson's* definition that "actions are transitory where the transactions on which they are founded might have taken place anywhere, but are local where the cause is in its nature, necessarily local." [FN165]

The *McCormick* court dealt with *Ducktown*, [FN166] by relegating it to an "apparent exception ... where the act or omission which caused the injury did not occur in the state or county where the real property is situated." [FN167] Nothing in *Ducktown* itself, however, ***284** suggested anything other than a total rejection of the rule in *Livingston v. Jefferson*. [FN168] Although the *McCormick* court noted that there had been criticisms of the rule, it engaged in no discussion of policy or rationale. It broadly held that because both act and injury occurred outside Tennessee, the "general rule" applied that "an action ex delicto based upon a tort against real property is local, and cannot be maintained in a state or county other than that in which the land is located." [FN169] The general rule controlled, moreover, regardless of whether the action was based upon trespass, negligence or nuisance. [FN170]

B. Intrastate Land

1. Tennessee's Intrastate Forum Selection Statutes

In cases involving Tennessee land outside the Tennessee county in which an action is brought, Tennessee courts apply local action restrictions similar to those they apply in cases involving land outside the state. While the authority for local action restrictions in the interstate context is found in common-law traditions and concepts of state sovereignty, the intrastate cases are governed not only by common-law traditions, but also by a number of statutes that address forum selection in Tennessee trial courts. Review of local action restrictions in the intrastate context, therefore, requires some examination of Tennessee's unique configuration of law and equity courts, and the provisions for procedure in those courts.

***285** The circuit court is the trial court of general jurisdiction in Tennessee, [FN171] while the "chancery court has exclusive original jurisdiction of all cases of an equitable nature." [FN172] Although Tennessee's Code of 1858 recognized the traditional rule that courts of equity act *in personam*, [FN173] the Code also gave Tennessee chancery courts authority to act *in rem* to vest and divest title to real property. [FN174] In 1877, moreover, the jurisdiction of the chancery courts was expanded to include concurrent jurisdiction with the circuit court in "all civil causes of action ... except for unliquidated damages for injuries to person or character, and except for unliquidated damages for injuries to property not resulting from a breach of oral or written contract." [FN175] Even in the excepted cases, if no objection to jurisdiction is asserted, the case may be "heard and determined by the chancery court upon the principles of a court of law." [FN176]

Adoption of the Tennessee Rules of Civil Procedure in 1971 provided a uniform body of procedure for circuit and chancery courts. Prior to that time, some statutory provisions for civil procedure applied exclusively to circuit court and others applied ***286** exclusively to chancery court. Some statutes applied to both courts. Many of these statutes were repealed in 1972 in light of adoption of the Rules. [FN177] As the Rules do not, however, include jurisdictional or venue provisions, an often archaic and confusing constellation of statutes continues to control in these areas. For example, with respect to venue, an ancient statute governs the "local jurisdiction" of the chancery court. [FN178] Another statute of comparable pedigree includes other provisions governing venue in "all civil actions of a transitory nature," [FN179] and has been held applicable to chancery courts. [FN180] Similarly, one statute governs venue for actions *in rem*, [FN181] while another provides for venue in chancery court actions "seeking to divest or clear the title to land." [FN182] In addition, numerous statutes scattered throughout the Code designate venue for particular cases. [FN183] The consequence of Tennessee's overlapping civil court jurisdictions and statutory provisions is that, in any given case, a number of different authorities, both common law and statutory, may determine the proper forums and whether an action is deemed local.

2. Actions Seeking to Affect Title to or Possession of Land

Principles of sovereignty do not, of course, limit a Tennessee court's authority to affect title to land within the state. Tennessee courts nevertheless employ common law local action restrictions in cases involving land within the state. [FN184] As early as 1841, Tennessee courts in actions at law applied the local action rule ***287** with respect to land located in Tennessee. [FN185] Although an Act of 1809 contained a local action restriction for "actions touching the freehold," the early decisions did not cite the statute and its language did not appear in the Code of 1858. [FN186] A statute in the Code of 1858, [FN187] on the other hand, is sometimes cited for the proposition that local actions must be brought in the county in which the property is located. [FN188] That statute, however, did not impose the rule, but rather assumed it. [FN189] On its face, the statute is ***288** permissive, not mandatory. It provides that certain actions *may* be brought in the county in which the land is located. [FN190] Appearing today at section 20-4-103 of the Tennessee Code, the statute provides:

> Actions in rem. In actions commenced by the attachment of property without personal service of process, and in cases where the suit is brought to obtain possession of personal property, or to enforce a lien or trust deed or mortgage, or where it relates to real property, the attachment may be sued out or suit brought in any county where the real property, or any portion of it, lies, or where any part of the personal property may be found. [FN191]

The earliest cases citing the statute did so not as authority for the local action restriction, but for its provision relaxing the rule by permitting suit affecting an entire tract of land within the state to be brought in any county in which a portion of the land was situated. [FN192] The statute's other purpose appears to be that of ***289** providing a local venue option in otherwise transitory actions against non-residents commenced by attachment of property as the means of acquiring jurisdiction. [FN193] Without such a statute, [FN194] the now-repudiated [FN195] practice of attachment jurisdiction might have been frustrated by the requirement that transitory actions be brought where the defendant is found. [FN196] Regardless of the original ***290** purpose of section 20-4-103 and its facially permissive language, [FN197] Tennessee judicial decisions require that, absent a statutory exception, [FN198] circuit court actions seeking to directly affect rights in real property located in Tennessee must be brought in the county in which a portion of the property is situated. [FN199]

In Tennessee chancery courts, where the common law local action restriction did not necessarily apply, [FN200] statutory imposition of the local action rule has been more important. In a section governing the "local jurisdiction" [FN201] of chancery courts, the Code of 1858 provided a generous list of venue options [FN202] that did not distinguish between "local" or "in rem" actions and "transitory" actions. [FN203] In addition to the county in which the defendant was found,

[FN204] suit was permissible in the chancery district in which the ***291** defendant resided. [FN205] For non-resident defendants, suit was permitted in the county where the cause of action arose or in which the subject of the suit was located. [FN206] Another section provided that bills "seeking to divest or clear up the title to land, or to enforce the specific execution of contracts relating to realty, *may* be filed in the district in which the land or any material part of it lies." [FN207]

An 1875 chancery decision, *Roper v. Roper*, [FN208] held that because the latter statute was permissive, a court in Davidson County, where a defendant resided, could set aside a sale of land in Trousdale County. [FN209] In 1877, most likely in response to *Roper*, [FN210] the statute was amended to read that the enumerated actions "shall" be filed in the county where the land is located. [FN211] The amended ***292** statute, which appears unchanged today at section 16-11-114(1) of the Tennessee Code, thus imposes the local action rule in chancery actions seeking to directly affect rights in real property. [FN212]

The general rule that Tennessee circuit and chancery court actions seeking to directly affect realty in Tennessee must be brought in the county where the land is located is subject to some significant exceptions authorized by statute. A court may directly affect land located anywhere in the state in cases of decedents' estates, [FN213] partitions, [FN214] and divorce. [FN215]

***293** Tennessee courts generally accept the principle that they may act to indirectly affect title to or possession of land outside the forum county by *in personam* order to a party respecting land located in Tennessee. [FN216] No decisions address, however, whether that authority is limited, as it is in the case of land outside Tennessee, to actions based upon fraud, trust, contract, or divorce. Thus, it may be permissible for a Tennessee court to enjoin a trespass to land located in another Tennessee county although it would not be permissible to enjoin a trespass to land outside the ***294** state. [FN217] On the other hand, actions for specific performance are excluded from the general principle that courts may issue orders indirectly affecting Tennessee land outside the forum county. The 1877 amendment to section 16-11-114, apparently designed to prohibit actions directly affecting title to land in another county, [FN218] also requires that suits "to enforce the specific execution of contracts relating to realty ... shall be filed in the county in which the land, or a material part of it, lies." [FN219] The anomalous, and probably inadvertent, consequence of the 1877 amendment, therefore, is that a Tennessee court may order a party subject to the court's jurisdiction to specifically perform a contract by conveying land situated outside Tennessee, [FN220] but the court may not order a party to specifically perform a contract by conveying Tennessee land situated outside the forum county.

A relatively recent decision illustrates the difficulty that courts experience in applying the maze of common-law and statutory doctrines that are relevant to a Tennessee court's authority to affect title to Tennessee land outside the forum county. In *Martin v. Martin*, [FN221] a Knox County chancellor found that by mistake a promissory note executed by the defendants had been marked "paid" and that, also by mistake, a release of trust deed on Roane County realty securing the note had been executed and recorded. [FN222] In addition to finding the defendants liable for the unpaid balance of the note, the chancellor "ruled the Roane County trust deed was valid although it had been released of record and never re-executed by the Defendants." [FN223] The defendants argued on appeal that under ***295** section 16-11-114(1), [FN224] the chancellor did not have jurisdiction to determine the validity of the trust deed. [FN225]

Affirming the chancellor, the court of appeals invoked the *Penn v. Lord Baltimore* principle that a chancery court's jurisdiction "'is sustainable wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree."' [FN226] Reliance upon that principle was misplaced, however, because the principle only authorizes a court to issue *in personam* orders that may indirectly affect title to foreign lands. The chancellor in *Martin*, however, had not ordered the defendants to re-execute the released deed; she merely declared the deed valid and the release invalid. The court of appeals apparently failed to appreciate the significance of the distinction between decrees that

directly affect title to land and those that affect title only indirectly through an *in personam* order to a party.

The court of appeals also did not appreciate that statutes applicable to suits seeking to affect title to land in Tennessee may limit common-law doctrines that apply in suits seeking to affect title to out-of-state land. The only Tennessee decision relied upon by the *Martin* court for the *Penn v. Lord Baltimore* principle was one in which a chancellor enjoined defendants from interfering with a plaintiff's contractual right of access to Arkansas land. [FN227] Because the subject land in the cited case was outside Tennessee, section 16-11-114(1) did not apply in that case to limit the court's common-law authority. The *Martin* court took no cognizance of any of the prior Tennessee decisions holding that section 16-11-114(1) indeed limits the court's authority to directly affect title to Tennessee land outside the forum county. [FN228]

Finally, the *Martin* court gave section 16-11-114(1) an unreasonably narrow construction, stating without elaboration that the suit did not fall within the types of actions enumerated in the ***296** statute, including a suit "to divest or clear the title to land." [FN229] It is difficult to reconcile this conclusion with prior decisions holding that the statute prohibits an action seeking to cancel a trust deed to Tennessee land outside the forum county. [FN230] If a suit to cancel a trust deed is one to "clear title" under the statute, how can a suit to cancel the release of a trust deed not be an action to "divest title" within the meaning of the statute? Although the result in *Martin* may have been desirable as a matter of efficiency and convenience, it did not correctly apply the Tennessee statute's local action limitation on chancery decrees directly affecting title to land in Tennessee.

3. Actions Seeking Money Damages for Trespass or Injury to Land

As in the case of actions at law seeking to directly affect title to Tennessee land, [FN231] Tennessee courts have acted without a statutory mandate in applying the local action rule to suits seeking money damages for injury to Tennessee land located outside the ***297** forum county. [FN232] Although a pair of early opinions involving Tennessee land seemed to resist the rule, [FN233] the courts were undoubtedly influenced by the cases involving damage to out-of-state land, [FN234] and by pronouncements in treatises on Tennessee practice. [FN235]

Tennessee courts have recognized at least one exception that permits an action for damages to Tennessee land located in a county other than the forum. The exception arose from a conflict ***298** between two local action rules. In *Piercy v. Johnson City*, [FN236] the plaintiff sued Johnson City, a Washington County municipality, in a Unicoi County circuit court for damage to his Unicoi county land allegedly caused by the city's diversion of waters in Washington County. [FN237] The case presented a conflict between the rule that suits for damage to land must be brought where the land is located, [FN238] and the rule that suits against municipalities must be brought in the county of their situs. [FN239] Deciding that the municipality rule was paramount, the Tennessee Supreme Court stated that the rule regarding land is "based on mere technical grounds or, at most, on considerations of the convenience of private individuals" [FN240] and must "yield to the other founded on public policy as well as public convenience." [FN241] Although there are no appellate decisions on point, it is possible that Tennessee courts would also honor the exception, found in cases involving out-of-state land, permitting suit in a county where the harmful act occurred even though the injury is to land outside the forum. [FN242]

The Tennessee Supreme Court also may have created an exception for claims by unnamed class members in class actions. *Meighan v. U.S. Sprint Communications Co.* [FN243] was an inverse condemnation and trespass action brought in a Knox County circuit court. [FN244] The plaintiff sought to represent a class of all ***299** Tennessee landowners whose property the defendant used, without consent or compensation, to install a cable in a railroad right-of-way across the plaintiffs' lands. [FN245] Interpreting as jurisdictional the eminent domain statute permitting suit only in the county

where the land is located, [FN246] the trial court certified a class limited to owners of property in Knox County. [FN247] After the court of appeals reversed the class certification altogether, the supreme court held that certification was proper. [FN248] The supreme court also rejected the trial court's and defendant's assertion that the issue of venue was one of subject matter jurisdiction, limiting the authority of the trial court to injuries to land located in Knox County. [FN249]

With respect to the jurisdictional issue, the court first indulged in some hyperbole, stating, "[W]ere the specific statutory provision regarding venue interpreted as defendant urges, class actions would, by definition, cease to exist in this and a number of different statutory causes of action." [FN250] Then, without acknowledging Tennessee law treating venue in local actions as jurisdictional, [FN251] the court discussed the general distinction between venue and subject matter jurisdiction. [FN252] The court next invoked the federal doctrine that "[i]n a class action venue is controlled by the residence of the named representative," [FN253] and concluded that the ***300** trial court erred in finding that all class members must "reside" in the same venue. [FN254] The *Meighan* opinion may be read as rejecting the proposition that an inverse condemnation action for injury to land is a local action and that local action rules are jurisdictional. [FN255] Because the court never directly addressed those propositions, however, and relied so heavily on class action policies and doctrines, it is probably more accurate to read the opinion as, at most, creating an exception to the local action rule for claims of unnamed plaintiffs in class actions.

C. Local Action Rules and Subject Matter Jurisdiction

Like some federal courts and courts of other states, Tennessee decisions usually treat local action restrictions in actions relating to land as rules of subject matter jurisdiction. [FN256] In the interstate context, Tennessee courts typically refer to the issue as one of subject matter jurisdiction whenever they hold it erroneous for a court to directly [FN257] or indirectly [FN258] affect title to or possession of land outside of Tennessee or for a court to award damages for trespass or injury to land outside Tennessee. [FN259] The Tennessee Supreme Court has applied the no-waiver, no-consent rule of subject matter ***301** jurisdiction to a local action objection [FN260] and has refused to give full faith and credit to sister state judgments that purport to directly affect Tennessee land. [FN261]

Similarly, in the intrastate context, Tennessee courts have treated a local action objection to suit in a county other than the situs of subject land as an objection to subject matter jurisdiction, which the defendant may assert at any stage of the litigation. [FN262] Tennessee decisions have also held that an action brought in violation of a local action restriction does not bar a subsequent action under the doctrine of prior suit pending, [FN263] and that a ***302** judgment entered in violation of a local action restriction may be subject to collateral attack. [FN264]

D. Municipal Corporations

The Tennessee Supreme Court has created an additional local action rule that is entirely unrelated to real property. That rule, in short, is that in a suit against a municipal corporation, only the courts in the county in which the corporation is located have subject matter jurisdiction.

In *Nashville v. Webb*, [FN265] the plaintiff brought suit in Wilson County against two railroad companies and the City of Nashville, a Davidson County municipality, for personal injuries he allegedly suffered by reason of a defective Nashville sidewalk. [FN266] The original writ was served on one of the railroad defendants at its office in Wilson County, and the other defendants were served in Davidson County by counterpart writs. [FN267] The City defaulted in the Wilson County action and then collaterally attacked the judgment against it by seeking in a Davidson County court to enjoin the judgment's execution. [FN268] The Tennessee Supreme Court affirmed ***303** the chancellor's injunction

against execution on the grounds that the Wilson County court had no jurisdiction, and the judgment was, therefore, void. [FN269]

The court gave two rationales for holding that all actions against municipal corporations are local and must be brought in the county in which the city is located. [FN270] First, the court stated that actions against municipal corporations are "inherently local." [FN271] The court did not reach this conclusion by reference to any of the established tests for determining whether an action is transitory or local. Applying the traditional test--the nature of the transaction or the subject injured (negligent injury to the person)--the action would be considered transitory. [FN272] Rather, the court began by noting the consequence of categorizing an action as transitory: "Transitory actions ... follow the person of the defendant wherever he may be found." [FN273] From this, the court reasoned that the action *must* be local because municipal corporations "cannot change their situs or their place of abode. They cannot remove from one place to another, and sojourn for a time at this point or that. They remain stationary; hence they must be sued where they are found-- that is, in the county of their location." [FN274] This rationale was simply metaphysical nonsense. Municipal corporations, like any other corporation, are capable of acting, through their agents, outside their locales, [FN275] and are capable of suing and being sued in other counties. [FN276]

***304** The second rationale expressed by the court in *Webb* revealed that the court's eagerness to apply the label "local" to the action before it arose from reservations about the rule of transitory venue. The court asserted that actions against municipal corporations should not be considered transitory because:

> [I]t is of the greatest importance to the welfare of such bodies, and of the citizens whom they serve, that their officers should be permitted to remain at home and discharge their public duties, instead of being called hither and thither over different parts of the state to attend to litigation brought against the city through the agency of counterpart writs. [FN277]

The court's concern about the defendant being called "hither and thither" as a consequence of transitory venue was not the first time the Tennessee Supreme Court expressed concern about transitory venue. In an 1886 decision, *Carlisle v. Cowan*, [FN278] a suit between private parties, the court strictly construed Tennessee's transitory venue statute, which stated, "In all transitory actions, the right of action follows the person of defendant, unless otherwise expressly provided." [FN279] The court held that for venue to be proper with respect to a defendant who resided outside the forum county, the defendant must be present in the county both when the suit is ***305** instituted and when the summons is served on him. [FN280] In justifying its construction, the *Carlisle* court explained that,

> [t]he common law was exceedingly averse to permitting defendants to be sued, even in transitory actions, other than at the place where [they] resided. That a defendant should be harassed by a suit at a distant point, and to which he might not be able to carry his witnesses, was rigidly guarded against .... [FN281]

The court further explained that approving of venue solely on the basis that the defendant was served with process in the county, without his presence when the suit was instituted, "would be to legalize the setting of a trap which might await the coming of a defendant an indefinite time, and merely for the purpose of suing him out of the county of his residence." [FN282]

In *Webb*, the court endeavored to protect at least municipal corporations from the operation of the transitory venue rule. Whatever the merits of giving municipal corporations this immunity, use of the local action doctrine, with its "jurisdictional" characteristics, is strong medicine. Following *Webb*, a municipal corporation is permitted to collaterally attack a judgment entered in another forum, and to raise the venue objection at any stage in the litigation. [FN283] The Tennessee Supreme Court has also invoked the ***306** *Webb* doctrine in finding that suits against state departments and agencies are local actions. [FN284] Moreover, as a rule of subject matter jurisdiction, the venue restriction may not be

waived by the defendant even when it prefers to litigate in a foreign county. [FN285]

E. The Localization Doctrine

As troublesome as it is for courts to treat venue rules as rules of subject matter jurisdiction, Tennessee would be no more guilty than other jurisdictions if it limited the practice to traditional local action rules respecting land. Tennessee has gone much further, however, by evolving a doctrine of "localization" that extends subject matter jurisdiction treatment to many other venue provisions. The localization doctrine declares that when a statute eliminates the option of suit wherever the defendant may be found and fixes venue for an otherwise transitory action in a particular county or counties, the legislative intent is to "localize" venue. Thus, the formerly transitory action becomes a local action. Once the label "local" is attached, the selection of a forum county becomes jurisdictional, subject to the no-waiver, no-consent rule and other consequences of litigation in a court lacking subject matter jurisdiction. Tennessee's localization doctrine does not create any new forum restrictions. It has nothing to do with the nature of the action, or with the policies that prompted the legislature to limit permissible venues. The doctrine merely converts a statutory venue restriction into a rule of subject matter jurisdiction solely because the legislative treatment no longer supports the historical label "transitory."

***307** One particular venue statute has figured prominently in the evolution of the localization doctrine. As an exception to the general provision for venue in transitory actions wherever the defendant may be found, the Code of 1858 provided, "If the plaintiff and defendant both reside in the same county in this state, such action shall be brought in the county of their residence." [FN286] This unique [FN287] Tennessee statute is known as the "common county rule." [FN288] As an early treatise described the statute:

> [I]t would be most unjust to permit the plaintiff in a simple action of debt or other such action, although the venue may be wherever the defendant may be found, to catch his neighbor away from home, and the home of his witnesses, and surprise him with a suit which, however able he may be to resist at home, he is wholly unable to do so among strangers. Such oppressive use as this would be of ***308** the process of courts is prevented by Section 8641, and it is believed this was all it was intended to do. [FN289]

Thus, the common county rule is a band-aid on the problem of abuse, discussed by the Tennessee Supreme Court in *Carlisle*, [FN290] that may result from application of the rule that transitory actions may be brought wherever the defendant is found.

Several Tennessee Supreme Court decisions in the 1920s set the stage for the localization doctrine. In *Haynes v. Woods*, [FN291] the Tennessee Supreme Court used fateful language when it described the common county rule as intended by the legislature to "localize" transitory actions. [FN292] The common county rule, however, was not at issue in the *Haynes* case, which concerned only an interpretation of the general transitory venue statute. The same year, in *Burger v. Parker*, [FN293] the court again spoke of venue that has been "localized by statute." Holding that the plaintiff was permitted to bring an action in Hamilton County against the sheriff of Marion County for an assault committed in Marion County, the *Burger* court observed that "in most of the states such actions have been localized by statute, but it is conceded that no statute of this character exists in Tennessee." [FN294] Although the *Haynes* and *Burger* opinions ***309** introduced the terminology of legislative intent to "localize" venue, neither opinion suggested any particular consequences that would follow from labeling venue "localized." [FN295]

The next year, in *Brown v. Brown*, [FN296] the court rejected an argument that by specifying certain counties as proper venues in divorce actions, [FN297] the legislature had made divorce actions "local," and therefore, made venue jurisdictional. [FN298] The court observed that the venue statute for divorce actions continued to include the option of

the county in which the defendant "is found." [FN299] The court stated that the "characteristic feature of a transitory action is that 'the right of action follows the person of the defendant."' [FN300] The *Brown* opinion is significant because, like the opinion in *Webb*, [FN301] it articulated the distinction between local and transitory actions not by reference to the nature of the action or the remedy ***310** sought, but solely in terms of the result that obtains once the label is applied. *Brown*'s statement about the "characteristic feature" of transitory actions amounts to nothing more than the proposition that actions are transitory when they are transitory. *Brown*, however, laid further groundwork for a court to reason that if the legislature eliminates the option of venue wherever the defendant may be found, the action is no longer transitory and, therefore, has become a "local action."

That is exactly the reasoning in *Curtis v. Garrison*, [FN302] an action for assault and battery brought in Warren County by a resident of Coffee County against a defendant who was also a resident of Coffee County. [FN303] The defendant filed a "plea of general issue," but later sought to withdraw the plea and to file a plea in abatement challenging venue on the ground of the common county rule. [FN304] The plaintiff contended that the defendant's plea of general issue had waived the venue objection. [FN305] The trial court dismissed the case and the Tennessee Supreme Court affirmed. [FN306] Citing *Haynes*, [FN307] the court stated that the common county rule evinced a "legislative purpose to localize transitory actions." [FN308] Then, citing *Webb*, [FN309] the court stated that the courts have "no jurisdiction of local actions brought in the wrong county and consent cannot give ***311** jurisdiction." [FN310] *Curtis* thus took a statute limiting venue options and transformed it into a rule of subject matter jurisdiction. [FN311]

Locked into the transitory/local dichotomy, the *Curtis* court apparently felt compelled to force all actions into the two categories. Because the legislature had removed the venue option of "wherever the defendant might be found," the action could not be transitory. It must be local, and therefore the defect in the place of suit was jurisdictional. Unfortunately, the court did not consider the possibility of a third category--transitory actions subject to limited, but waivable, venue options designated by the legislature. Nor did the court undertake any serious inquiry, beyond its categorical reasoning, in determining the legislative purpose upon which it based its holding.

Following *Curtis*, Tennessee courts continued to transform venue into subject matter jurisdiction on the sole basis that a statute eliminates the option of suit wherever the defendant is found and limits venue to particular locales. [FN312] A potentially disastrous example surfaced in the 1960s when the legislature removed the option of the county where the defendant is found ***312** from the statute governing venue in divorce actions. [FN313] A 1965 court of appeals decision, *Oliphant v. Oliphant*, [FN314] held that as the legislature had localized divorce actions, venue had become jurisdictional. Consequently, regardless of the parties' waiver or consent to venue, any decree entered by a court with improper venue was void and subject to collateral attack. [FN315] *Oliphant* raised the unpleasant prospect that scores of unsuspecting couples would suddenly find themselves still married. [FN316]

The legislature acted quickly to undo the worst of the damage, amending the divorce venue statute in 1967 to add a provision that, "Any divorce granted prior to the passage of this act 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 was entered." [FN317] The amendment did not provide, however, that venue in future divorces would be waivable and did not, therefore, eliminate the possibility that divorces granted in an improper venue after enactment of the amendment would be found void.

Ten years later, the Tennessee Supreme Court cured that problem. In *Kane v. Kane*, [FN318] the parties, both Davidson County ***313** residents, had been divorced by a 1964 decree in a Robertson County court. [FN319] Sometime in the 1970s in an ongoing child custody dispute, the wife brought an action in a Davidson County court challenging a ruling of the Robertson County court on the grounds that the latter court had never acquired "jurisdiction" in the case because ven-

ue was improper. [FN320] The supreme court rejected the wife's argument not only on the basis of the 1967 amendment, but also on the ground that the parties had waived venue objections in the Robertson County action. [FN321] With no mention of the "localizing" effect of the venue statute, the court stated that the wife "confuses venue with jurisdiction." [FN322] While the court in *Kane* removed the localization doctrine from cases governed by the venue statute for divorces, [FN323] it did nothing to undo the effect of the doctrine in other areas in which the court itself, both before and after *Kane*, can fairly be accused of the same confusion.

The localization doctrine has also corrupted the concept of venue in the area of suits against state governmental officials and entities. The general rule in Tennessee is that actions against state boards and commissions, departments, agencies, and their officials are local actions that may be brought only in Davidson County, [FN324] ***314** unless a statute specifically permits the action to be brought elsewhere. [FN325] This general rule originally derived from judicial interpretations of a statute providing that each department of state government "shall maintain a central office at the capitol, which shall be the official residence of each commissioner, or head of department." [FN326] For example, in *Delta Loan & Finance Co. v. Long*, [FN327] the plaintiff sought judicial review in a Shelby County court of a cease and desist order issued by the Commissioner of the Department of Insurance and Banking. [FN328] The Commissioner moved to dismiss the action, asserting that the Shelby County court had no "jurisdiction of the matter." [FN329] The supreme court reversed the trial court's denial of the motion. [FN330] The supreme court's opinion noted the statute that established the Commissioner's "official residence" in Nashville, and then reasoned that, "The *situs* of such department and official residence is, therefore, local like that of a municipal corporation." [FN331] On the basis of the ***315** Commissioner's exclusive official residence in Nashville, the court held that the Commissioner could be sued only in Davidson County. [FN332]

In 1996, the Tennessee General Assembly enacted a set of statutes governing lawsuits by prison inmates. [FN333] The statutes ***316** include a venue provision that appears to create an exception to the general rule that actions against departments of state government must be brought in Nashville. [FN334] Section 41-21-803 of the Tennessee Code provides, "Venue. Except as otherwise provided by law, an action that accrued while the plaintiff inmate was housed in a facility operated by the department shall be brought in the county in which the facility is located." The courts have had considerable difficulty determining when section 41-21-803 applies, as opposed to the general rule permitting suit only in Davidson County. [FN335] In *Hawkins v. Tennessee Department of Corrections*, [FN336] the court of appeals delivered an extensive analysis of the conflicting statutes and judicial decisions pertinent to the problem. The court concluded in the case before it that pursuant to section 41-21-803, the inmate's suit arising from events that took place at the state penitentiary in Henning should have been brought where the prison was located, not in Davidson County. [FN337]

The *Hawkins* opinion repeatedly invoked the "localization" doctrine. [FN338] Indeed, the court stated that the issue before it was "which 'localizing' statute should prevail." [FN339] The court's holding that section 41-21-803 had localized the action, [FN340] and that the ***317** statute was jurisdictional, [FN341] had two important consequences. First, these holdings justified the action of the trial court in dismissing the suit *sua sponte*, and also justified the appellate court's holding that venue was improper in spite of the fact that on appeal *both* the plaintiff and the Department of Corrections contended otherwise. [FN342] Second, unlike many jurisdictions, [FN343] Tennessee has no statute providing for transfer of a suit brought in an improper venue. [FN344] A recently-enacted statute, however, authorizes transfer of a case filed in a court that "lacks jurisdiction." [FN345] The "jurisdictional" holding in *Hawkins*, therefore, permitted the court of appeals to remand the case with instructions to the trial court to transfer to the county in which the prison was located, [FN346] an option that would not have been available had the venue not been deemed "local." [FN347]

***318** IV. CRITIQUE

Local action rules interfere with the modern ideal of just, speedy and inexpensive determination of disputes. [FN348] Because local action rules are often illogical, uncertain and difficult to apply, they may necessitate time-consuming preliminary adjudication before litigation proceeds to the merits. [FN349] These rules sometimes dictate a forum that is inconvenient for both parties and witnesses, and may prevent the forum having the greatest interest in the controversy from adjudicating the matter. [FN350] Local action restrictions cause inefficiency when they interfere with unified distribution of property in cases of divorce and decedents' and ***319** insolvents' estates. [FN351] Application of the no-waiver, no-consent rule assures that parties will have no way to avoid litigating in a forum that all concerned consider to be less desirable than some other choice. When courts allow local action objections to be raised at any time in the litigation, even for the first time on appeal or collateral attack, considerable resources may be completely wasted by a belated but successful assertion of the objection.

A. Local Action Rules

Courts should not be prohibited from adjudicating disputes on the sole basis that the action may determine rights respecting land located outside the forum. No useful purpose or important policy justifies the disadvantages of traditional local action rules. The various rationales for the rules do not withstand scrutiny.

The original rationale for the local action concept--selection of jurors with first-hand knowledge of disputed facts [FN352]--has long been an anachronism. The early notion that actions involving land are inherently, or by nature, local because their cause could occur in only one place [FN353] is nothing but an abstraction that reveals no reason or purpose for a local action rule.

In ninteenth century United States courts, state sovereignty became the force behind local action restrictions in suits seeking title to or possession of land outside the forum state. Courts at that time assumed that there was a distinction between *in rem* and *in personam* proceedings; that *in rem* judgments affected property directly without exerting authority over persons; [FN354] and that judgments directly affecting land in another state invaded the situs state's sovereignty. [FN355] Nineteenth-century local action rules, including the doctrine that courts could exercise *in personam* remedial authority respecting land located in another state, [FN356] expressed these policies.

***320** The *in personam/in rem* distinction, and its premise that a judgment can affect property without affecting persons, was rejected in the twentieth century. In *Shaffer v. Heitner*, [FN357] the Supreme Court explained that a proceeding *in rem* is nothing other than an adjudication of a person's rights in property, [FN358] and held that all actions require *in personam* jurisdiction over affected parties. [FN359] After *Shaffer*, a court's judgment cast in the *in rem* format, for example divesting title to land, can be understood only as an assertion of power over the parties and their interests in the property. In other words, no judgments directly affect land. Judgments affect only persons and are permissible so long as the court has jurisdiction over those persons. Thus, the notion that a state has exclusive authority over land in its territory is illusory, or at best overly broad. State sovereignty does not justify a local action rule that prohibits a court at the outset from adjudicating the parties' rights to title or possession of land located in another state.

Recognition that all proceedings are *in personam*, however, does not dispel all legitimate concerns about *in rem*-styled remedies respecting land in another state. A court's judgment divesting, vesting, conveying, or creating title to land, or imposing or releasing a lien on land, is an instrument, like any other conveyance or mortgage, that clouds the title. The concern, therefore, is that non-situs judgments will introduce uncertainty into a state's title records. [FN360]

Judgments, however, are subject to state recording acts, [FN361] which are designed to insure the integrity of titles by protecting the ***321** public from undisclosed instruments affecting the title. [FN362] Under the recording acts, judg-

ments generally are not effective against third parties until recorded in the county land records. [FN363]

Nevertheless, as Professor Currie asserted, a state legitimately may be concerned about certainty in land titles because a foreign court's conveyance in the chain of title, albeit recorded, is vulnerable to attack on grounds such as the court's lack of jurisdiction or some other irregularity in its proceedings. Local title examiners should not be required to evaluate the validity of judgments rendered in unfamiliar forums. Currie posited that a state is justified in insisting upon a subsequent judicial proceeding at the situs to create a local title instrument (judgment or commissioner's deed) before the substance of the foreign judgment is enforced or the interest it creates is perfected through recording. [FN364] Currie concluded, however, that this interest of the situs state does not support a state's refusal to otherwise give full faith and credit to sister states' judgments adjudicating rights in land. [FN365] Similarly, concern for sister states' title records does not justify a state's refusal to adjudicate parties' rights to extraterritorial land. [FN366] Local action rules that prohibit adjudications of disputes merely because extraterritorial land is involved are overbroad. Concerns about title integrity are adequately addressed by a remedial prohibition against judgments that purport to directly vest or divest interests in extraterritorial land. [FN367]

***322** In addition, concerns about enforceability [FN368] provide little support for rules prohibiting judgments affecting parties' rights in land in other states. So long as the forum court has jurisdiction over the parties, its judgment as to their rights and liabilities should be accorded full faith and credit at the situs, [FN369] which will entitle the prevailing party to the situs courts' machinery for enforcing its own judgments. [FN370]

Issues of title integrity and enforceability provide even less support for local action restrictions in suits seeking traditionally *in personam* remedies. Both the local action rule in suits seeking money damages for trespass or injury to land, [FN371] and rules limiting a court's authority to order parties to convey land located outside the forum, [FN372] are sustained primarily by blind adherence to arbitrary precedent. [FN373] Courts also justified local action restrictions, ***323** however, by concerns about choice of law, which may call for application of non-forum law in any variety of suit involving land outside the forum. Situs courts feared that foreign forums would ignore or misapply situs law, [FN374] and non-situs courts feared the difficulty of ascertaining situs law. [FN375] A state's jealousy about its law, however, does not justify denying the jurisdiction of a sister state to adjudicate controversies between parties properly before it in any other context, [FN376] and there is no reason to make an exception merely because the controversy involves land. [FN377] Likewise, the fact that the particular foreign law that a court must ascertain involves rights in land does not make the forum court's task any more difficult than in the myriad of other situations in which courts determine and apply foreign law. [FN378]

Local jealousy alone may be the reason for the endurance of local action restrictions in the area of decedents' estates. States generally require application of situs law to all questions of the descent of real property [FN379] and also require separate proceedings in each state in which assets of the estate are located. [FN380] Although criticized by scholars, [FN381] these rules have been especially resistant to reform. The Uniform Probate Code, [FN382] for example, was a step toward unified administration of estates, [FN383] but the Code has been adopted in only sixteen states. Commentators blame the continuation of this unnecessarily complex and inefficient system on the parochialism of the probate bar, which benefits from the ***324** resulting specialization of practice and redundant costs of administration. [FN384] As Professor Leflar wrote,

> The absurd inefficiency that inheres in complete separation of administrations can be quite evident where land is concerned .... The courts are under no duty to preserve wasteful procedures merely out of deference to the legislative inertia or unenlightened self-interest which in any particular state may delay the enactment of the Uniform Probate code or comparably realistic statutes. [FN385]

Trial convenience and simplification of factual determinations have also been cited as rationales for local action rules. [FN386] Modern technology and procedural law, however, have greatly diminished the problems of finding and proving both foreign law and records of title located in another state. [FN387] Moreover, in many cases subject to local action restrictions, such as suits for injury to land, title to the subject land may not be a disputed issue. Issues of trial convenience, considering both applicable law and factual development, are better served by the doctrine of forum non conveniens than by an overly-broad per se rule. [FN388]

***325** Rationales that derive from concerns about state sovereignty provide no support, of course, for local action rules in the intrastate context. Nor are any of the other concerns discussed above sufficient reasons for local action rules in the intrastate setting. Tennessee judgments affecting title to or possession of land in a Tennessee county outside the forum do not threaten the integrity of county land records, a fact that the legislature implicitly recognized in statutes permitting courts, in certain cases, to divest title and to decree sales of land anywhere in the state, [FN389] and requiring that such judgments be registered in the county land records. [FN390] Enforceability and choice of law are, of course, of no concern in a Tennessee action involving land located in Tennessee, whether the action seeks to directly or indirectly affect title to or possession of the land, or only to recover money damages for trespass or injury to the land.

Tennessee's court-made local action restrictions respecting municipal corporations also enjoy no sound rationale. The municipal corporation rules are based on abstract and unrealistic notions that such entities are “stationary” and that they should be protected from suits outside their official situs. [FN391] These propositions are belied by judicially recognized exceptions and legislative enactments that specifically permit suits against municipal corporations in various counties in the state. [FN392]

Of perhaps greatest importance, there is no tenable basis for treating any of the local action restrictions as rules of subject matter jurisdiction. The original reasons for this treatment lie somewhere in the early history of local action rules, arising from the same notions of sovereignty and power that gave rise to the local action restrictions themselves. Given pre-twentieth century ideas about territorial authority, it is not surprising that courts thought of the local action rule for *in rem* proceedings as ***326** jurisdictional. [FN393] Courts unthinkingly carried that treatment over to all actions categorized as “local,” regardless of the nature of the action or the remedy sought. Subject matter jurisdiction treatment is also unjustified when applied to local action rules unrelated to land--such as Tennessee's municipal corporation and common county rules. These rules, designed to protect defendants from inconvenient venues, are turned on their heads when the defendants are unable to waive their application.

B. The Localization Doctrine

Tennessee's localization doctrine is a triumph of labeling over reasoning. “Localized” venue, in the parlance of Tennessee decisions, has nothing to do with the traditional local action concept that some actions are inherently tied to a situs because of the nature of the claim or the remedy sought. Localized venue is merely a label courts apply to a legislative decision to limit venue to counties with some meaningful relation to the controversy or the parties, rather than to permit suit in any county in which the defendant is found. There is no reason to assume, however, that whenever the legislature specifies where an action may be brought that it also intends those venue restrictions to be treated as limitations on the courts' subject matter jurisdiction. Indeed, in those states that have abandoned altogether the option of venue wherever the defendant may be found, [FN394] the localization doctrine would lead to the absurd conclusion that all venue is jurisdictional.

Venue statutes are commonly described as creating a waivable personal privilege focused on convenience to the parties, particularly the defendant. [FN395] When the legislative purpose in specifying venues is to promote convenience

for the parties, that ***327** purpose is undermined by Tennessee's localization doctrine. By declaring that venue is jurisdictional, the courts inflexibly impose the statutorily designated venues even when all parties consider another forum more convenient. [FN396] The localization doctrine requires that courts reject the collective judgment of opposing parties, even though the parties' familiarity with the case places them in a far better position than the court to know the most convenient forum for presenting the evidence. The localization doctrine also undermines the legislature's judgment that defendants should be required to assert their objections to the place of trial in a timely fashion. [FN397] Tennessee courts, moreover, have applied the localization doctrine inconsistently, ignoring it altogether in categories of cases in which they find it unpalatable. [FN398]

Admittedly, there may be instances in which the legislature intends that a particular forum restriction be treated as a limitation on the courts' subject matter jurisdiction. When a statutory provision is ambiguous, the courts may be obliged to make that determination. Because of the inflexibility of jurisdictional rules, however, courts should be particularly careful before categorizing place-of-suit provisions as jurisdictional rules. Absent an unequivocal legislative statement, courts should accord subject matter jurisdiction treatment only after taking into account all relevant considerations, including the statutory language, [FN399] context, ***328** and purpose. Tennessee's localization doctrine permits the courts to avoid struggling with these often difficult inquiries. The localization doctrine substitutes categorical reasoning for a realistic decision about whether the legislature intends its forum restriction to have particular consequences. Tennessee courts should abandon the doctrine.

V. PROPOSAL FOR REFORM

The Tennessee Supreme Court should abrogate the judicially-created localization doctrine. The court should adopt instead a presumption that, so long as any court--circuit, chancery, probate, etc.--has subject matter jurisdiction for a type of action, statutory limitations on the geographical locales in which the action may be brought are nothing more than waivable venue rules.

The Tennessee Supreme Court can, and should, abrogate judicially-created local action restrictions by holding that in all actions seeking to adjudicate persons' rights, including rights respecting real property, venue is governed by the general statutory provision for transitory actions. [FN400] Such a holding would at least eliminate the local action restriction on actions seeking money damages for injury or trespass to land. [FN401] The court should also make clear that judgments indirectly affecting interests in land, wherever located, are appropriate so long as the court has jurisdiction over the parties and, when equitable relief is ordered, the case is appropriate for such relief. [FN402] In addition, the court should overrule *Nashville v. Webb* and its progeny, [FN403] and hold that absent a specific statute to the contrary, governmental entities are subject to the same venue rules as any other party.

Judicial action, however, is an imperfect method of reform for the problem of local action restrictions, both because the court must await an appropriate case and because some of the common-law rules have been codified. Consequently, legislative reform is required. The legislature could accomplish the reforms suggested ***329** above by adding provisos to the general venue statute to the effect that the statute governs actions seeking to adjudicate persons' rights in real property and suits by and against governmental entities, as well as a statement that venue provisions are not intended to affect the subject matter jurisdiction of any Tennessee court. [FN404]

To completely eliminate local action restrictions for suits seeking to directly or indirectly affect title to or possession of real property, section 16-11-114(1) [FN405] and section 20-4-103 [FN406] of the Tennessee Code must be repealed. [FN407] In place of these statutes, an option should be added to the general venue statute, section 20-4-101, for the county in which a substantial part of the property that is the subject of the action is situated. [FN408] In deference to the

federalism and practical concerns regarding judgments that purport to directly affect title to land outside the state, [FN409] such a prohibition could be added to the provisions currently authorizing courts to divest and vest interests in land. [FN410] Judgments directly affecting title to Tennessee land, however, should be permitted in any ***330** Tennessee county that is otherwise a proper venue, as statutes currently allow in some particular cases. [FN411]

If these statutory revisions are accomplished, the legislature will have interred the concept of a local action, and it will be appropriate to change the name of the general venue statute, section 20-4-101, from "Transitory Actions" to "Venue Generally" or "Residual Venue." In addition, the legislature should consider eliminating the anachronistic provision for venue where ever the defendant is found. [FN412] The provision has been criticized by the courts, [FN413] has spawned the common county rule, [FN414] and, by preserving the concept of a transitory action, has led to the localization doctrine. [FN415] The only situation in which the provision serves any conceivable purpose is the case of a suit against only non-residents for a claim that arose outside Tennessee, in which case there may be no venue option under the current general venue statutes, despite the ability to assert personal jurisdiction over the non-resident defendants in Tennessee. [FN416] A better option for such cases would be to provide for venue where any plaintiff resides, or in any county chosen by the plaintiff, when there is no other proper venue. [FN417]

Modernization of Tennessee's confusing and outdated venue law is overdue. An essential first step is to eliminate the local/transitory distinction. [FN418] That step will require that courts repudiate the local action and localization concepts, and that the ***331** legislature revise current venue statutes that codify traditional local action rules. A thorough revision of Tennessee's venue law would be even better.

[FNa1]. Professor of Law, University of Memphis Cecil C. Humphreys School of Law. A portion of this article previously appeared in June F. Entman, *Jurisdiction, Venue, and "Localized" Actions in Tennessee*, 39 TENN. B. J. Apr. 2003, at 34. The University of Memphis School of Law supported this work through the services of student research assistants. Justin Joy, Class of 2004, met all of my many demands promptly, thoroughly, and cheerfully. Brian Russell, Rajiv Singh, and Joni Smith also helped in the early stages of research. In addition, my colleague, Robert Banks, assisted enormously with criticism of both writing and analysis. I am grateful to them all.

[FN1]. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT (Tentative Draft No. 4, 2001).

[FN2]. *See* Hawkins v. Tenn. Dep't of Corr., No. M2001-00473-COA-R3-CV, 2002 Tenn. App. LEXIS 536, 2002 WL 1677718 (Tenn. Ct. App. July 25, 2002) (discussed *infra* text accompanying notes 336-47).

[FN3]. *See* William H. Wicker, *The Development of the Distinction Between Local and Transitory Actions*, 4 TENN. L. REV. 55, 58-62 (1926), a seminal work on the evolution of the distinction.

[FN4]. *See, e.g.*, 28 U.S.C. § 1391 (2000); TENN. CODE ANN. § 20-4-101(a) (1994). In many states, the latter two choices have replaced the option of the place where the defendant is found. George Neff Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 314 (1951).

[FN5]. *Cf.* 28 U.S.C. § 1392 (2000) ("Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.").

[FN6]. *See, e.g.*, Orloff v. Morehead Mfg. Co., 262 N.W. 736, 737-38 (Mich. 1935) (adjudicating dissolution of corporation); State *ex rel.* Gardner v. Hall, 221 S.W. 708, 711 (Mo. 1920) (adjudicating claim against state board).

[FN7]. *See infra* Parts II.D. & III.C.

[FN8]. *See, e.g.*, Livingston v. Jefferson, 15 F. Cas. 660, 663-64 (C.C.D. Va. 1811) (No. 8411); Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994, 996 (Ark. 1952); Roger S. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1217-20 (1930); Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 631 (1987).

[FN9]. *See infra* note 70.

[FN10]. Such actions include those in which the judgment or decree purports to divest and vest or clear title, to operate as a conveyance or to cancel a conveyance, to declare or release an encumbrance, or to authorize judicial sale (including foreclosure) or transfer of the property.

[FN11]. *See infra* Part III.A.1.

[FN12]. Such actions include those in which the judgment or decree orders a party to convey an interest in land, or enjoins a party from trespassing on land or from otherwise interfering with another's possession or enjoyment of land.

[FN13]. *See infra* Part III.A.2.

[FN14]. *See infra* Part III.A.3.

[FN15]. *See infra* Part III.B.2.

[FN16]. *See infra* Part III.B.2.

[FN17]. *See infra* Part III.B.3.

[FN18]. *See infra* Part III.D.

[FN19]. *See infra* Part III.E.

[FN20]. Wicker, *supra* note 3, at 58-60.

[FN21]. *Id*. at 59-62.

[FN22]. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294 (1768).

[FN23]. *Id*.

[FN24]. Wicker, *supra* note 3, at 61-62.

[FN25]. *Id*. at 62. For other discussions of the historical development of the distinction, see LINDA S. MULLENIX & GEORGENE M. VAIRO, 17 MOORE'S FEDERAL PRACTICE ¶ 110 App. 104 (3d ed. 1997); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 313-17 (2d ed. 2000); William Wirt Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1 (1949); Stephen Lee, *Title to Foreign Real Property in Transnational Money Claims*, 32 COLUM. J. TRANSNAT'L L. 607, 613-20 (1995).

[FN26]. *See* Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (discussed *infra* Part II.C.).

[FN27]. AUSTIN WAKEMAN SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 32 (1922) (attributing the rule to "historical accident"); Blume, *supra* note 25, at 20; Wicker, *supra* note 3, at 70.

[FN28]. SCOTT, *supra* note 27, at 32; Wicker, *supra* note 3, at 62.

[FN29]. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 776-78 (2d ed. 1994) (describing five different usages of the *in personam/in rem* distinction).

[FN30]. SCOTT, *supra* note 27, at 2. Scott describes proceedings *in rem* as actions "to recover possession of specific land, or to affect the title thereto or some interest therein." *Id*. Although ejectment originated as a remedy to recover possession of a leasehold estate, it developed into a means of trying title to real property. *See* 1 WILLIAM F. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 8, at 63 (1947).

[FN31]. ROBERT A. LEFLAR, ET AL., AMERICAN CONFLICTS LAW § 19, at 40-41 (4th ed. 1986).

[FN32]. Used in this sense, all judgments at law, including money damages, are *in rem* because they merely declare the legal rights of the parties and do not constitute personal directives to them. Judgments at law are enforced by subsequent action, such as a writ of execution directing the sheriff to sell a defendant's assets to satisfy the judgment. Decrees in equity are *in personam* because they directly command a party to act or not to act in a certain way, subject to the penalty of contempt for disobedience. 1 DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.2, at 73-74 (2d ed. 1993).

[FN33]. *See* William F. Walsh, *Development in Equity of the Power to Act In Rem*, 6 N.Y.U. L. REV. 1 (1928).

[FN34]. In 1774, Lord Mansfield explained,

> There is a formal and substantial distinction as to the locality of trials ... where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1029 (K.B. 1774).

[FN35]. *See* Stevens, *supra* note 4, at 310 ("The local sheriff can attach, deliver or execute upon the property. The local clerk can make the necessary entries with a minimum of red tape where title to land is affected.").

[FN36]. 95 U.S. 714 (1877).

[FN37]. *Id*. at 722. This notion was rejected in Shaffer v. Heitner, 433 U.S. 186, 212 (1977), in which the Court stated, "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *See also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950) ("The requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification [*in rem* and *in personam*] for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.").

[FN38]. Modern doctrines of territorial jurisdiction based upon minimum contacts make it unlikely that a state court will lack jurisdiction over persons whose rights are affected by a lawsuit concerning property located within that state. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).

[FN39]. *Pennoyer*, 95 U.S. at 720.

[FN40]. *See, e.g.*, Burnley v. Stevenson, 24 Ohio St. 474, 478 (Ohio 1873) (stating that the decree of a court having power over the parties "can not operate to transfer title to lands situate in a foreign jurisdiction. And this, for the reason that a judgment or decree *in rem* can not operate beyond the limits of the jurisdiction or state wherein it is rendered.").

[FN41]. *See* Willard Barbour, *The Extra-Territorial Effect of the Equitable Decree*, 17 MICH. L. REV. 527, 547 (1919) ("It is the anxious fear that the State may be deprived of control over its own land which leads to the denial of power in the foreign court."); *see also* Hayes v. Gulf Oil Corp., 821 F.2d 285, 290 (5th Cir. 1987) ("Title to real estate would never be certain again since it would be involved in unknown claims in unknown fora with no practical method for control of liens, lis pendens or priority of title claims. State land title records would become unmanageable."); Stevens, *supra* note 4, at 310 (stating that the benefit of the local action rule is that "[t]hird parties can readily ascertain, at a logical point of inquiry, the status of a res in which they may be interested").

[FN42]. *See* French v. Clinchfield Coal Co., 407 F. Supp. 13, 15 (D.Del.1976) (stating that the local action rule "prevents courts unfamiliar with local property rights and laws from interfering with the title to real property"); Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 634-35 (1954).

[FN43]. *See* Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994, 995 (Ark. 1952) (suggesting that difficulty in determining title under foreign law was a rationale for the local action rule); SCOTT, *supra* note 27, at 6 ("It has been suggested that as a practical matter it is more difficult to determine questions relating to title to land situated in another jurisdiction that it is to ascertain the truth as to other matters occurring in another jurisdiction."); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2945, at 97-98 (1995) (stating that a reason for judicial restraint in regard to extraterritorial orders is "that since the forum court typically would be required to apply ... the law of the state ... in which the property is situated, the courts of the situs state generally represent a better forum in which to litigate").

[FN44]. Fall v. Eastin, 215 U.S. 1, 14 (1909); Carpenter v. Strange, 141 U.S. 87, 104-06 (1891); Clouse v. Clouse, 207 S.W.2d 576, 578 (Tenn. 1948) (stating that the Michigan decree was "an absolute nullity" insofar as it attempted to divest and vest title to Tennessee land); Johnson v. Kimbro, 40 Tenn. (3 Head) 557, 559 (1859) (refusing to recognize North Carolina judgment purporting to partition Tennessee land); LEFLAR, *supra* note 31, §§ 82, 173.

[FN45]. *See* Oliver v. Loye, 59 Miss. 320, 323 (1881) (stating that equity was never "hampered by distinctions of local and transitory causes of action").

[FN46]. 27 Eng. Rep. 1132 (Ch. 1750).

[FN47]. *Id*. at 1139.

[FN48]. *Id*.

[FN49]. 10 U.S. (6 Cranch) 148 (1810).

[FN50]. *Id*. at 158.

[FN51]. A few courts have manipulated the *in personam/in rem* distinction, holding that decrees placing liens on realty and decrees ordering court officers to execute deeds on behalf of contumacious parties do not operate to "directly affect" extraterritorial realty. The weight of authority, including the decision in Fall v. Eastin, 215 U.S. 1 (1909) (affirming deni-

al of Full Faith and Credit to court commissioner's deed), is to the contrary. *See* Alden, *supra* note 8, at 599-604.

[FN52]. *Massie*, 10 U.S. (6 Cranch) at 158-60.

[FN53]. *Id*. at 160.

[FN54]. *See* St. Louis Smelting & Ref. Co. v. Hoban, 209 S.W.2d 119, 124 (Mo. 1948) (suggesting that equity courts decline jurisdiction in cases merely determining title to extraterritorial land, not because the actions are local, but because equitable relief is not appropriate in such cases regardless of the land's location); *see also* Currie, *supra* note 42, at 626 n.36; Lee, *supra* note 25, at 632 n.141.

[FN55]. 1 DOBBS, *supra* note 32, § 5.1, at 712; *see* Stevens v. Beekman, 1 Johns. Ch. 318 (N.Y. Ch. 1823).

[FN56]. *Massie*, 10 U.S. (6 Cranch) at 158; *see* Lee, *supra* note 25, at 628 n.122 (suggesting that Marshall's language was "loose usage," not intended to indicate that the local action rule applied in equity).

[FN57]. *Massie*, 10 U.S. (6 Cranch) at 158 (stating that in a case of fraud, trust or contract, "[t]he principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.").

[FN58]. *See* Currie, *supra* note 42, at 624-28 (discussing the supposed requirement that an *in personam* decree respecting foreign land must be based upon an "antecedent obligation"); Lee, *supra* note 25, at 628 n.122 (decrying the "fallacy that there are claims for equitable relief beyond contract, fraud or trust over which there is no jurisdiction" to order conveyance of foreign land).

[FN59]. *See, e.g.*, *Hoban*, 209 S.W.2d at 124 (holding that Missouri court of equity properly issued injunction against continuing trespass to prevent injury to Illinois land; "Since equity had jurisdiction, appellants were not entitled to a jury trial on the issue of damages."); Sikes v. Turner, 247 S.W. 803, 805 (Mo. Ct. App. 1923) ("The law does not require that a person shall submit to the stripping of his timber land of its forest trees ... [t]he nature of the property involved and the inconvenience of suing for continuous trespasses constitute a basis for equitable relief."). *Cf*. Erhardt v. Boaro, 113 U.S. 537, 539 (1885) (approving preliminary injunction to enjoin trespass "to preserve the property from destruction pending legal proceedings for the determination of the title").

[FN60]. *See* Rozan v. Rozan, 317 P.2d 11 (Cal. 1957) (affirming California divorce decree awarding land in North Dakota); *In re* Mack, 373 N.W.2d 97, 100 (Iowa 1985) (giving comity to Missouri dissolution decree awarding Iowa land to wife even though decree did not order husband to convey his interest); McElreath v. McElreath, 345 S.W.2d 722, 733 (Tex. 1961) (enforcing Oklahoma divorce decree ordering party to convey Texas land); Sheldon R. Shapiro, Annotation, *Power of Divorce Court to Deal with Real Property Located in Another State*, 34 A.L.R. 3d 962 (1970).

[FN61]. *See, e.g.*, Raphael J. Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 507 (7th Cir. 1984) (stating that action must be one of "fraud, trust, or contract"); Humble Oil & Ref. Co. v. Copeland, 398 F.2d 364, 367-68 (4th Cir. 1968) (stating that a court may not grant an *in personam* decree determining interest in extraterritorial land that "depends solely upon the transmission of realty by will or intestacy"); *see also* Annotation, *Jurisdiction to Enjoin Trespass Upon Real Property in Another State or Country*, 113 A.L.R. 940 (1938); Annotation, *Jurisdiction of Equity Over Suits Affecting Real Property in Another State or Country*, 69 L.R.A. 673 (1905).

[FN62]. *See supra* note 20 and accompanying text.

[FN63]. As early as 1792, an English jurist declared "settled" that an action for money damages for trespass was local, Doulson v. Matthews, 100 Eng. Rep. 1143, 1144 (K.B. 1792), although Lord Mansfield had earlier rejected the proposition in Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774).

[FN64]. Scott lists replevin at law, actions upon covenants running with the land when based upon privity of estate, actions of debt for arrears of a rent-charge when based upon privity of estate, and actions against an innkeeper based upon the custom of the realm. SCOTT, *supra* note 27, at 5-6; *see also* Wicker, *supra* note 3, at 62-63. Wright and Miller also list actions to abate a nuisance. 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3822, at 209 (1986). *See generally* Annotation, *Jurisdiction of Action at Law for Damages for Tort Concerning Real Property in Another State or Country*, 42 A.L.R. 196 (1922), supplemented by M.O. Regensteiner, Annotation, 30 A.L.R. 2d 1219 (1952).

[FN65]. 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

[FN66]. *Id*. at 660.

[FN67]. *Id*. at 663-65.

[FN68]. *Id*. at 661-63.

[FN69]. Marshall expressed dissatisfaction with the consequence of "a right without a remedy," which results if the defendant is not subject to jurisdiction in the place where the land is located. *Id*. at 665. In fact, as Jefferson was never found in Louisiana to be served, and never owned property that could be attached there, nineteenth century limitations on territorial jurisdiction kept Livingston from ever successfully bringing his action. *See* SCOTT, *supra* note 27, at 1-2. Historians have suggested political and personal reasons for Marshall's desire to find in favor of Jefferson despite his distaste for the rule that justified that result. *See id*. at 14-15; Ronan E. Degnan, *Livingston v. Jefferson--A Freestanding Footnote* , 75 CAL. L. REV. 115 (1987). Marshall's fear that the defendant may escape liability altogether if he is not subject to jurisdiction where the land is located is of less concern today in light of the modern "minimum contacts" theory, as demonstrated by Shaffer v. Heitner, 433 U.S. 186, 211 (1977), and generally expansive long-arm statutes. *See, e.g.*, TENN. CODE ANN. §§ 20-2-223, -225 (1994).

[FN70]. *Livingston*, 15 F. Cas. at 664. Judicial decisions in at least three states have rejected the rule in *Livingston v. Jefferson*. *See* Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994 (Ark. 1952); Holmes v. Barclay, 4 La. Ann. 63 (La. 1849); Little v. Chicago Ry., 67 N.W. 846 (Minn. 1896). In New York the rule was rejected by statute. *See* N.Y. REAL PROP. LAW § 121 (McKinney 1989); Jacobus v. Colgate, 111 N.E. 837, 838 (N.Y. 1916); *see also* Archibald v. Mississippi & T.R. Co., 6 So. 238 (Miss. 1889) (holding that under Mississippi statute, trespass to land is local but damage action for injury to land from act "disconnected from the land" is not); Ingram v. Great Lakes Pipe Line Co., 153 S.W.2d 547, 550 (Mo. Ct. App. 1941) (holding damage action for trespass to real estate not local by virtue of Missouri statute, MO. ANN. STAT. § 508.030 (West 1949), that defines actions as local only if they directly affect title). Academics unanimously disapprove of the *Livingston* rule. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 87 (1971); SCOTT, *supra* note 27, at 1-18; 15 WRIGHT, MILLER & COOPER, *supra* note 64, § 3822, at 206 ("a triumph of sterile history over common sense"); Foster, *supra* note 8, at 1219-20; Wicker, *supra* note 3, at 65-71; Note, *Local Actions in the Federal Courts*, 70 HARV. L. REV. 708, 712 (1957).

[FN71]. *Livingston*, 15 F. Cas. at 665.

[FN72]. *Id*. at 664. Marshall cited 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND

294 (1765) for the local/transitory distinction. Blackstone, however, was describing a time when all actions were to be tried where the cause arose, and the local/transitory distinction was merely a rule of pleading. *See supra* notes 20-22 and accompanying text. As Marshall himself acknowledged, venue had subsequently evolved to permit transitory actions wherever the defendant was found, and the more reasonable local/transitory distinction for venue purposes was between "proceedings *in rem* in which the effect of a judgment cannot be had, unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded." *Livingston*, 15 F. Cas. at 663-64 (citing Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774)). Marshall was apparently unconcerned about citing Judge Blackstone, "from whose authority no man will lightly dissent," *Livingston*, 15 F. Cas. at 664, out of context.

[FN73]. Scott criticizes the definition as "metaphysical speculation" and "valueless as a reason for the distinction between local and transitory actions." SCOTT, *supra* note 27, at 5. Foster posits that the definition leads to "speculation about this little cause of action that stayed at home and this that went to market." Foster, *supra* note 8, at 1218; *see also* Wicker, *supra* note 3, at 70 ("[C]haracter of the remedy sought rather than the character of the plaintiff's right should determine whether an action is local or transitory."). Some courts continue to focus upon the character of the remedy. *See* Raphael J. Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 508 (7th Cir. 1984) ("[D]eterminative element in defining a transitory action is whether the type of relief requested is of a 'personal' nature so that the court, in acting upon the person or personal property of the defendant which is within its control, need not act directly upon the lands involved."). Professor Currie suggested that there are no satisfactory definitions: "[t]ransitory actions are ... those which have somehow been freed from the localizing effect of the common law's institutions, traditions, and forms. The remainder are local not because of inherent characteristics which make them so in the nature of things, but simply because they have not been so liberated." Brainerd Currie, *The Constitution and the Transitory Cause of Action*, 73 HARV. L. REV. 36, 67 (1959).

[FN74]. *See* P.M. Dwyer, Annotation, *Location of Land as Governing Venue of Action for Damages for Fraud in Sale of Real Property*, 163 A.L.R. 1312 (1946); Annotation, *Jurisdiction of Action at Law for Damages for Breach of Contract, or for Tort Concerning Real Property in Another State or Country*, 26 L.R.A. (N.S.) 928 (1910).

[FN75]. *See* SCOTT, *supra* note 27, at 5-7.

[FN76]. *See* Livingston v. Jefferson, 15 F. Cas. at 664 (Marshall, J.) ("It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found: yet, in such a case, every difficulty may occur which presents itself in an action of trespass.").

[FN77]. *See, e.g.*, McCormick v. Brown, 297 S.W.2d 91, 93 (Tenn. 1956) ("[A]ctions are transitory where the transactions on which they are founded might have taken place anywhere, but are local where the cause is in its nature, necessarily local."); SCOTT, *supra* note 27, at 4 ("[a]ctions should be held to be transitory when the transactions on which they are founded might have taken place anywhere; and should be held local when the transactions could not have taken place anywhere except where they did take place.").

[FN78]. *See* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 430-31 (1981) (explaining that federal court territorial jurisdiction and venue were largely indistinguishable concepts until the Judiciary Act of 1887).

[FN79]. *See, e.g.*, Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632, 638-39 (Tenn. 1996); 15 WRIGHT, MILLER & COOPER, *supra* note 64, § 3801 (distinguishing the three doctrines). This is not to say that the three categories are now satisfactorily distinguished. *See, e.g.*, Nuernberger v. State, 359 N.E.2d 412, 415 (N.Y. 1976) (stating that "'jurisdiction' is not a term of a single meaning and none of its uses has an invulnerable definition"); Allan R. Stein,

Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. PA. L. REV. 781, 786-95 (1985) (discussing overlap among the three doctrines and the doctrine of forum non conveniens). In particular, statutes frequently use the terms jurisdiction and venue haphazardly and without definition. *See* Stevens, *supra* note 4, at 317-18.

[FN80]. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999) ("Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject matter jurisdiction) and authority over the parties (personal jurisdiction) ...."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (stating that the personal jurisdiction concept of minimum contacts "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); LEFLAR, *supra* note 31, § 3, at 5 (stating that subject matter jurisdiction refers "to the court's power or authority to act in the general type of case"); *see also* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982) ("The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.").

[FN81]. *See* Foster, *supra* note 8, at 1217 ("Venue ... has come to signify the doctrines which determine whether a court having the requisite power happens to be at an appropriate place for trial."); *see also* Metro. Dev. & Hous. Agency v. Brown Stove Works, 637 S.W.2d 876, 880 (Tenn. Ct. App. 1982) ("[V]enue merely determines whether a court having the requisite power is an appropriate place for trial.").

[FN82]. *See* Leroy v. Great Western United Corp., 443 U.S. 173, 183-84 (1979) ("In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial."). Although convenience is also a factor in the modern formula for due process limitations on a court's exercise of personal jurisdiction, *see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-14 (1987), due process continues to permit courts to exercise territorial jurisdiction over parties even in places inconvenient for trial, *see* Burnham v. Superior Court, 495 U.S. 604 (1990), in part because venue rules may provide safeguards against seriously inconvenient forum selection. *See Burnham*, at 639 n.13 (Brennan, J. concurring) (citing 28 U.S.C. § 1404 (transfer of venue) and the doctrine of forum non conveniens).

[FN83]. *See* FED. R. CIV. P. 12(h) (providing that lack of jurisdiction over the person and venue are waived if not asserted in first response); Brown v. Brown, 296 S.W. 356, 359 (Tenn. 1927) (stating that a statute that limits the venue for a divorce action confers upon the defendant a waivable personal privilege not to be liable to suit in that county); *see also* Corby v. Matthews, 541 S.W.2d 789, 791 (Tenn. 1976) ("A plaintiff, by filing suit, waives right to dispute venue.").

[FN84]. *See* FED. R. CIV. P. 12(h) (providing that lack of subject matter jurisdiction may be raised at any time).

[FN85]. *Compare* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931) (holding that lack of personal jurisdiction may be asserted following default judgment), *with* Commercial Cas. Ins. Co. v. Consol. Stone Co., 278 U.S. 177, 181 (1929) (holding objection to venue waived following default judgment) *and* Clover Leaf Freight Lines v. Pacific Coast Wholesalers Ass'n, 166 F.2d 626 (7th Cir. 1948) (same), *and* State *ex rel*. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994) (same), *and* Vanover v. Stonewall Cas. Co., 289 S.E.2d 505 (W. Va. 1982) (same). *See* Shopper Advertiser, Inc. v. Wis. Dept. of Revenue, 344 N.W.2d 115, 122 (Wis. 1984) (Abrahamson, J., concurring in part and dissenting in part) ("[B]lack-letter Restatement rule is that if venue is improper, the judgment is not void, but is invalid or erroneous and subject to reversal only on direct attack.").

[FN86]. *See* Foster, *supra* note 8, at 1238-39 (stating that two disadvantages of classifying forum selection doctrines as constitutional and jurisdictional are unfairness to plaintiffs when defendants are permitted to assert defenses belatedly and loss of flexibility in development of the doctrines).

[FN87]. *See supra* notes 20-22 and accompanying text.

[FN88]. In *Livingston v. Jefferson*, the plea sustained was to the jurisdiction of the court. Judge Tyler's opinion, and less so Justice Marshall's, discussed the local action rule in terms of the court's lack of jurisdiction. 15 F. Cas. at 663 (Tyler, J.) ("I am too unwell to follow and pay respect to all the arguments which have been advanced in support of the jurisdiction of this court over the case before us--and therefore must conclude by giving my decided opinion in favor of the plea to the jurisdiction.").

[FN89]. *See* British South Africa Co. v. Companhia de Mocambique, 1893 A.C. 602, 617 (appeal taken from Eng.) ("The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction of the Courts, but only determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction.").

[FN90]. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").

[FN91]. One author suggested that so long as federal courts continue to define the local action rule to include *in personam* actions, they should treat the local action defect in such cases as one of venue, even while treating the defect as jurisdictional in *in rem* actions. Note, *Local Actions in the Federal Courts*, 70 HARV. L. REV. 708, 712-13 (1957).

[FN92]. *See supra* Part II.B.

[FN93]. *See, e.g.*, Allin v. Conn. River Lumber Co., 23 N.E. 581 (Mass. 1890); Cragin v. Lovell, 88 N.Y. 258 (1882); *see also* SCOTT, *supra* note 27, at 24-30.

[FN94]. 158 U.S. 105 (1895).

[FN95]. *Id.* at 108.

[FN96]. *Id.*

[FN97]. *See* Pennoyer v. Neff, 95 U.S. 714, 722, 726 (1877).

[FN98]. 222 P. 838 (Cal. Dist. Ct. App. 1923).

[FN99]. *Id.* at 839.

[FN100]. *Id.* at 840.

[FN101]. *Id.* at 841.

[FN102]. 111 N.E. 837 (N.Y. 1916).

[FN103]. *Id.* at 838-39. The action sought damages for a thirty-three year old arson to a building in Kansas. *Id.* at 838.

[FN104]. *Id.* at 839-40.

[FN105]. *Id.* at 840. Judge Cardozo's assumption that there is no subject matter jurisdiction where there is no cause of ac-

tion is called into question by the opinion in Bell v. Hood, 327 U.S. 678, 682 (1946), which stated that "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." A consequence of the *Bell v. Hood* doctrine, if the local action rule is seen as negating a "cause of action," is that after a dismissal on the basis of the local action rule, the plaintiff would be barred by claim preclusion from bringing her claim in a court where the land was located. Judge Seabury, dissenting in *Jacobus*, argued that the local action rule was purely a "technical rule relating to the law of venue." *Jacobus*, 111 N.E. at 842. He relied upon Sentenis v. Ladew, 35 N.E. 650 (N.Y. 1893), in which the court affirmed a judgment for costs against plaintiffs who defaulted on the day of trial. The plaintiffs argued that the judgment was invalid because their suit was for injury to real property in Tennessee. *Id*. at 650. The *Sentenis* court held that the judgment was neither void nor voidable for lack of jurisdiction and that the local action rule was only a rule of procedure that might be waived by consent of the parties. *Id*. The court stated, "We entertain no doubt that the [S]upreme [C]ourt had jurisdiction to render the judgment awarded in this action. Under the [C]onstitution it has general jurisdiction in law and equity, and of the class of actions to which this cause belongs." *Id*.

[FN106]. *See, e.g.*, MULLENIX & VAIRO, *supra* note 25, ¶ 110.20[5], at 110-52 (stating that local action rule "should be treated at most as a personal jurisdiction defect, which, like venue objections, is waivable if not raised in the first response to the complaint").

[FN107]. 15 WRIGHT, MILLER & COOPER, *supra* note 64, § 3822, at 206; Note, *supra* note 91, at 712-13; Stevens, *supra* note 4, at 319 n.56. *Compare* Hayes v. Gulf Oil Corp., 821 F.2d 285, 290-91 (5th Cir. 1987) (stating that like domestic relations and probate, the local action rule is a judicially created limitation to a federal court's exercise of its diversity jurisdiction), *with* Wheatley v. Phillips, 228 F.Supp. 439, 442 (W.D.N.C. 1964) (holding that North Carolina federal court has subject matter jurisdiction in diversity action for damage to Georgia land; question is one of venue), *and* Jacobus v. Colgate, 111 N.E. 837, 842 (N.Y. 1916) (Seabury, J. dissenting) ("purely a technical rule relating to the law of venue"). *See also* Trust Co. Bank v. United States Gypsum Co., 950 F.2d 1144, 1149 n.7 (5th Cir. 1992) ("It is unclear whether the local action doctrine runs to the jurisdiction or the venue of a court."). Another oddity of the local action rule is that federal courts sometimes apply state law, even though matters of subject matter jurisdiction and venue are usually treated as matters of federal law. *Compare* Trust Co. Bank v. U.S. Gypsum Co., 950 F.2d 1144, 1149 (5th Cir. 1992) (applying state law), *and* Still v. Rossville Crushed Stone Co., 370 F.2d 324 (6th Cir. 1966) (applying Tennessee law), *with* Raphael J. Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 506 (7th Cir. 1984) (applying federal law).

[FN108]. The circuit court is the court of general jurisdiction in Tennessee. TENN. CODE ANN. § 16-10-101 (1994). In addition, the Code of 1858, section 4484 provided that chancery court was authorized to "divest the title to property, real or personal, out of any of the parties, and vest it in others, and such decree shall have all the force and effect of a conveyance by such parties, executed in due form of law." The statute was repealed in 1972, *see* 1972 Tenn. Pub. Acts ch. 565, § 1 (repealing TENN. CODE ANN. § 21-1203), in light of the adoption of TENN. R. CIV. P. 70, which provides authority for decrees divesting and vesting title and for appointment of a person to execute a deed on behalf of a party who is ordered, but fails to do so. Another statute of ancient vintage, TENN. CODE ANN. § 16-1-108 (1994), provides, "Vesting title by decree or clerk's deed. Courts having jurisdiction to sell lands, instead of ordering parties to convey, may divest and vest title directly by decree, or empower the clerk to make title." A variety of other statutes authorize chancery and circuit courts to act *in rem* in particular types of cases. *See* TENN. CODE ANN. § 16-10-109 (1994) (partition and sale of real property); § 16-11-104 (1994) (proceedings in aid of execution); § 16-11-106 (1994) (boundary disputes); § 16-11-107 (1994) (suits on foreign judgments); § 16-11-111 (1994) (partition or sale of property); § 29-27-106 (2000) (partition).

[FN109]. *See* TENN. R. CIV. P. 70 (providing that only with respect to land "located in this state" may a court order that a decree of specific performance operates as a deed); Cory v. Olmstead, 290 S.W. 31, 32 (Tenn. 1926) (holding that Ten-

nessee court is without jurisdiction to foreclose land in Kentucky); Wicks v. Caruthers, 81 Tenn. (13 Lea) 353, 364 (1884) ("[L]and lying in another State is beyond our control ...."); Miller v. Birdsong, 66 Tenn. (7 Baxt.) 531, 536 (1874) (stating that Tennessee chancery court may not decree sale of portion of land located in Mississippi); Boals v. Boals, 519 S.W.2d 594, 596 (Tenn. Ct. App. 1973) (holding that Tennessee court did not have jurisdiction to vest and divest title to real estate in Florida); Robinson v. Johnson, 52 S.W. 704, 706 (Tenn. Ch. App. 1899).

[FN110]. *See* Brown v. Dayton Coal & Iron Co., 3 Tenn. Civ. App. 395, 398 (1912) (stating that investigations of title are "local questions with which a foreign Court is never presumed to deal or to be equipped to settle"); HENRY R. GIBSON, GIBSON'S SUITS IN CHANCERY § 177, at 181 n.28 (3d ed. 1929) ("All suits relating to land, or injuries to land or liens or incumbrances on land, are local; and the reason they are ordinarily required to be brought in the county where the land lies is the records affecting the title are, ordinarily, in such county, and should remain there.").

[FN111]. *See* Cory v. Olmstead, 290 S.W. 31, 32-33 (Tenn. 1926); Roberts v. Roberts, 767 S.W.2d 646, 646-49 (Tenn. Ct. App. 1988) (holding that chancellor exceeded his jurisdiction in ordering clerk and master to execute a deed to Alabama land after the defendant refused to comply with an order to convey the land); Trivette v. Trivette, 564 S.W.2d 672 (Tenn. Ct. App. 1977).

[FN112]. *See, e.g.*, Miller v. Birdsong, 66 Tenn. (7 Baxt.) 531, 536-37 (1874) (holding that Tennessee chancery court having jurisdiction of the person of constructive trustee may order trustee to make a conveyance of Mississippi land, citing *Penn v. Lord Baltimore*); Kirklin v. Atlas Sav. & Loan Ass'n, 60 S.W. 149, 156-57 (Tenn. Ch. App. 1900); *see also* Gilliland v. Stanley, No. 3258, 1997 WL 180587 (Tenn. Ct. App. Apr. 16, 1997) (holding that Tennessee court may enforce divorce decree awarding wife interest in Texas real estate by ordering husband to pay wife share of proceeds of sale of the land).

[FN113]. 81 Tenn. (13 Lea) 353 (1884).

[FN114]. *Id*. at 365. The court in *Wicks* referred to W. Union Tel. Co. v. W. & Atl. R.R., 67 Tenn. (8 Baxt.) 54 (1874), which held that a chancellor properly granted an injunction restraining a railroad company and its agents from interfering with plaintiff's contractual right of access to property "so far as the company or its agents were within the State of Tennessee," but properly refused to grant "a decree against the officers and agents of the corporation in the State of Georgia," reasoning that such an injunction "might be disregarded every day, and a court of chancery in Tennessee would be powerless to punish for the contempt of its authority." *Id*. at 60-61. It is not clear, however, why the railroad company in *Western Union* could not have been held in contempt in Tennessee for acts of its agents in Georgia. *See* Anderson-Tully Co. v. Thompson, 177 S.W. 66, 68 (Tenn. 1915) (holding that Tennessee chancery court properly found defendants in contempt for acts of their agents in Arkansas in violation of injunction restraining defendants from interfering with plaintiff's right of access to Arkansas land).

[FN115]. *See* Orr's Heirs v. Irwin's Heirs & Devisees, 4 N.C. 351, 354 (1816) (approving a decree compelling conveyance of land in Tennessee, the court explained that although the remedy may fail by the defendant's removal from the court's jurisdiction, so may a remedy at law for damages fail by a defendant's removal of himself and his property from the jurisdiction); G.H.P., Annotation, *Jurisdiction of Equity Over Suits Affecting Real Property in Another State or Country*, 69 L.R.A. 673, 677-78 (1905).

[FN116]. *But see* Chamberlain v. Wakefield, 213 P.2d 62, 69 (Cal. Ct. App. 1949) ("If the court has the power to order a party to convey land outside the state, it follows that upon his failure to do so the court has power to enforce its order by directing the clerk to execute the conveyance.").

[FN117]. *See* TENN. R. CIV. P. 70 ("[W]here a judgment or decree directs a party to execute a conveyance of land or other property or to deliver deeds ... and the party fails to comply ... the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party.").

[FN118]. Roberts v. Roberts, 767 S.W.2d 646 (Tenn. Ct. App. 1988). In *Roberts*, the chancery court ordered the clerk and master to execute a deed to Alabama land after the defendant refused to comply with an order to convey the land. *Id*. at 646-47. Holding that the chancellor exceeded his jurisdiction, the *Roberts* court relied upon two earlier opinions--Cory v. Olmstead, 290 S.W. 31, 32-33 (Tenn. 1926) and Trivette v. Trivette, 564 S.W.2d 672 (Tenn. Ct. App. 1977)--that had rejected the idea of court-authorized deeds to foreign land. *Id*. at 648. *Cory* and *Trivette* are distinguishable from *Roberts*, however, because in neither case was a party ordered to execute a conveyance. *Cory's* discussion of the subject was entirely hypothetical and the decree in *Trivette* attempted to reverse the defendant trustees' sale of North Carolina land by directly divesting title from the defendant purchasers and appointing the clerk and master as substitute trustee to execute a conveyance to the plaintiffs.

[FN119]. *See* Watkins v. Watkins, 22 S.W.2d 1, 2 (Tenn. 1929) ("It is not material whether the trust involved be an express trust, a resulting trust, or a constructive trust."); Miller v. Birdsong, 66 Tenn. (7 Baxt.) 531, 536-37 (1874) (constructive trust); *Ex Parte* Reid, 34 Tenn. (3 Sneed) 375, 381 (1854) (stating that in decreeing specific performance, a court of equity may order a party to execute a deed for land outside the state); *see also* Anderson-Tully Co. v. Thompson, 177 S.W. 66, 67 (Tenn. 1915) (citing *Massie v. Watts*, 10 U.S. 148 (1810) in holding that Tennessee chancery court properly enjoined defendants from interfering with plaintiff's contractual right of access to Arkansas land).

[FN120]. 10 U.S. (6 Cranch) 148 (1810) (discussed *supra* notes 49-61 and accompanying text).

[FN121]. *See* Pickett v. Ferguson, 8 S.W. 386, 391 (Tenn. 1888) ("[I]f there is not even a constructive trust arising from the fiduciary relation, the courts of Tennessee can have no conceivable ground of jurisdiction of this case affecting land in Arkansas ....").

[FN122]. 3 Tenn. Civ. App. 395 (1912).

[FN123]. *Id*. at 398.

[FN124]. *Id*. at 396.

[FN125]. *Id*. at 397.

[FN126]. *Id*. at 398.

[FN127]. *See supra* notes 54-61 and accompanying text.

[FN128]. 52 S.W. 704 (Tenn. Ch. App. 1899).

[FN129]. *Id*. at 704.

[FN130]. *Id*. at 704-05.

[FN131]. *Id*. at 705.

[FN132]. *Id*. at 706.

[FN133]. *Id*.

[FN134]. *Cf*. TENN. CODE ANN. § 16-1-107 (1994) ("Power to sell land. In all suits, instituted according to law, to sell the real estate of decedents for the payment of debts, or to sell lands for partition, a court of record may decree a sale of lands lying in any part of the state.").

[FN135]. *See* Ducktown Sulpher, Copper, & Iron Co. v. Fain, 70 S.W. 813 (Tenn. 1902) (bill of peace).

[FN136]. Boals v. Boals, 519 S.W.2d 594, 596-97 (Tenn. Ct. App. 1973) (stating that Tennessee trial court had jurisdiction to require husband to do all things necessary, including executing and delivering a deed, to transfer title to Florida land to wife as alimony *in solido*); *cf*. Roberts v. Roberts, 767 S.W.2d 646, 649 (Tenn. Ct. App. 1988) (holding that chancellor exceeded his jurisdiction in ordering the clerk and master to execute a deed to Alabama land after the defendant refused to comply with an order to convey the land).

[FN137]. In the areas of divorce and decedents' estates, unified treatment is available for land located in Tennessee outside the forum county. *See infra* notes 213 & 215.

[FN138]. *See supra* Part II.C.

[FN139]. 60 S.W. 593 (Tenn. 1900).

[FN140]. *Id*. at 594.

[FN141]. *Id*. at 595. The landowners claimed that the company's smelting operation in Tennessee emitted smoke and gases that injured their timber and growing crops in Georgia. *Id*.

[FN142]. *Id*. at 598.

[FN143]. *Id*. at 606. Along with *Livingston v. Jefferson*, the mining company also cited *Roach v. Damron*, 21 Tenn. (2 Hum.) 425, 427 (1841), in which the court reversed a Knox County jury verdict of damages for trespass to land for lack of proof that the land was in Knox County, stating, "In its nature it is a local action, the court of the county in which the land is situated alone having jurisdiction." *Id*.

[FN144]. *Ducktown*, 60 S.W. at 606-07.

[FN145]. *Id*. at 598.

[FN146]. 3 Tenn. Civ. App. 395 (1912) (writ of certiorari denied).

[FN147]. *Id*. at 398 ("It is impossible to determine an action of this kind without an investigation of the title and right of possession and the nature of possession--all purely local questions with which a foreign Court is never presumed to deal or to be equipped to settle."). The *Brown* case is also discussed *supra* at text accompanying notes 122-27.

[FN148]. 155 S.W. 928 (Tenn. 1913).

[FN149]. *Id*. at 929.

[FN150]. *Id*.

[FN151]. *Id*.

[FN152]. *Id*.

[FN153]. *Id*.

[FN154]. *Id*.

[FN155]. *Id*. (quoting Gunther v. Dranbauer, 38 A. 33, 34 (Md. 1897)).

[FN156]. *Id*. at 930. *See* Lee, *supra* note 25, at 634 (describing the early common-law distinction that rights arising from privity of estate were local, while rights arising from privity of contract were not, and concluding that the distinction is without logical force and rarely followed in modern times).

[FN157]. *See supra* text accompanying notes 71-72.

[FN158]. *Mattix*, 155 S.W. at 929.

[FN159]. *See* Burger v. Parker, 290 S.W. 22, 22 (Tenn. 1926) (stating that "the subject of the injury, rather than the means used, is the determining factor" in distinguishing local and transitory actions).

[FN160]. *Mattix*, 155 S.W. at 930.

[FN161]. *Id*.

[FN162]. *Id*. *See generally* Lee, *supra* note 25, at 644-64 (describing various re-characterization techniques that courts use to avoid application of the local action rule to an action seeking money damages for injury or trespass to land).

[FN163]. 297 S.W.2d 91 (Tenn. 1956).

[FN164]. *Id*. at 91-92.

[FN165]. *Id*. at 93. Without noting the discrepancies, *see supra* text accompanying notes 71-72 & 157-58, the court stated that this definition was used in *Mattix v. Swepston*, and that *Mattix* had taken it from *Livingston v. Jefferson*. *Id*. at 92. The court also approved *Brown v. Dayton Coal & Iron Co.*, 3 Tenn. Civ. App. 395 (1912) (discussed *supra* at text accompanying notes 146-47). *Id*. at 92.

[FN166]. 60 S.W. 593 (Tenn. 1900) (discussed *supra* at text accompanying notes 139-45).

[FN167]. *McCormick*, 297 S.W.2d at 92. Some states had adopted such an exception to the rule of *Livingston v. Jefferson*. *See, e.g.*, Smith v. S. Ry., 123 S.W. 678 (Ky. 1909); Armendiaz v. Stillman, 54 Tex. 623 (1881). In *Graham v. Hamilton County*, 450 S.W.2d 571 (Tenn. 1969), plaintiffs sued Hamilton County, Tennessee in a Hamilton County circuit court seeking damages in inverse condemnation because the county had closed a road that provided the only access to the plaintiffs' Georgia land. Applying the exception that it had recognized in *McCormick*, the court held that the suit could proceed in Hamilton County because the act causing the injury occurred there. *Id*. at 573. The court also rejected the County's assertion that the exception applied only in a case of negligence or nuisance and not in a condemnation action that "necessarily involves title to land." *Id*. The court further opined that the traditional rule that an action for injury to land is local "should not be arbitrarily enforced" because it "is based on only technical reasons or reasons of private convenience." *Id*. (citing Piercy v. Johnson City, 169 S.W. 765 (Tenn. 1914), discussed *infra* at text accompanying notes

236-41).

[FN168]. *See supra* notes 143-45 and accompanying text.

[FN169]. *McCormick*, 297 S.W.2d at 92.

[FN170]. *Id*.

[FN171]. TENN. CODE ANN. § 16-10-101 (1994).

[FN172]. TENN. CODE ANN. § 16-11-103 (1994); *see also* TENN. CODE ANN. § 16-11-101 (1994) ("The chancery court has all the powers, privileges, and jurisdiction properly and rightfully incident to a court of equity."). Several other provisions specify particular jurisdictional grants to the chancery courts. *See* TENN. CODE ANN. §§ 16-11-104 through 16-11-113 (1994). Circuit courts also have some traditionally equitable powers. *See* TENN. CODE ANN. §§ 16-10-103 through 16-10-111 (1994).

[FN173]. *See* Code of 1858 § 4305 ("The Court of Chancery acts ordinarily in personam, and suit may be instituted wherever the defendant or any material defendant is found, unless otherwise prescribed by law.") (subsequently codified at TENN. CODE ANN. § 16-11-203, *repealed by* 1992 Tenn. Pub. Acts ch. 753, § 1).

[FN174]. *See supra* note 108.

[FN175]. TENN. CODE ANN. § 16-11-102(a) (1994). For a discussion of the background and consequences of this expansion, see Eric Fetter, Note, *Laches at Law in Tennessee*, 28 U. MEM. L. REV. 211 (1997). Despite the statute's exceptions, chancery courts may, under the "clean-up doctrine," award unliquidated damages for injury to property as incidental to equitable relief. *See, e.g.*, Morrison v. Jones, 430 S.W.2d 668 (Tenn. Ct. App. 1968).

[FN176]. TENN. CODE ANN. § 16-11-102(b) (1994).

[FN177]. 1972 Tenn. Pub. Acts ch. 565, § 1.

[FN178]. TENN. CODE ANN. § 16-11-114 (1994) (derived from 1787 Tenn. Pub. Acts ch. 22, § 1).

[FN179]. TENN. CODE ANN. § 20-4-101(a) (1994).

[FN180]. *See* Childress v. Perkins, 3 Tenn. (Cooke) 87 (1812); *see also* State *ex rel*. Logan v. Graper, 4 S.W.2d 955 (Tenn. 1927).

[FN181]. TENN. CODE ANN. § 20-4-103 (1994).

[FN182]. TENN. CODE ANN. § 16-11-114(1) (1994).

[FN183]. *See, e.g.*, TENN. CODE ANN. § 29-20-308 (2000) (governmental tort liability); TENN. CODE ANN. § 29-30-101 (2000) (action to recover personal property); TENN. CODE ANN. § 36-4-105 (2001) (divorce).

[FN184]. Tennessee is not alone in adopting intrastate local action rules. *See* Stevens, *supra* note 4, at 340-41 (cataloging local action statutes in 48 states).

[FN185]. In *Roach v. Damron*, 21 Tenn. (2 Hum.) 425 (1841), the court reversed a Knox County jury verdict of damages

for trespass to land for lack of proof that the land was in Knox County. *Id.* at 427. The court stated, "In its nature it is a local action, the court of the county in which the land is situated alone having jurisdiction." *Id.*; *see also* Draper v. Kirkland, 38 Tenn. (1 Head) 260 (1858) (ejectment is local and must be brought in county where the land lies); Gorham v. Jones, 30 Tenn. (11 Hum.) 353, 354 (1850) (stating without citation that "[i]t is certainly true that in ejectment, as in local actions generally," location of the land in the county where the action is brought must be proved); McGuire v. Hay, 25 Tenn. (6 Hum.) 419, 420 (1846) ("This is an action of ejectment, a local action, and therefore brought in the county where the land lies, as by law it must have been."); Culwell v. Culwell, 133 S.W.2d 1009, 1012-13 (Tenn. Ct. App. 1939) (holding that circuit court in Davidson County had no jurisdiction to declare a lien on Cheatham County realty).

[FN186]. 1809 (Sept.) Tenn. Pub. Acts ch. 126, § 3 provided: "And to prevent disputes about the venue of suits in the circuit courts ... in actions touching the freehold, the trial shall be had in the county in which the freehold may be situated."

[FN187]. Code of 1858 § 2810 (currently at TENN. CODE ANN. § 20-4-103 (1994)).

[FN188]. *See* Five Star Express, Inc. v. Davis, 866 S.W.2d 944, 945 n.1 (Tenn. 1993); *see also* ABRAHAM CARUTHERS, HISTORY OF A LAWSUIT 50 (Andrew B. Martin ed., 5th ed. 1919) (citing predecessor to TENN. CODE ANN. § 20-4-103 (1994) for the proposition that actions for land or injuries to land are local and must be brought in the county where the land lies); G. David Delozier, Note, *Venue Alternatives in Transitory Actions: Legislative Amendment*, 39 TENN. L. REV. 118, 118 (1971) (suggesting that local action rule was codified in TENN. CODE ANN. § 20-404 (currently at TENN. CODE ANN. § 20-4-103 (1994)).

[FN189]. Federal courts similarly assume the local action rule, despite the lack of a statute mandating or defining it. *See* Ky. Coal Lands Co. v. Mineral Dev. Co., 191 F. 899, 899-900 (E.D. Ky. 1911) (holding that Kentucky federal court had removal jurisdiction on basis of diversity of citizenship in ejectment and damage action regarding Kentucky land; provision of Judicial Code that diversity action must be brought in district in which either plaintiff or defendant resides is a rule of venue that does not apply to local action; motion for remand to state court denied), *rev'd*, 219 F. 45 (6th Cir. 1914) (affirming jurisdiction and remanding for new trial on other grounds).

[FN190]. *But see Ex Parte* Reid, 34 Tenn. (2 Sneed) 375,381 (1854) (holding that statutes governing petitions in circuit and chancery court to authorize sale of minor's land required that action be instituted in county where the land is situated).

[FN191]. TENN. CODE ANN. § 20-4-103 (1994). An even earlier act concerning only ejectment and trespass provided,

> That in all actions of ejectment or trespass for injuries to real estate, where the tract of land lies in two or more counties the court of the county, in which process shall be served on the defendant or defendants, shall have jurisdiction to try the title to the whole tract of land in the action of ejectment, and award execution accordingly; and in the action of trespass, to hear and determine the case, as though the entire tract lay in the county in which the suit was brought."

1847-48 Tenn Pub. Acts ch. 173.

[FN192]. Campbell v. Hampton, 79 Tenn. (11 Lea) 440 (1883) (holding that predecessor to TENN. CODE ANN. § 20-4-103 (1994) gives jurisdiction to the court of either county and extends to the property in either county; court had jurisdiction to order sale of entire tract by sheriff of that county and sheriff may convey the title); Draper v. Kirkland, 38 Tenn. (1 Head) 260 (1858) (holding that predecessor to TENN. CODE ANN. § 20-4-103 (1994) applies only where the tract of land in dispute lies in two or more counties, not where the land is embraced within a grant to plaintiffs that lies in two counties, but the disputed land is entirely in one county). Later cases applying this provision include *French v.*

Buffatt, 33 S.W.2d 92 (Tenn. 1930), *Carter v. Brown*, 263 S.W.2d 757 (Tenn. 1953), and *Medlock v. Ferrari*, 602 S.W.2d 241 (Tenn. Ct. App. 1979). The statute governing local action venue in chancery court includes a similar provision respecting land located in more than one county. TENN. CODE ANN. § 16-11-114(1) (1994) ("the land, or a material part of it").

[FN193]. *See* Robert v. Frogge, 258 S.W. 782, 783 (Tenn. 1924) ("A suit against a nonresident, without the service of process, upon seizure of property and publication, no matter what its nature, is necessarily a local action."); *see also* N.C. Blanchard Co. v. Doak, 70 S.W.2d 21, 22 (Tenn. 1934) (stating that predecessor to TENN. CODE ANN. § 20-4-103 (1994), permitting suit where property is attached, is in the nature of an exception to the general rule that in transitory actions the right of action follows the person of the defendant); Brewer v. De Camp Glass Casket Co., 201 S.W. 145, 146 (Tenn. 1918) (stating that effective jurisdiction of nonresident defendants may be obtained by attachment of their property in any county of the state where it may be found, citing predecessor to TENN. CODE ANN. § 20-4-103 (1994)); Culwell v. Culwell, 133 S.W.2d 1009, 1012-13 (Tenn. Ct. App. 1939) (holding that jurisdiction to render a money decree against nonresident requires either personal service or attachment of his property by a court in the county where his real property is located, citing predecessor to TENN. CODE ANN. § 20-4-103 (1994)).

[FN194]. In chancery court, a similar statute, derived from an Act of 1801, provides, "When attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county in which the property, or any material part thereof, sought to be attached, is found at the commencement of the suit." TENN. CODE ANN. § 16-11-114(4) (1994) (derived from 1801 Tenn. Pub. Acts ch. 6, § 2).

[FN195]. *See* Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977).

[FN196]. Prior to 1971, the general venue statute for transitory actions provided only that "in all transitory actions, the right of action follows the person of the defendant, unless otherwise expressly provided." TENN. CODE ANN. § 20-401, *repealed by* 1971 Tenn. Pub. Acts ch. 51, § 1. In 1953, the legislature added the option of the place where the cause of action arose, but only for tort actions under certain conditions. 1953 Tenn. Pub. Acts ch. 34, § 3 (codified at TENN. CODE ANN. § 20-402, *repealed by* 1972 Tenn. Pub. Acts ch. 446, § 2). It was not until 1971 that the general statute was amended to provide the options of the defendant's residence and the county where the cause of action arose in addition to where the defendant is found. 1971 Tenn. Pub. Acts ch. 51, § 1 (codified at TENN. CODE ANN. § 20-4-101 (1994)). *See* Delozier, *supra* note 188, at 119-23.

[FN197]. *But see* Burns v. Duncan, 133 S.W.2d 1000, 1006-07 (Tenn. Ct. App. 1939) (discussing cases in which the word "may" in a statute has been construed as "shall").

[FN198]. *See infra* notes 213-15 and accompanying text.

[FN199]. *See supra* note 185.

[FN200]. *See supra* note 45 and accompanying text.

[FN201]. The term "local jurisdiction" is equivalent to the term venue in modern parlance. *See* State *ex rel.* Logan v. Graper, 4 S.W.2d 955, 955 (Tenn. 1927).

[FN202]. Code of 1858, § 4311. *See* Ray v. Haag, 1 Tenn. Ch. App. 249, 264-65 (1901) (finding three different provisions of the statute that authorized suit against non-resident to clear title to land in county in which the land was located).

[FN203]. Code of 1858, § 4311; *cf.* TENN. CODE ANN. § 20-4-101 (1994) ("Transitory Actions"); TENN. CODE

ANN. § 20-4-103 (1994) (“Actions in Rem”).

[FN204]. Code of 1858, § 4305 (“The Court of Chancery acts ordinarily in personam, and suit may be instituted wherever the defendant or any material defendant is found, unless otherwise prescribed by law.”) (subsequently codified at TENN. CODE ANN. § 16-11-203, *repealed by* 1992 Tenn. Pub. Acts ch. 753, § 1).

[FN205]. Code of 1858, § 4311(1) (“Where any material defendant resides. The bill may be filed in the chancery district in which the defendant or a material defendant resides; and if, upon inquiry at his residence, he is not to be found, he may be proceeded against by publication or judicial attachment, as herein provided.”). In 1994, the legislature deleted this section from the current version of the statute, section 16-11-114 of the Tennessee Code. 1994 Tenn. Pub. Acts, ch. 560, § 1. The deletion was most likely because of the unconstitutionality of the provisions for notice by publication and judicial attachment. *See* Shaffer v. Heitner, 433 U.S. 186, 211 (1977). With respect to venue at defendant's residence, the statute was no longer necessary because section 20-4-101(a), which was amended in 1971 to provide for venue where the defendant resides in transitory actions, *see supra* note 196, applied in chancery courts. State *ex rel*. Logan v. Graper, 4 S.W.2d 955 (1927); Childress v. Perkins, 3 Tenn. 87 (1812).

[FN206]. Code of 1858, § 4311(4) (currently codified at TENN. CODE ANN. § 16-11-114(3) (1994)). *See* Roberts v. Frogge, 258 S.W. 782, 783 (Tenn. 1923) (recognizing that this section authorized venue in 1859 suit against non-resident for resulting trust in real property located in county in which the action was brought even though the land had not been attached at the commencement of the action).

[FN207]. Code of 1858, § 4311(2) (emphasis added). Another section specifically addressed cases of attachment jurisdiction, authorizing venue in the county in which the attached property, real or personal, was found. Code of 1858, § 4311(5) (currently at TENN. CODE ANN. § 16-11-114(4) (1994)). *See supra* note 194.

[FN208]. 3 Tenn. Ch. (Cooper's) 53 (1875).

[FN209]. *Id*.

[FN210]. *See* French v. Buffatt, 33 S.W.2d 92, 93 (Tenn. 1930) (suggesting that 1877 amendment was response to *Roper*).

[FN211]. The Act of 1877 was amended by section 4311(2) (currently codified at TENN. CODE ANN. § 16-11-114(1) (1994)) to read, “All bills filed in any court seeking to divest or clear up the title to land, or to enforce the specific execution of contracts relating to realty, or to foreclose a mortgage or deed of trust by a sale of personal property or realty, shall be filed in the county in which the land, or a material part of it, lies, or in which the deed or mortgage is registered.”

[FN212]. *See* Patrick v. Hardin, 385 S.W.2d 905, 907 (Tenn. 1964) (holding that Wayne County Chancery Court administering insolvent decedent's estate had no jurisdiction to foreclose vendor's lien on Hardin County land); Stinnett v. Tom-Ken Builders, 379 S.W.2d 766, 769 (Tenn. 1964) (holding that Knox County chancellor erred in overruling defendants' plea in abatement in suit to enjoin foreclosure and to cancel trust deed on realty in Louden County); Carter v. Brown, 263 S.W.2d 757, 759 (Tenn. 1953) (holding that Hamilton County Chancery Court lacked jurisdiction to cancel deed to Marion County land); French v. Buffatt, 33 S.W.2d 92, 93-94 (Tenn. 1930) (holding that Washington County Chancery Court had no jurisdiction in bill by judgment creditor to reach equities of defendants in Knox County land); Crosby Milling Co. v. Grant, 289 S.W. 511, 513 (Tenn. 1926) (holding that Hamblen County Chancery Court had no jurisdiction in creditor's bill to decree sale of land in Jefferson County); Frankfort Land Co. v. Hughett, 191 S.W. 530, 532 (Tenn. 1917) (holding that plaintiffs' claim for money damages for timber removed was “incidental” and did not render

action transitory; because principal purpose of bill was to establish the plaintiffs' right to possession and to cancel a deed, action was local and properly brought in the county where the land was located); Johnson v. Evans, 1 Tenn. Ch. App. 603 (1903) (holding that Bedford County Chancery Court did not have "local jurisdiction" to foreclose mortgage and sell land in Davidson County).

[FN213]. *See* TENN. CODE ANN. § 16-1-107 (1994) ("Power to sell land. In all suits, instituted according to law, to sell the real estate of decedents for the payment of debts, or to sell lands for partition, a court of record may decree a sale of lands lying in any part of the state."); Robertson v. Winchester, 1 S.W. 781 (Tenn. 1886). In *Patrick v. Hardin*, 385 S.W.2d 905, 907 (Tenn. 1964), the court held that had the plaintiff filed her claim for unpaid notes secured by a vendor's lien on Hardin County land in the Wayne County court administering the deceased vendee's estate, that court would have had authority to sell the deceased's interest in the land to satisfy the debt. The Wayne County court, however, did not have authority to foreclose a vendor's lien on Hardin County land and plaintiff properly sued in Hardin County to do so. *Id*.

Several decisions have addressed the question of whether the rule applies in the case of a non-deceased insolvents' estate, but none have so held. *See* French v. Buffatt, 33 S.W.2d 92, 94 (Tenn. 1930) (declining to reach the question); Crosby Milling Co. v. Grant, 289 S.W. 511, 512 (Tenn. 1926) (Cook, J., dictum); Johnson v. Evans, 1 Tenn. Ch. App. 603, 626 (1903) (suggesting, but not deciding, that by filing of general creditors' bill, all property of insolvent "was drawn into" jurisdiction of the court).

[FN214]. TENN. CODE ANN. § 16-1-107 (1994) ("Power to sell land. In all suits, instituted according to law, ... to sell lands for partition, a court of record may decree a sale of lands lying in any part of the state."); TENN. CODE ANN. § 29-27-107 (2000) (stating venue in suit for partition is the county in which the land is located, or in which the defendant resides, or if all claimants agree, any county in the state).

[FN215]. *See* Knobler v. Knobler, 697 S.W.2d 583, 585 (Tenn. Ct. App. 1985) (holding that TENN. CODE ANN. § 29-27-107, governing partition cases, is statutory exception to section 16-11-114, and gives divorce court authority to vest and divest title to real property located anywhere in Tennessee). At one time there was also an express statutory exception for actions to confirm sales of land in estates of those under disability. *See* Smartt v. Smartt, 1 Tenn. App. 68, 80 (1925) (holding that venue in chancery action to confirm sale of minor's land is controlled by statutes governing jurisdiction of minors and their estates, not by general venue statute and that the bill may be filed either where the land is located or where the minor resides). The statute, section 34-3-209, however, was repealed by 1992 Tenn. Pub. Acts ch. 794, § 40, as part of an overhaul of the provisions governing such estates, and the new statutes do not include a provision addressing the subject.

[FN216]. *See* Martin v. Martin, 755 S.W.2d 793 (Tenn. Ct. App. 1988) (discussed *infra* text accompanying notes 221-30).

[FN217]. *See* Brown v. Dayton Coal & Iron Co., 3 Tenn. Civ. App. 395, 398 (1912) (discussed *supra* notes 122-27 and accompanying text.).

[FN218]. *See supra* notes 210-12 and accompanying text.

[FN219]. TENN. CODE ANN. § 16-11-114(1) (1994).

[FN220]. *See supra* note 119. The decree may not, however, operate as a conveyance. TENN. R. CIV. P. 70.

[FN221]. 755 S.W.2d 793 (Tenn. Ct. App. 1988).

[FN222]. *Id*. at 794.

[FN223]. *Id*. at 795.

[FN224]. At the time of the *Martin* case, the provision was found at section 16-11-114(2) of the Tennessee Code.

[FN225]. *Martin*, 755 S.W.2d at 795.

[FN226]. *Id*. at 797 (quoting Massie v. Watts, 10 U.S. 148, 160 (1810)).

[FN227]. *Id*. (citing Anderson-Tully Co. v. Thompson, 177 S.W. 66 (Tenn. 1915)).

[FN228]. *See supra* notes 209-12 and accompanying text.

[FN229]. *Martin*, 755 S.W.2d at 797. In contrast, an unreasonably broad construction of the prohibition appears in the popular treatise, HENRY R. GIBSON, GIBSON'S SUITS IN CHANCERY § 177, at 181 n.28 (John A. Chambliss ed., 3d ed. 1929). Several decisions quote the treatise for its proposition that "All suits relating to land, or injuries to land or liens or incumbrances on land, are local." *See, e.g.*, French v. Buffatt, 33 S.W.2d 92, 94 (Tenn. 1930). The treatise also states that a complainant should consider, "Whether the suit *in any way affects* the title or possession of realty, or any interest in or lien on realty; if so, the bill must be filed in the county where such realty, or a material part of it lies, unless the statute expressly allows the bill to be filed in some other county." GIBSON, *supra*, at 193 (emphasis added). Gibson's broad language would prohibit not only suits directly affecting title to real property outside the forum county, but also those in which the title would be indirectly affected, such as actions seeking a decree ordering a constructive trustee to convey realty located outside the forum county.

[FN230]. *See* Stinnett v. Tom-Ken Builders, 379 S.W.2d 766, 768 (Tenn. 1964) (holding that Knox County chancellor erred in overruling defendants' plea in abatement in suit to enjoin foreclosure and to cancel trust deed on realty in Louden County); Carter v. Brown, 263 S.W.2d 757, 759 (Tenn. 1953) (holding that Hamilton County Chancery Court lacked jurisdiction to cancel deed to Marion County land).

[FN231]. *See supra* notes 184-99 and accompanying text.

[FN232]. *See* Roach v. Damron, 21 Tenn. (2 Hum.) 425, 427 (1841) (reversing a Knox County jury verdict of damages for trespass to land for lack of proof that the land was in Knox County); Wylie v. Farmers Fertilizer & Seed Co., No. W2002-01227-COA-R9-CV, 2003 Tenn. App. LEXIS 589, 2003 WL 21998408 (Tenn. Ct. App. Aug. 21, 2003) (holding that Dyer County trial court erred in denying motion to dismiss suit seeking damages for injury to land in Gibson County).

[FN233]. In *Wilson v. Wood Lumber Co.*, 5 Tenn. Civ. App. 353 (1913), plaintiff sought damages alleging that sparks from defendant's engine set fire to rails, fences, crops and timber on plaintiff's land. *Id*. at 354. The court held the action transitory, not local, because "[t]he gist of the action is negligence as distinguished from actual trespass." *Id*. at 358. In *Nashville, Chattanooga & St. Louis Ry v. Weaks*, 81 Tenn. 148 (1884), the court affirmed a judgment of damages for injury to land although the defendant pled that the land was not located in the forum county. The only opinion written by a member of the court was a dissent invoking the local action rule and arguing that the case should be remanded for trial on that plea. *Id*. at 150-51. Despite its holding, *Weaks* is sometimes cited as an application of the local action rule. *See infra* note 238.

[FN234]. *See* Hall v. Southhall Bros. & Carl, Tenn. 240 S.W. 298, 298-99 (Tenn. 1922) (holding that Williamson County

court was without jurisdiction to entertain action for injury to real property located in Hickman County) (citing Mattix v. Swepston, 155 S.W. 928 (Tenn. 1913); Wylie v. Farmers Fertilizer & Seed Co., No. W2002-01227-COA-R9-CV, 2003 Tenn. App. LEXIS 589, 2003 WL 21998408 (Tenn. Ct. App. Aug. 21, 2003) (following *Hall* and *Mattix* in holding that Dyer County trial court erred in denying motion to dismiss suit seeking damages for injury to land in Gibson County). For cases involving out-of-state land, *see supra* Part III.A.3.

[FN235]. *See* ABRAHAM CARUTHERS, HISTORY OF A LAWSUIT 50 (Andrew B. Martin ed., 5th ed. 1919) ("[T]he action for land or for injuries to it is not transitory, but a local action, and must be brought in the county where the land lies."); HENRY R. GIBSON, GIBSON'S SUITS IN CHANCERY § 177, at 181 n.28 (John A. Chambliss ed., 3d ed. 1929) ("All suits relating to land, or injuries to land or liens or incumbrances on land, are local.").

[FN236]. 169 S.W. 765 (Tenn. 1914).

[FN237]. *Id*. at 766.

[FN238]. *Id*. at 766 (citing *Weaks*, 81 Tenn. 148 (1884) (*see supra* note 233) and *Mattix*, 155 S.W. 928 (Tenn. 1913) (*see supra* text accompanying notes 148-62)). The *Piercy* court declined to decide that actions for damages to realty are local, but assumed so for purposes of the case before it. *Id*. at 766.

[FN239]. *See infra* Part III.D.

[FN240]. *Piercy*, 169 S.W. at 766. The court quoted Justice Marshall's statement in Livingston v. Jefferson, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411), that, "I have yet to discern a reason other than a technical one which can satisfy my judgment." *Piercy*, 169 S.W. at 766.

[FN241]. *Piercy*, 169 S.W. at 766. An exception to this rule is a suit by one county to recover disputed territory from an adjoining county. Such suits may be entertained in the courts of the complaining county. *See, e.g.*, Putnam County v. White County, 203 S.W. 334 (Tenn. 1917).

[FN242]. *See supra* note 167 and accompanying text.

[FN243]. 924 S.W.2d 632 (Tenn. 1996).

[FN244]. *Id*. at 635.

[FN245]. *Id*.

[FN246]. *Id*. at 635-36. The trial court stated, "[I]n an inverse condemnation case, such as this one, venue means jurisdiction and ... this Court therefore has no jurisdiction to certify a class action comprised of landowners whose land lies outside Knox County, Tennessee." *Id*. at 636. *See* TENN. CODE ANN. § 29-16-104 (2000).

[FN247]. *Meighan*, 924 S.W.2d at 636.

[FN248]. *Id*. at 636-38.

[FN249]. *Id*. at 638-39.

[FN250]. *Id*.

[FN251]. *See infra* Part III.C.

[FN252]. *Meighan*, 924 S.W.2d at 639. *See supra* notes 78-86 and accompanying text.

[FN253]. *Meighan*, 924 S.W.2d at 639. This statement of federal doctrine was actually somewhat obsolete because plaintiff's residence was eliminated as a venue option for federal diversity actions in 1990. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 311, 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1391(a) (2000)). A more accurate statement might have been that venue in class actions is determined by the *claims* of the named class representatives.

[FN254]. *Meighan*, 924 S.W.2d at 639. The court misstated the trial court's finding, which concerned the location of the injured lands, not the plaintiffs' residences.

[FN255]. *Cf.* Graham v. Hamilton County, 450 S.W.2d 571 (Tenn. 1969).

[FN256]. *See supra* Part II.D.

[FN257]. *See, e.g.*, Cory v. Olmstead, 290 S.W. 31, 33 (Tenn. 1926) (holding that "demurrer should have been sustained on the ground of want of jurisdiction of the subject-matter in so far as the bill sought foreclosure" of land in Kentucky); Boals v. Boals, 519 S.W.2d 594, 596 (Tenn. Ct. App. 1973) (holding that trial court erred in finding defendant in contempt of divorce decree divesting him of title to real estate in Florida because the trial court had no jurisdiction to render such a decree).

[FN258]. *See, e.g.*, Pickett v. Ferguson, 8 S.W. 386, 391 (Tenn. 1888) ("[I]f there is not even a constructive trust arising from the fiduciary relation, the courts of Tennessee can have no conceivable ground of jurisdiction of this case affecting land in Arkansas."); Brown v. Dayton Coal & Iron Co., 3 Tenn. Civ. App. 397 (1912).

[FN259]. *See, e.g.*, McCormick v. Brown, 297 S.W.2d 91, 93 (Tenn. 1956).

[FN260]. In *Cory v. Olmstead*, 290 S.W. 31, 32 (Tenn. 1926), the court held that a party's answer to the merits of a bill did not waive his demurrer to the trial court's jurisdiction to foreclose Kentucky land because the demurrer "raised only a question of jurisdiction of the subject-matter."

[FN261]. Clouse v. Clouse, 207 S.W.2d 576, 579 (Tenn. 1948) ("[W]e cannot give full faith and credit to a foreign decree which shows on its face that the court had no jurisdiction of the subject matter, to wit, to vest and divest title to lands located in a foreign state.").

[FN262]. Draper v. Kirkland, 38 Tenn. (1 Head) 260, 261 (1858) (stating that ejectment is local and must be brought in county where the land lies; "[D]efendant may avail himself of [the defect] on the trial."); *Ex Parte* Reid, 34 Tenn. (2 Sneed) 375 (1854) (sustaining objection first asserted in petition to set aside court-decreed sale of real property in another county); Smartt v. Smartt, 1 Tenn. App. 68, 80 (1925) (sustaining objection first asserted in petition to vacate decree vesting and divesting title to land in another county; failure to plead in abatement did not waive the question of jurisdiction); *see also* Wylie v. Farmers Fertilizer & Seed Co., No. W2002-01227-COA-R9-CV, 2003 Tenn. App. LEXIS 589, 2003 WL 21998408 (Tenn. Ct. App. Aug. 21, 2003) (holding that trial court erred in denying motion to dismiss on ground of local action rule, court of appeals remanded with instructions to transfer the case to the proper county pursuant to section 16-1-116 of the Tennessee Code, which authorizes transfer for lack of "jurisdiction"). *But see* Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996) (discussed *supra* at text accompanying notes 239-49); Johnson v. Evans, 1 Tenn. Ch. App. 603, 616-25 (1903) (holding that predecessor to section16-11-114(1) refers only to the "local jurisdiction [venue]" of the chancery court, not to its subject matter jurisdiction).

[FN263]. Patrick v. Hardin, 385 S.W.2d 905, 907-08 (Tenn. 1964) (holding that because Wayne County court had no jurisdiction to foreclose vendor's lien on Hardin County property, plea of former suit pending sustained in Hardin County action is reversed); Hall v. Southhall Bros. & Carl, 240 S.W. 298, 299 (Tenn. 1921) (stating that judgment in action for damage to real estate in another county would be void).

[FN264]. Robinson v. Hughes, C.A. 101, 1986 Tenn. App. LEXIS 2831, 1986 WL 1662 (Tenn. Ct. App. Feb. 6, 1986) (holding that notwithstanding defendants' failure to appeal, judgment against them was void in suit based upon attachment of property in another county); Culwell v. Culwell, 133 S.W.2d 1009, 1012-13 (Tenn. Ct. App. 1939) (holding that Cheatham County court did not err in declaring void a lien that Davidson County court had placed on land in Chatham County). *But see* Cothron v. Scott, 446 S.W.2d 533, 535-36 (Tenn. Ct. App. 1969) (holding that in plaintiffs' action in Trousdale County seeking possession of a tract of Trousdale County land, they were estopped to deny jurisdiction of the Sumner County court in which they had previously sued unsuccessfully for possession of the Trousdale County tract); Johnson v. Evans, 1 Tenn. Ch. App. 603, 616-25 (1903) (rejecting collateral attack on Bedford County court's decree foreclosing mortgage and selling land located in Davidson County).

[FN265]. 85 S.W. 404 (Tenn. 1905).

[FN266]. *Id*. at 405.

[FN267]. *Id*. at 405. Shannon's Code section 4526 provided in pertinent part, “[W]here there are two or more defendants in any suit in courts of law ... the plaintiff may cause counterpart summons, or subpoena, to be issued to any county where any of the defendants are most likely to be found ....” *Id*.

[FN268]. *Id*.

[FN269]. *Id*.

[FN270]. *Id*.

[FN271]. *Id*.

[FN272]. *See supra* text accompanying notes 71-72 & 158.

[FN273]. *Webb*, 85 S.W. at 405.

[FN274]. *Id*.

[FN275]. *See, e.g.*, Vanderbilt Univ. Med. Ctr. v. County of Macon, No. A01-9712-CH-00707, 1999 Tenn. App. LEXIS 146, 1999 WL 118380 (Tenn. Ct. App. Mar. 9, 1999) (adjudicating claim against County of Macon for medical services rendered by plaintiff medical center to inmate that County brought to plaintiff for treatment in Davidson County).

[FN276]. *See, e.g.*, TENN. CODE ANN. § 29-20-308 (2000) (providing that suits against governmental entities under the Governmental Tort Liability Act may be brought in the county in which the entity is located or in the county in which the incident occurred from which the cause of action arises); Watauga v. Johnson City, 589 S.W.2d 901, 903-04 (Tenn. 1979) (holding in suit by City of Watauga, located in Carter County, against Johnson City, located in Washington County, that venue is proper in either county); Putnam County v. White County, 203 S.W. 334, 337 (Tenn. 1918) (holding that suit by one county to recover disputed territory from an adjoining county may be brought in the courts of the complaining county).

[FN277]. *Webb*, 85 S.W. at 405. The court also relied upon its decision in *Board of Directors of St. Francis Levee District v. Bodkin*, 69 S.W. 270 (Tenn. 1902), in which it held that a suit could not be maintained in Tennessee against an Arkansas governmental entity.

[FN278]. 85 Tenn. 165 (1886), 2 S.W. 26 (Tenn. 1886). Although this decision is styled *Carlisle v. Corran* in the South Western Reporter, it is styled *Carlisle v. Cowan* in the Tennessee Reports and is most often cited as such.

[FN279]. Code of 1858, § 2808. The current version of the statute provides, "In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the defendant resides or is found." TENN. CODE ANN. § 20-4-101(a)(1994).

[FN280]. *Carlisle*, 2 S.W. at 28.

[FN281]. *Id*.

[FN282]. *Id*.

[FN283]. *See* Keeble v. Loudon Utils., 370 S.W.2d 531, 536 (Tenn. 1963) (holding that objection by city, located in Loudon County, to suit brought against it in Monroe County was not barred by city's belated plea in abatement). The rule in *Webb* applies to counties as well as cities. *See, e.g.*, O'Neal v. DeKalb County, 531 S.W.2d 296, 298 (Tenn. 1975) (holding venue improper in Hamilton County in suit against DeKalb County alleging that DeKalb County deputy sheriff arrested plaintiff in Hamilton County under an arrest warrant issued for another named party); Vanderbilt Univ. Med. Ctr. v. County of Macon, A01-9712-CH-00707, 1999 Tenn. App. LEXIS 146, at * 2, 1999 WL 118380 at *6 (Tenn. Ct. App. Mar. 9, 1999) (holding venue improper in Davidson County in suit against County of Macon for medical services rendered by plaintiff medical center to inmate that County brought to plaintiff for treatment in Davidson County).

[FN284]. *See infra* text accompanying note 331.

[FN285]. In *Shelby County v. Memphis*, 365 S.W.2d 291 (Tenn. 1963), the supreme court *sua sponte* dismissed a declaratory judgment action brought by Shelby County against the City of Memphis in a Davidson County Chancery Court because neither the city nor the other defendants challenged venue or jurisdiction in the trial court. *Id*. at 291. The supreme court, nevertheless, stated, "We, therefore, hold, as the Nashville v. Webb case did, that a judgment rendered against a municipal corporation in a suit brought against it in a county other than that of its location is void." *Id*. at 292.

[FN286]. Code of 1858, § 2809. From 1932 to 1967, the codified version of the common county rule was not limited to parties residing in the same county in the state. Thus, the court in *Ivey v. Dean*, 410 S.W.2d 408 (Tenn. 1966), affirmed dismissal of an action for damages arising from an automobile accident by a Georgia resident against a resident of the same Georgia county on the basis of the common county rule. *Id*. at 410. A year later, the Tennessee legislature amended the statute to re-insert the words "in this state," thereby limiting the common county rule to residents of the same Tennessee county. *See* W.C.C., Case Note, *Civil Procedure--Venue--Local Cause of Action--Non-Resident Party's Access to Courts*, 34 TENN. L. REV. 687 (1967).

[FN287]. In his 1951 survey of state venue statutes, Stevens identified Tennessee as the only state with such a statute. Stevens, *supra* note 4, at 350.

[FN288]. The common county rule has subsequently been somewhat relaxed. The venue option of the county where the cause of action arose is currently available in all transitory actions, even when the parties both reside in the same county. TENN. CODE ANN. § 20-4-101(a) & (b) (1994). On the other hand, the common county rule controls over the usual

rule, *see, e.g.*, Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765 (Tenn. 1979), that in a transitory action against multiple defendants, venue is proper in the county where any properly-joined defendant resides. Thus, so long as the plaintiff and one defendant reside in the same county, the action must be brought there, or where the claim arose, regardless of the joinder of a defendant who resides in a different county. *See, e.g.*, Tims v. Carter, 241 S.W.2d 501 (Tenn. 1951); Mills v. Wong, 39 S.W.3d 118 (Tenn. Ct. App. 2000); Bing v. Baptist Memorial Hospital-Union City, 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996).

[FN289]. SAM B. GILREATH, CARUTHERS' HISTORY OF A LAWSUIT § 41, at 43 (7th ed. 1951), *quoted in Tims*, 241 S.W.2d at 503.

[FN290]. *See supra* text accompanying notes 278-82 (discussing *Carlisle*).

[FN291]. 268 S.W. 632 (Tenn. 1925).

[FN292]. *Id*. at 633.

[FN293]. 290 S.W. 22 (Tenn. 1926).

[FN294]. *Id*. at 23. In *Burns v. Duncan*, 133 S.W.2d 1000 (Tenn. Ct. App. 1939), the court disagreed with the result in *Burger*. The plaintiff in *Burns* brought a false imprisonment suit in Davidson County against the sheriff of Hamilton County. *Id*. at 1002. As in *Burger*, the plaintiff also named the sheriff's official bondsman. *Id*. Both defendants filed a plea in abatement challenging venue. *Id*. The *Burns* court found that the bondman was essential to the litigation, and could be sued only in the county where the bond "was made," that is, the county of the sheriff's official residence. *Id*. at 1008. The *Burns* court attributed the failure of the *Burger* court to "localize" the action to an oversight of counsel in not bringing to the court's attention the relevant statute (the predecessor to TENN. CODE ANN. § 56-15-112 (2000)), concerning venue for suits against bondsmen. *Id*. at 1008.

[FN295]. Since the 1920s, Tennessee courts have frequently used the terminology of legislative "localization" in connection with other statutes that limit venue options. *See, e.g.*, State *ex rel*. Huskey v. Hatler, 606 S.W.2d 534, 538 (Tenn. 1980) (applying the Juvenile Post-Commitment Procedures Act, the court stated, "Actions are considered to be local when a statute prescribes the particular county in which they must be brought."); *see also* Gordon E. Jackson, Comment, *Venue--Localizing Transitory Actions in Tennessee Civil Proceedings*, 35 TENN. L. REV. 520, 530-33, 536-40 (1968) (discussing decisions construing the non-resident motorist and workers' compensation venue statutes).

[FN296]. 296 S.W. 356 (Tenn. 1927).

[FN297]. The statute provided in pertinent part, "The bill may be filed ... in the circuit or chancery court of the county or district where the parties resided at the time of their separation, or in which the defendant resides, or is found, if a resident; but, if a nonresident or convict, then in the county where the applicant resides." *Id*. at 357 (quoting Code of 1858, § 2451).

[FN298]. *Id*. at 358-59. The issue of jurisdiction arose because the Giles County Chancery Court had appointed a receiver at the beginning of the divorce action to take charge of the defendant's property. *Id*. at 357. After the final judgment was reversed on appeal for improper venue in the Giles County court, the receiver sought to recover his expenses. *Id*. The court of appeals reversed the chancellor's award to the receiver reasoning that the dismissal had been for lack of jurisdiction, thereby depriving the court of authority to make the award. *Id*. at 357-58.

[FN299]. *Id*. at 358.

[FN300]. *Id*. (quoting Code of 1858, § 2808).

[FN301]. *See supra* text accompanying notes 270-74.

[FN302]. 364 S.W.2d 933 (Tenn. 1963).

[FN303]. *Id*. at 934.

[FN304]. *Id*.

[FN305]. *Id.; see* TENN. CODE ANN. § 21-602 (repealed 1972 Tenn. Pub. Acts ch. 565, § 1) ("Manner of contesting jurisdiction. After answer filed, and no plea in abatement to the local jurisdiction of the court, no exception for want of jurisdiction shall afterwards be allowed."). The term "local jurisdiction" is equivalent to the term venue in modern parlance. *See* State *ex rel*. Logan v. Graper, 4 S.W.2d 955, 955 (Tenn. 1927). The substance of TENN. CODE ANN. § 21-602 is currently found in TENN. R. CIV. P. 12.08.

[FN306]. *Curtis*, 364 S.W.2d at 936.

[FN307]. 268 S.W. 632 (Tenn. 1925).

[FN308]. *Curtis*, 364 S.W.2d at 936.

[FN309]. 85 S.W. 404 (Tenn. 1905).

[FN310]. *Curtis*, 364 S.W.2d at 936. *See generally* Case Note, *Procedure--Venue--Statute Localizing Venue Held To Be Jurisdictional and Not Waivable*, 31 TENN. L. REV. 558 (1964).

[FN311]. In *Shelby County v. Memphis*, 365 S.W.2d 291 (Tenn. 1963), decided the same day as *Curtis v. Garrison*, the supreme court *sua sponte* dismissed a declaratory judgment action brought by Shelby County against the City of Memphis (a Shelby County municipality) in a Davidson County Chancery Court. Neither the city nor the other defendants had challenged venue or jurisdiction in the trial court. *Id*. at 291. The supreme court, nevertheless, stated, "We, therefore, hold, as the Nashville v. Webb case did, that a judgment rendered against a municipal corporation in a suit brought against it in a county other than that of its location is void." *Id*. at 292.

[FN312]. *See, e.g.*, Southwest Williamson County Cmty. Ass'n v. Saltsman, 66 S.W.3d 872, 882 (Tenn. Ct. App. 2001) (holding that section 4-4-104(a) of the Tennessee Code, which purportedly requires that suits against state departments be brought in Davidson County, "is a question of subject matter jurisdiction, not one of venue"); Howse v. Campbell, No. M1999-01580-COA-R3-CV, 2001 Tenn. App. LEXIS 311, at *13-*14, 2001 WL 459106, at *4 (Tenn. Ct. App. May 2, 2001) ("As a result of [the enactment of TENN. CODE ANN. § 41-21-803] transitory actions filed by state prisoners have essentially been localized by statute .... In those circumstances, venue is intertwined with the trial court's subject matter jurisdiction which cannot be conferred by waiver or consent.").

[FN313]. The legislature struck the words, "or is found" from the statute. 1961 Tenn. Pub. Acts ch. 180; 1963 Tenn. Pub. Acts ch. 153. For the text of the statute prior to the amendment, see *supra* note 297.

[FN314]. Slip op. at 10-11 (Tenn. Ct. App. June 25, 1965).

[FN315]. *Id*. at 14. On petition to rehear, the court of appeals held that as the husband had remarried after the decree was final, he was estopped to assert the divorce's invalidity even though it was void. *See* Oliphant v. Oliphant, 401 S.W.2d

778, 779 (Tenn. 1966). The supreme court declined to review the decision on the merits because the husband failed to timely file a brief in support of his petition for writ of certiorari. *Id*. at 779-81. *See also*, Jackson *supra* note 295, at 535-36 (discussing *Oliphant*).

[FN316]. One author reported the number at 1,500. William K. West, Jr., *The New Office of Divorce Referee in Shelby County*, 4 MEM. ST. U. L. REV. 33, 37 n.25 (1973).

[FN317]. 1967 Tenn. Pub. Acts ch. 185. The current version of the statute states, "Any 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 the divorce decree was entered." TENN. CODE ANN. § 36-4-105(b) (2001).

[FN318]. 547 S.W.2d 559 (Tenn. 1977).

[FN319]. *Id*. at 559.

[FN320]. *Id*. at 559-60.

[FN321]. *Id*. at 560.

[FN322]. *Id.; see also* Dockery v. Dockery, NO. 01-A-01-9106-CV-00202, 1992 Tenn. App. LEXIS 114, 1992 WL 17493 (Tenn. Ct. App. Feb. 5, 1992) (following *Kane* and rejecting venue objection asserted on appeal by husband who had brought the action in the improper venue).

[FN323]. *Kane*, 547 S.W.2d at 559-60. *But see* Ferguson v. Ferguson, No. M2001-01836-COA-R3-CV, 2002 Tenn. App. LEXIS 775, 2002 WL 31443205 (Tenn. Ct. App. Nov. 1, 2002) (affirming trial court's *sua sponte* dismissal of divorce action for improper venue, stating that parties cannot by waiver of venue compel a court to entertain their suit).

[FN324]. *See, e.g.*, McKee v. Bd. of Elections, 117 S.W.2d 752 (Tenn. 1938) (holding that suit against State Board of Elections challenging board's removal of Shelby County election commissioners could be brought only in Davidson County); Morris v. Snodgrass, 871 S.W.2d 484 (Tenn. Ct. App. 1993) (holding that suit against Comptroller of the Treasury, Commissioner of Department of Corrections, and Attorney General seeking declaration that certain statutes are unconstitutional could be brought only in Davidson County).

[FN325]. There are a myriad of specific statutory exceptions. *See, e.g.*, TENN. CODE ANN. § 9-8-404 (1999) (claims against the State); TENN. CODE ANN. § 20-4-107 (1994) ("Real property--State or agency a party. Notwithstanding any other provision of law or rule of procedure to the contrary, any action the subject matter of which involves real property in which the state of Tennessee, or any agency thereof, is a party, may be properly instituted in any county in which such property is located."); TENN. CODE ANN. § 4-5-322(b) (1998) ("A person who is aggrieved by a final decision of the department of human services or the department of children's services in a contested case may file a petition for review in the chancery court located either in the county of the official residence of the appropriate commissioner or in the county in which any one (1) or more of the petitioners reside.").

[FN326]. TENN. CODE ANN. § 4-4-104(a) (1998). The statute also authorizes commissioners to establish other offices to carry out the functions of the department. *Id*.

[FN327]. 336 S.W.2d 5 (Tenn. 1960).

[FN328]. *Id*. at 6.

[FN329]. *Id*. at 6.

[FN330]. *Id*. at 8.

[FN331]. *Id*. at 6 (citing Nashville v. Webb, 85 S.W. 404 (1905), discussed *supra* text accompanying notes 265-85); *see also* Southwest Williamson County Cmty. Ass'n v. Saltsman, 66 S.W.3d 872, 881-82 (Tenn. Ct. App. 2001) (following *Delta Loan*; holding that requirement that suit be brought in Davidson County, "is a question of subject matter jurisdiction, not one of venue," and judgment is, therefore, "void and of no effect").

[FN332]. *Delta Loan*, 336 S.W.2d at 6. Firmer statutory grounds are now available for the court's holding respecting venue in actions against state agencies. The Uniform Administrative Procedures Act, first adopted in Tennessee in 1974, currently provides that judicial review of a contested case before a state government agency is "instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute." TENN. CODE ANN. § 4-5-322(b)(1) (1998). Furthermore, the Court of Appeals has stated that section 4-5-322(b)(1) grants "exclusive subject matter jurisdiction" to the Davidson County Chancery Court. Doe v. Hattaway, No. E-2001-02372-COA-R3-CV, 2002 Tenn. App. LEXIS 458, at *7, 2002 WL 1400057, at *3 (Tenn. Ct. App. June 28, 2002). *See generally* Ben H. Cantrell, *Judicial Review under the Tennessee Uniform Administrative Procedures Act-- An Update*, 13 MEM. ST. U. L. REV. 589, 600-02 (1983).

An older set of statutes, sections 27-9-101 through -114 of the Tennessee Code (2002), also specifies procedures for judicial review of judgments of boards or commissions. Section 27-9-102 of the Tennessee Code provides that the complainant "shall ... file a petition of certiorari in the chancery court of any county in which any one (1) or more of the petitioners, or any one (1) or more of the material defendants reside, or have their principal office ...." In *Real Estate Commission v. Potts*, however, the court reasoned that because of the nature of judicial review, "'[i]t is the situs of the lower tribunal, and not the residence of the parties, that points out the proper appellate tribunal."' 428 S.W.2d 794, 796 (Tenn. 1968) (quoting McKee v. Bd. Of Elections, 117 S.W.2d 752, 754 (Tenn. 1938)). The court held that the statute "does not have the effect of giving the trial court of any county wherein the party affected may have residence subject matter jurisdiction over the review of a Board or Commission exclusively located elsewhere." *Id*. at 796-97.

[FN333]. 1996 Tenn. Pub. Acts ch. 913 (codified at TENN. CODE ANN. §§ 41-21-801 through -818 (1997 & Supp. 2001)). The statutes do not specify that they are limited to suits against the Department of Corrections, but it is evident from their various provisions that they contemplate at least such lawsuits. In addition, the statutes' applicability is limited to suits "in which an affidavit of inability to pay costs is filed with the claim by the inmate." TENN. CODE ANN. § 41-21-802 (1997). The primary purpose of the statutes appears to be reduction of frivolous lawsuits. *See, e.g.*, TENN. CODE ANN. § 41-21-804 (1997) (permitting courts to *sua sponte* dismiss frivolous or malicious claims); TENN. CODE ANN. § 41-21-805 (1997) (requiring inmate to file along with affidavit of inability to pay costs, an additional affidavit giving information about the inmate's prior lawsuits).

[FN334]. TENN. CODE ANN. § 41-21-803 (1997 & Supp. 2001).

[FN335]. *Compare* Howse v. Campbell, No. M1999-01580-COA-R3-CV, 2001 Tenn. App. LEXIS 311, *11-*15, 2001 WL 459106, *4 (Tenn. Ct. App. May 2, 2001) (holding that civil rights action challenging conditions of confinement and treatment of inmate at Lake County Correctional Center should have been brought in Lake County, not in Davidson County), *with* Brown v. Majors, No. W2001-00536-COA-R3-CV, 2001 Tenn. App. LEXIS 948, *10-*15, 2001 WL 1683768, *5 (Tenn. Ct. App. Dec. 19, 2001) (holding that petition for writ of certiorari seeking review of disciplinary action while inmate was incarcerated at Hardeman County Correctional Facility should have been brought in Davidson County, not Hardeman County).

[FN336]. No. M2001-00473-COA-R3-CV, 2002 Tenn. App. LEXIS 536, 2002 WL 1677718 (Tenn. Ct. App. July 25, 2002).

[FN337]. *Hawkins*, 2002 Tenn. App. LEXIS at *44, 2002 WL 1677718, at *13.

[FN338]. *Hawkins*, 2002 Tenn. App. LEXIS at *1-*6, *26-*34, 2002 WL 1677718, at *1-*3, *8-*9.

[FN339]. *Hawkins*, 2002 Tenn. App. LEXIS at *34, 2002 WL 1677718, at *10.

[FN340]. *Hawkins*, 2002 Tenn. App. LEXIS at *9, 2002 WL 1677718, at *3 (citing Howse v. Campbell, No. M1999-01580-COA-R3-CV, 2001 Tenn. App. LEXIS 311, 2001 WL 459106 (Tenn. Ct. App. May 2, 2001)).

[FN341]. *Hawkins*, 2002 Tenn. App. LEXIS at *6-*8, 2002 WL 1677718, at *2-*3.

[FN342]. Despite the *Hawkins* holding that section 41-21-803 creates a rule of subject matter jurisdiction, the Court of Appeals has subsequently held, on several occasions, that it will not dismiss or remand for transfer an action filed in violation of the statute so long as the action was filed before *Hawkins* was decided and the defendants did not raise the objection in the trial court. *See, e.g.*, Hicks v. Campbell, No. M2001-00280-COA-R3-CV, 2003 Tenn. App. LEXIS 753, at *3 n.3, 2003 WL 22438441, at *1 n.3 (Tenn. Ct. App. Oct. 28, 2003), Jeffries v. Tenn. Dep't of Corr., 108 S.W.3d 862, 867 n.3 (Tenn. Ct. App. 2002). This limitation on *Hawkins*' application is, of course, inconsistent with the ordinary treatment of subject matter jurisdiction as a non-waivable defect and inconsistent with the result in *Hawkins* itself.

[FN343]. *See, e.g.*, 28 U.S.C. § 1406(a) (1994); KY. REV. STAT. ANN. § 452.105 (Supp. 2001); MONT. CODE ANN. § 25-2-201 (2001); N.H. REV. STAT. ANN. § 507:11 (1997); N.C. GEN. STAT. § 1-83 (2001).

[FN344]. *But see* Ferguson v. Ferguson, No. M2001-01836-COA-R3-CV, 2002 Tenn. App. LEXIS 775, *8-*9, 2002 WL 31443205 at *3 (Tenn. Ct. App. Nov. 1, 2002) (suggesting that despite lack of statutory authority for transfer, trial court lacking proper venue may transfer case to a proper court).

[FN345]. TENN. CODE ANN. § 16-1-116 (Supp. 2001) (effective May 23, 2000).

[FN346]. 2002 Tenn. App. LEXIS 536, at *42-*43, 2002 WL 1677718, at *12-*13 (citing TENN. CODE ANN. § 16-1-116 (Supp. 2001)); *see also* Wylie v. Farmers Fertilizer & Seed Co., No. W2002-01227-COA-R9-CV, 2003 Tenn. App. LEXIS 589, 2003 WL 21998408 (Tenn. Ct. App. Aug. 21, 2003) (after holding that trial court erred in denying motion to dismiss on ground of local action rule respecting injury to land, court of appeals remanded with instructions to transfer the case to the proper county pursuant to TENN. CODE ANN. § 16-1-116).

[FN347]. In holding section 41-21-803 jurisdictional, the *Hawkins* court also invoked the doctrine of sovereign immunity, which declares that states may not be sued without their consent. Citing Article 1, section 17 of the Tennessee Constitution that "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct," the court asserted that statutory requirements for suits against the state are jurisdictional. *Hawkins*, 2002 Tenn. App. LEXIS 536 at *6-*8, 2002 WL 1677718 at *2-*3. The difficulty with the *Hawkins* court's reasoning is that the court used the doctrine of sovereign immunity to justify rejecting, rather than honoring, "such manner" as the legislature had directed for this particular suit against the State. The legislature entitled section 41-21-803 "Venue." While statutes often use the word "jurisdiction" indiscriminately, *see* Stevens, *supra* note 4, at 319 (discussing inaccurate and misleading use of the word "jurisdiction" in venue statutes), the word "venue" has a more universal and predictable meaning. The legislature directed a venue provision. The court turned it into a jurisdiction provision.

[FN348]. *See* FED. R. CIV. P. 1; TENN. R. CIV. P. 1.

[FN349]. Complicated venue rules for transitory actions have also been criticized on this ground. *See* David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 307 (1969) ("It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money.").

[FN350]. *See* LEFLAR, *supra* note 31, § 165, at 475 ("a forum which is the domicile of all the parties, or is the situs of consideration promised, or is the place where promised transactions are to occur, or where some burdensome consequence may be incurred, can have interests as real as those of the [land] situs state").

[FN351]. *See supra* text accompanying notes 128-37.

[FN352]. *See supra* text accompanying note 20.

[FN353]. *See supra* note 72 and accompanying text.

[FN354]. *See supra* notes 29-31 and accompanying text.

[FN355]. *See supra* notes 36-40 & 44 and accompanying text.

[FN356]. *See supra* Part II.B.

[FN357]. 433 U.S. 186 (1977).

[FN358]. *Id*. at 207 n.22 (noting "'[a]ll proceedings, like all rights, are really against persons,"' quoting Tyler v. Court of Registration, 55 N.E. 812, 814 (Mass. 1900) (Holmes, C. J.)); *see also supra* note 37.

[FN359]. Shaffer, 433 U.S. at 212.

[FN360]. *See supra* notes 41-42.

[FN361]. *See, e.g.*, TENN. CODE ANN. § 16-1-109 (1994) ("Registration of decree or clerk's deed. The decree or deed of the clerk, as the case may be, shall have the same force and effect as a conveyance by the party, and shall be registered."); TENN. CODE ANN. § 66-24-101(17) (Supp. 1999) (providing for registration of judgments affecting title, use or possession of real estate); TENN. R. CIV. P. 70 (requiring that copy of decree for specific performance that operates as a deed to convey land shall be recorded in the county where the land lies).

[FN362]. *See, e.g.*, Patterson v. De La Ronde, 75 U.S. 292, 300 (1868); State v. Young, 151 N.E.2d 697, 698-99 (Ind. 1958).

[FN363]. *See, e.g.*, TENN. CODE ANN. § 66-24-119 (1993) (providing that judgments "affecting title, use or possession of real estate, issued by any court shall be effective against any person having, or later acquiring, an interest in such property who is not a party to the action [in which the judgment was] issued only after an appropriate copy or abstract, or anotice of lis pendens, is recorded in the register's office of the county wherein the property is situated").

[FN364]. Currie, *supra* note 42, at 638-41, 663-65.

[FN365]. *Id*. at 640.

[FN366]. *See* Alden, *supra* note 8, at 593 (“As long as situs recording requirements are met and deeds are appropriately constructed and recorded, the exercise of jurisdiction by a nonsitus court poses no unique dangers.”).

[FN367]. *See* FED. R. CIV. P. 70 (limiting court's power to vest and divest to property located within the district).

[FN368]. *See supra* notes 41-42.

[FN369]. This statement assumes that the holding in *Fall v. Eastin*, 215 U.S. 1 (1909)--that a situs state's courts are not required by the Full Faith and Credit Clause to give res judicata effect to a sister state's decree (a commissioner's deed) directly affecting title to land in the situs--is either no longer viable, *see* LEFLAR, *supra* note 31, § 82, or is not implicated because the judgment does not purport to directly affect the title. *See, e.g., In re* Mack, 373 N.W.2d 97 (Iowa 1985); McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961); Currie, *supra* note 42, at 672; Moffatt Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299, 1318 (1966) (stating that conclusion seems “inescapable that even if the defendant has eluded the power of the court of equity and has refused to execute the conveyance, the courts of the situs are constitutionally obligated to treat the former proceedings as res judicata with respect to all issues of fact determined therein and as imposing a binding obligation on the defendant to obey the decree”); Sheldon R. Shapiro, Annotation, *Res Judicata or Collateral Estoppel Effect, In State Where Real Property is Located, of Foreign Decree Dealing With Such Property*, 32 A.L.R. 3d 1330 (1970).

[FN370]. LEFLAR, *supra* note 31, § 47.

[FN371]. *See supra* Parts II.C., III.A.3. & III.B.3.

[FN372]. *See supra* Parts II.B., III.A.2. & III. B.2.

[FN373]. With respect to both of these rules, Justice John Marshall authored the most influential precedent. *See supra* notes 65-77 and accompanying text (discussing Livingston v. Jefferson, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411)) and *supra* notes 49-61 and accompanying text (discussing Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810)).

[FN374]. *See supra* note 42.

[FN375]. *See supra* note 43.

[FN376]. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908).

[FN377]. *See* Currie, *supra* note 42, at 634-48.

[FN378]. *See* LEFLAR, *supra* note 31, § 2.

[FN379]. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 236-243 (1969).

[FN380]. LEFLAR, *supra* note 31, § 202.

[FN381]. *See, e.g., id.* (criticizing separate administrations); Alden, *supra* note 8, at 614-20 (criticizing choice of situs law); Steven D. Lerner, Comment, *The Need for Reform in Multistate Estate Administration*, 55 TEX. L. REV. 303 (1977).

[FN382]. 8 U.L.A. 1 (1983 & Supp. 2000).

[FN383]. *See* Allan D. Vestal, *Multi-State Estates Under the Uniform Probate Code*, 9 CREIGHTON L. REV. 529 (1976).

[FN384]. LEFLAR, *supra* note 31, § 202; Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1292-93 (1992).

[FN385]. LEFLAR, *supra* note 31, § 204, at 573; *see also* Alden, *supra* note 8, at 606 ("No acceptable distinction exists, at least for jurisdictional purposes, between a court adjudicating the rights of persons in the course of interpreting a contract or rendering a divorce, and a court adjudicating personal rights in a decedent's estate.").

[FN386]. *See, e.g.*, French v. Clinchfield Coal Co., 407 F. Supp. 13, 15 (D. Del. 1976) ("[S]ince such actions often involve the testimony of local witnesses concerning the cause of action and the historical usages of the property, the restricted venue makes it more likely that the action will be tried in a convenient forum with full disclosure of all relevant facts, and notice to all interested parties."); Ariz. Commercial Mining Co. v. Iron Cap Copper Co., 128 N.E. 4, 6 (Mass. 1920); Stevens, *supra* note 4, at 310 ("Trial convenience is served where 'a view' is necessary or of value in reaching a determination.").

[FN387]. *See* FED. R. EVID. 901(b)(7) & 902(1), (2), (4) (methods for authentication of public records); LEFLAR, *supra* note 31, § 130.

[FN388]. *See* Clermont, *supra* note 78, at 450-51; Lee, *supra* note 25, at 640.

[FN389]. *See supra* notes 213-15.

[FN390]. TENN. CODE ANN. § 16-1-109 (1994); *see also* Knobler v. Knobler, 697 S.W.2d 583, 587 (Tenn. Ct. App. 1985) (explaining that plaintiff in Williamson County divorce action might have protected her interest in Davidson County real property by filing abstract of complaint as *lis pendens* in Davidson County register's office).

[FN391]. *See supra* Part III.D.

[FN392]. *See supra* note 276.

[FN393]. *See supra* notes 36-44 and accompanying text; Part II.D.

[FN394]. *See, e.g.*, IND. R. CIV. P. 75; MICH. COMP. LAWS ANN. §§ 600.1621, 600.1629 (West 1996); OHIO R. CIV. P. 3(b); *see also* Stevens, *supra* note 4, at 313-14.

[FN395]. *See, e.g.*, Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632, 639 (Tenn. 1996); Kane v. Kane, 547 S.W.2d 559, 560 (Tenn. 1977); Tims v. Carter, 241 S.W.2d 501, 503 (Tenn. 1951); Chambers v. Sanford & Treadway, 289 S.W. 533, 535 (Tenn. 1926); *see also supra* notes 80-83 and accompanying text.

[FN396]. *See* Hawkins v. Tenn. Dep't of Corr., No. M2001-00473-COA-R3-CV, 2002 Tenn. App. LEXIS 536, 2002 WL 1677718 (Tenn. Ct. App. July 25, 2002) (discussed *supra* text accompanying notes 336-47).

[FN397]. *See* Curtis v. Garrison, 364 S.W.2d 933 (Tenn. 1963) (discussed *supra* at text accompanying notes 302-311).

[FN398]. *See* Kane v. Kane, 547 S.W.2d 559 (Tenn. 1977) (discussed *supra* at text accompanying notes 318-23).

[FN399]. Given the indiscriminate use of the term jurisdiction, particularly in vintage statutes, the legislative language

should not be considered determinative. *See, e.g.*, Smith v. Barr, 79 N.W. 507, 508-09 (Minn. 1899) (stating that statute declaring that the court shall have no "jurisdiction" "is not to be construed as meaning that the court has no jurisdiction of the subject-matter of the action, in the full sense in which that term is ordinarily used .... We have no doubt that, notwithstanding the statute, the district court for any county in the state would, with the express consent of both parties, have jurisdiction to try any action for the recovery of real property, although no part of the property was situated in that county ..."); *see also* Stevens, *supra* note 4, at 319 (discussing inaccurate and misleading use of the word "jurisdiction" in venue statutes).

[FN400]. *See* TENN. CODE ANN. § 20-4-101 (1994).

[FN401]. *See supra* Parts III.A.3. & III.B.3.

[FN402]. *See supra* Part III.A.2. and text accompanying notes 208-212.

[FN403]. *See supra* Part III.D.

[FN404]. The legislature could thus undo the "localization" doctrine, which presupposes the contrary legislative intent. *See supra* Part III.E. Stevens suggested a model venue code that began with the following section: "*Venue-- Place of Trial:* The following provisions relate to venue--the place of trial-- of civil actions within the state. They are not, and are not to be construed to be, jurisdictional provisions or limitations under any circumstances whatsoever." Stevens, *supra* note 4, at 332-33.

[FN405]. TENN. CODE ANN. § 16-11-114(1) (1994) (discussed *supra* at text accompanying notes 208-12, 218-30).

[FN406]. TENN. CODE ANN. § 20-4-103 (1994) (discussed *supra* at text accompanying notes 187-99).

[FN407]. Indeed, it would be profitable to repeal section 16-11-114 of the Tennessee Code entirely and to have one statute containing the general venue provisions for both circuit and chancery courts.

[FN408]. This language is taken from the federal general venue statute, 28 U.S.C. § 1391 (2000).

[FN409]. *See supra* text accompanying notes 363-73.

[FN410]. A new general statute might be enacted in place of the scattered provisions currently in the Code and in TENN. R. CIV. P. 70. *See supra* notes 108-09.

[FN411]. *See supra* notes 213-15.

[FN412]. Stevens explains that this venue provision is an "historical hang-over" from the time when service of process was required in the county of venue. Once legislatures provided for statewide service, venue could be based solely upon factors independent of the place of service. Stevens, *supra* note 4, at 314, 325-27.

[FN413]. *See supra* text accompanying notes 278-82.

[FN414]. *See supra* text accompanying notes 286-90.

[FN415]. *See supra* Part III.E. & IV.B.

[FN416]. *See* TENN. CODE ANN. §§ 20-2-214(6), 20-2-225 (1994).

[FN417]. *See, e.g.*, 28 U.S.C. § 1391(a)(3) (2000); IDAHO CODE § 5-404 (1998); MD. CODE ANN., CTS. & JUD. PROC. § 6-202(3), (11) (2002); *see also* Stevens, *supra* note 4, at 335.

[FN418]. *See* Currie, *supra* note 73, at 68 ("[I]n modern times, the question is not simply whether the action is local or transitory, but, more broadly: Where may this action be brought?").
34 U. Mem. L. Rev. 251

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Court Documents

Appellate Court Documents (U.S.A.)

Appellate Briefs

2 STATE OF TENNESSEE, On Relation of the Commission of the Department of Transportation, for and On Behalf of Said Department, Plaintiff/Counter-Defendants/ Appellant, v. William H. THOMAS, Jr., Defendant/Counter-Plaintiff/Appellee., 2009 WL 1996226, *1996226 (Appellate Brief) (Tenn.Ct.App. Jun 26, 2009) **Brief of Defendant/Appellee William H. Thomas, Jr.** (NO. W2008-00853-COA-R3-C) ★★