reduction in the amount of the employee's award simply because the employee institutes the action rather than the employer.

It would appear that the court's holding would require employers to pay their statutorily prescribed allocation of attorney's fees based on the gross amount of an award *only* when the amount of the recovery from the third party tortfeasor equals or exceeds the amount of the award. If the amount of recovery from the third party tortfeasor is less than that of the gross award, then the ratable basis of the legal expense would be the amount recovered and not the total award made to the employee.[114]

II. Civil Procedure and Jurisdiction

*William F. Harvey**

The following survey of significant cases involving various aspects of civil procedure and jurisdiction in the chronological order of a law suit should be regarded as an overview rather than an extensive analysis.

A. Jurisdiction and Service of Process

In *Neill v. Ridner*,[1] a case of major impact in Indiana, a bastardy proceeding was commenced by plaintiff, seeking support for twins born in 1969. Defendant was eventually served in Kentucky. Defendant argued that there was no personal

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[114]If the total gross award was the basis for computing attorney's fees in all circumstances, it would be possible for the attorney to receive fees in excess of the total third party recovery. For example, assume that the gross award to the employee is $20,000 and the amount recovered in the third party action is $1,000. If the attorney's fees were based upon the gross award, the attorney could receive $5000 under the statutorily prescribed 25% fee in cases in which recovery is received prior to suit. In such a situation the attorney would receive a fee five times greater than the amount of the third party recovery.

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The author wishes to extend his thanks to Bruce Bagni and Lawrence Giddings for their assistance in the preparation of this discussion.

[1]286 N.E.2d 427 (Ind. Ct. App. 1972).

jurisdiction in the Indiana court because a bastardy proceeding was not specifically provided for in the bases of jurisdiction listed under Indiana Rule of Trial Procedure 4.4, because process was served extraterritorially, and because the act complained of was effected prior to the effective date of the trial rules.

The court of appeals, in an opinion by Judge Robertson, held that Trial Rule 4.4(A)(2) applied to the case, in that there was "*no requirement that the act complained of be a tort as it was known at the common law.*"[2] Thus the court gave clear recognition to the proposition that the jurisdiction of a trial court is not to be defined by the concept of "tort" as it is determined in litigation, that is, the "act" committed gives jurisdiction, and the final determination as to its tortious nature will neither create nor divest a court of jurisdiction to hear the dispute.[3]

In the case of *Transcontinental Credit Corp. v. Simkin*,[4] an action was filed in which plaintiff sought to satisfy a personal claim by attaching property owned by the defendant which was located in the State of Indiana. The defendant, however, was not a resident of Indiana. On appeal from a dismissal in the trial court for lack of jurisdiction, the defendant argued that the attachment was an auxiliary action and it was conditioned upon obtaining a valid judgment in the main action. The court of appeals reversed.

The court of appeals held, in effect, that a complaint for recovery of money may be filed together with an affidavit for attachment, and in the proceeding the claim may be adjudicated and satisfied against the property of a nonresident which is held in the State of Indiana. The court said that the following elements must be met:[5] (1) a complaint filed, (2) for the recovery of money, (3) against a nonresident defendant, (4) who owns property in the State of Indiana. The court also stated that when this type of action is filed and there can be no personal service against a nonresident defendant (if the "long arm" statute is inapplicable), then publication pursuant to Trial Rule 4.13 may be sufficient for jurisdiction.

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[2]*Id.* at 429 (emphasis added).

[3]The court also held that extraterritorial service will give personal jurisdiction, as the Trial Rules so contemplate, if the requisite minimum contact and adequate notice are met. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4]277 N.E.2d 374 (Ind. Ct. App. 1972). *See* Fuentes v. Shevin, 407 U.S. 67 (1972).

[5]IND. CODE § 34-1-11-1 (1971); IND. R. TR. P. 64(B)(1).

The claim in the action, however, could be satisfied only to the extent of the value of the property brought before the court.

Mueller v. Mueller,[6] dealt with a default judgment awarding custody of two children some six years after the original divorce. In seeking the custody award, the petitioner served his former wife with process pursuant to publication, which the appellant ultimately attacked. On appeal, the supreme court held that the trial court had jurisdiction of the action pursuant to Trial Rule 4.4 (A) (7), as well as its continuing jurisdiction over the parties. The court held that Trial Rule 4.4(B) allowed process by personal service, service by certified mail, or service by publication.

The appellant, at the time of the action, had become the resident of another state and there was a showing that there was no forwarding address available. The court sustained the process by publication because it was the best notice possible on the facts of the case. Therefore, the trial court had personal jurisdiction.

In *Morris v. Harris*,[7] a primary question was raised as to whether service of process on the Secretary of State[8] tolled the statute of limitations when service was affected after a nonresident defendant died, but before the statute of limitations expired. An automobile accident occurred on December 7, 1967, between plaintiff and defendant, the latter being an Illinois resident. On October 14, 1969, plaintiff filed suit and directed summons to be served on the Secretary of State of Indiana. But, the defendant died on March 18, 1968. Plaintiff later petitioned the Indiana court to appoint a personal representative for the deceased defendant in June of 1970.

On appeal the court of appeals held that the agency relationship between the Secretary of State and the nonresident operator was terminated by the death of the nonresident. Because the relationship was terminated and constructive agency revoked, service upon the Secretary of State was not effective. Thus the statute of limitations had continued to run.

In the case of *State of Florida ex rel. O'Malley v. Department of Insurance*,[9] the State of Florida entered a proceeding in Marion

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[6]287 N.E.2d 886 (Ind. Ct. App. 1972).

[7]293 N.E.2d 202 (Ind. Ct. App. 1973).

[8]IND. R. TR. P. 4.4(B) (2). Specifically, on serving a nonresident motorist, see IND. CODE § 9-3-2-1 (1971), which provides that if the nonresident dies, service may be made on the executor or administrator of the nonresident's estate.

[9]291 N.E.2d 907 (Ind. Ct. App. 1973).

Superior Court and sought a modification of an order which concerned the distribution of assets of an insurance company. The relief sought was not granted. On appeal, the State of Florida argued that there was no personal jurisdiction over the Florida receiver in that the entry into the Marion County Superior Court was a "special appearance" for purposes of challenging the jurisdiction of that court.

The court of appeals held, in an opinion by Judge Buchanan, that there was no such appearance. The court stated that when one entered an action or commenced an action, then pursuant to Trial Rule 4(A), there was jurisdiction over the person who entered the court. Thus, there was no "special appearance" as the words were used by the State of Florida in the case.

The court also held that subject matter jurisdiction was never waived and was thus properly raised on appeal.[10] The issue concerned whether the State of Indiana had jurisdiction over an intangible thing. The court referred to the *Restatement of Conflicts*[11] and concluded that Indiana did have jurisdiction over the "intangible" (which referred to the liquidation proceeding and a reinsurance contract) because there was a greater association with the State of Indiana in the proceeding concerning the intangible than with any other state.

Duncan v. Binford[12] concerned an attack upon a sheriff's return. The defendant moved to set aside a default judgment on the ground, among others, that there was a mistake and excusable neglect because the evidence showed that the defendant did not receive summons in the action. Defendant also alleged that he had a meritorious defense to the action.

The court of appeals said that when a default has been entered against a person who has not been served with process and who thus has no notice of the action, that person is entitled to have the

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[10]Trial Rule 12(H)(1) provides for waiver of personal jurisdiction if not timely raised. However, lack of subject matter jurisdiction may be raised at any time. *See* Cooper v. Grant County Bd. of Review, 276 N.E.2d 533 (Ind. Ct. App. 1971).

[11]RESTATEMENT OF CONFLICTS OF LAW § 51, Comment a, at 83 (1934), provides in part:

> If any state has jurisdiction over an intangible thing, it is by reason of some special circumstances which connect the intangible thing to the state.

[12]278 N.E.2d 591 (Ind. Ct. App. 1972).

judgment set aside.[13] It further stated that when a sheriff's return shows summons has been served, it is "conclusive" to give the court jurisdiction over the defendant, but the defendant is not estopped from showing that summons was not in fact served upon him, and that he had no knowledge of the action.[14] The court held that the question would be for the trial court to determine, based upon the evidence presented.

In the case of *State ex rel. American Fletcher National Bank & Trust Co. v. Daugherty*,[15] certain stock of an Indiana corporation was before a probate court as part of an estate. Plaintiff claimed that he was entitled to additional compensation because of an employment agreement between himself and the decedent, which agreement might be affected by the vote of the stock in an annual meeting.

The plaintiff therefore brought suit in a Marion County Superior Court to seek an injunction against AFNB to prevent the voting of the stock at any shareholders' meeting. A preliminary injunction was granted and this proceeding was commenced originally in the supreme court as a writ against the Superior Court of Marion County to prohibit its exercise of jurisdiction.

The court said that the legal issue involved concerned the effect upon a court's jurisdiction of another court's acquisition of jurisdiction over the dispute, when the jurisdiction of each court was concurrent. The court held that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time and that once jurisdiction over the parties and the subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is determined.[16] Therefore the court's writ of prohibition was made permanent, because the probate court had full concurrent jurisdiction with the superior court and first acquired judicial power over the estate and the stock in question.

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[13]Dobbins v. McNamara, 113 Ind. 54, 14 N.E. 887 (1888); Ward v. Ward, 117 Ind. App. 225, 71 N.E.2d 131 (1947).

[14]Knowlton v. Smith, 163 Ind. 294, 71 N.E. 895 (1904); Nietert v. Trentman, 104 Ind. 390, 4 N.E. 306 (1885).

[15]283 N.E.2d 526 (Ind. 1972).

[16]State v. Bridwell, 241 Ind. 135, 170 N.E.2d 233 (1960); State *ex rel.* Montgomery v. Superior Court, 238 Ind. 664, 154 N.E.2d 375 (1959); State *ex rel.* Poindexter v. Reeves, 230 Ind. 645, 104 N.E.2d 735 (1952). The court first acquiring jurisdiction retains it so long as it can render complete justice. *See* Demma v. Forbes Lumber Co., 133 Ind. App. 204, 178 N.E.2d 455 (1961).

In *Etherton v. Wyatt*,[17] the court of appeals discussed the question of whether the Boone County Circuit Court would have jurisdiction over a case transferred from the Marion County Superior Court which concerned a money demand against the State of Indiana. The State argued that the Boone County Circuit Court lacked jurisdiction over the subject matter because Indiana Code section 34-4-16-1 required that the Superior Court of Marion County shall try cases involving a money demand against the State of Indiana.

The court of appeals held that that provision was no longer operative in fixing jurisdiction or venue in the type of case before it. Therefore, the Boone County Circuit Court did not lack jurisdiction over the subject matter of the cause. The court reasoned that Trial Rule 75(D) negated the statutory requirement when it specifically stated that no "statute or rule fixing the place of trial shall be deemed a requirement of jurisdiction."[18] Thus, there was jurisdiction in the transferee court.

B. Scope of the Trial Rules

The supreme court in *Jensen v. Indiana & Michigan Electric Co.*,[9] held that, pursuant to Trial Rule 1, the Indiana Rules of Trial Procedure were applicable in full to an eminent domain proceeding and that the parties had the right to exercise discovery as provided and enumerated in the Indiana Trial Rules. The specific holding reversed a trial court decision which granted a motion to deny interrogatories which were filed under Trial Rule 33. The trial court granted the motion on the basis that interrogatories could not be used in an eminent domain proceeding because the trial rules were not applicable thereto.

In the case of *State v. Bridenhager*,[20] the supreme court considered the question, which has often arisen, as to which rule or

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[17]293 N.E.2d 43 (Ind. Ct. App. 1973).

[18]IND. R. TR. P. 75(D); IND. CODE § 34-5-1-1 (1971). In explanation of the rule, Professors Harvey and Townsend wrote:

> [T]he oppressive statute formerly construed as allowing claims against the state only to be litigated in the superior court of Marion County has now been broadened to permit suit in any county of the state subject only to the preferred venue requirement of Rule 75(A) . . . .

4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE § 75.8, at 540 (1971).

[19]277 N.E.2d 589 (Ind. 1972).

[20]279 N.E.2d 794 (Ind. 1972).

statute will control if there is a conflict between the rules of procedure and another statute. The statute in question concerned special notice and extension of time for the Attorney General.[21] The court held that the statutory provision, to the extent that it would make an exception to the general application of Trial Rule 72(D), was abrogated by the rule of procedure.

The court explained that in order to be in conflict with a rule of procedure, it is "required that [a statutory provision] be incompatible to the extent that both could not apply in a given situation. Thus a procedural rule enacted by statute may not operate as an exception to one of our rules having general application."[22] Furthermore, if such an exception were made, it was within the exclusive province of the court to make it.

C. Pleadings and Pretrial Motions

In *Cheathem v. City of Evansville*,[23] the plantiff brought suit seeking relocation expenses and moving expenses equal to other residents. Indiana law did not then allow such payments, and recovery under federal law was prohibited.[24] Defendant filed a motion to dismiss under Trial Rule 12(B)(6), which the trial court sustained, and the court of appeals affirmed.

The court stated that normally the failure to state definitely and clearly a claim will not warrant the granting of a motion to dismiss, that no question of fact will be determined on a motion to dismiss under Trial Rule 12(B)(6), and that the complaint need state only enough to enable the defendant to form a responsive pleading. But, the court explained that the elements necessary to give the defendants notice of the recovery theory cannot be excluded. "The detailed pleading of facts under the old code pleading has been dispensed with but not the disclosure by the claimant of the theory upon which his claim is based."[25] It is not the trial court's duty to search for all possible legal theories which may or may not apply to statements advanced by the plantiff.[26]

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[21] IND. CODE § 4-6-4-1 (1971).

[22] 279 N.E.2d at 796.

[23] 278 N.E.2d 602 (Ind. Ct. App. 1972).

[24] 42 U.S.C. § 1465(e) (1970).

[25] 278 N.E.2d at 605.

[26] Later in 1972, the court of appeals reaffirmed the *Cheathem* holding in City of Hammond v. Board of Zoning Appeals, 284 N.E.2d 119 (Ind. Ct. App.

Subsequently, the Indiana Supreme Court in *State v. Rankin,*[27] succinctly enunciated the requisites of a complaint and the requirements for a Trial Rule 12(B)(6) dismissal. In *Rankin*, an action was brought by the Attorney General of Indiana against several persons who were, allegedly, responsible for property damage at Indiana State University.

The case was dismissed in the trial court pursuant to a motion to dismiss filed under Trial Rule 12(B)(6). The judgment was affirmed in the court of appeals. However, the supreme court held that a complaint is not subject to dismissal "unless it *appears to a certainty* that the plaintiff would not be entitled to relief under *any set of facts.*"[28] The court noted that the rules do not require the complaint to state the elements of a cause of action and that there are other means less drastic than dismissal of the action which can be used to identify the theory or basis for a claim for relief, such as Trial Rules 12(E) and 16(A)(1). The court then cited with express disapproval the opinion found in *Cheathem v. City of Evansville.*[29] Finally, the court indicated that when no evidence has been heard and no affidavit submitted, a Trial Rule 12(B)(6) motion should be granted only when it is clear from the face of the complaint that under no circumstances could relief be granted.

In *American States Insurance Co. v. Williams,*[30] the court of appeals held that when a complaint shows on its face that it was filed subsequent to the running of the statute of limitations, a motion to dismiss under Trial Rule 12(B)(6) is a proper mechanism to attack the complaint and the claim for relief. The court of appeals further explained the function of a Trial Rule 12(B)(6)

1972). In this writer's opinion, the position taken by the court of appeals in both cases presents serious difficulties. First, in a *complaint*, in notice pleading, it should be less necessary to state a "theory" than to state even "facts." (If the product being used fails, was it "negligence" or "breach of warranty?" In the *complaint*, the answer should be, does it really matter?) Secondly, the statement expressed in those two cases is not consistent with another line of cases from the same court. *See, e.g.*, Gladis v. Melloh, 273 N.E.2d 767 (Ind. Ct. App. 1971). The supreme court agreed with this analysis and overruled the *Cheathem* decision. *See* State v. Rankin, 294 N.E.2d 604 (Ind. 1973).

[27]294 N.E.2d 604 (Ind. 1973).

[28]*Id.* at 606. *See also* Sacks v. American Fletcher Nat'l Bank & Trust Co., 279 N.E.2d 807 (Ind. 1972).

[29]278 N.E.2d 602 (Ind. Ct. App. 1972).

[30]278 N.E.2d 295 (Ind. Ct. App. 1972).

motion and its relation to affirmative defenses in *Lacey v. Morgan.*[31] Suit was brought upon an oral contract for the sale of real estate, which appeared, initially, to fall within the Statute of Frauds.[32] The trial court therefore sustained the motion to dismiss, and indicated that various receipts which were filed with the complaint were insufficient to sustain an exception to the statute.

The court of appeals, in reversing, held that the complaint should have been sustained against the attack because "where the complaint shows the plaintiff may be entitled to some relief the complaint is not to be dismissed even though [the plaintiff] is not entitled to the particular relief for which he has asked in his demand for judgment."[33] The court of appeals did not disagree with the trial court, and it did not express an opinion on the merits of the act. It said, simply, that recovery depends upon the plaintiff's ability to carry the evidentiary burden in the proceeding. The court of appeals thus held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.

Trial Rule 8(C) should be noted at this point. Under that rule, the Statute of Frauds is an affirmative defense, which the defendant usually must set out in his answer. A question which has often arisen is whether, and to what extent, an affirmative defense can be asserted by way of a motion to dismiss under Trial Rule 12 (B)(6). This case held, implicitly, that it is entirely correct to permit the raising of an affirmative defense by way of a Trial Rule 12(B)(6) motion.

In the case of *Salem Bank & Trust Co. v. Whitcomb,*[34] a question arose whether a motion to dismiss, which was filed pursuant to Trial Rule 12(B)(6), should be determined under the requirements of Trial Rule 12(B)(8), which states that under certain circumstances the motion to dismiss shall be treated as and disposed of pursuant to Trial Rule 56. In this case, after filing a motion to dismiss under Trial Rule 12(B)(6), the defendants gave answers to interrogatories propounded by the plaintiff which were duly filed with the court.

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[31] 282 N.E.2d 344 (Ind. Ct. App. 1972).

[32] IND. CODE § 32-2-1-1 (1971).

[33] 282 N.E.2d at 346.

[34] 289 N.E.2d 537 (Ind. Ct. App. 1972).

The court of appeals held that because the interrogatories were filed and answered and made a part of the record of the case *before* the trial judge ruled on the motion to dismiss, and the interrogatories were not excluded from the record of the trial court, the motion to dismiss pursuant to Trial Rule 12(B)(6) should have been treated as if made pursuant to or under Trial Rule 12(B)(8) and thus converted into a motion for summary judgment.[35] The court of appeals also stated that if the interrogatories had not been filed and made a part of the record, the provision of Trial Rule 12(B)(8) would have been inapplicable.

In *Burcham v. Singer*,[36] the defendants, in resisting a motion for summary judgment, filed an affidavit in which they stated that there "is a dispute as to material facts giving rise to this law suit." The trial court granted the motion for summary judgment, and on appeal, the court of appeals held that the affidavit entered by defendants was not sufficient to show a genuine issue of material fact pursuant to Trial Rule 56.[37]

The question as to whether a trial court commits reversible error in refusing to allow the defendant to testify at a summary judgment hearing was answered by the court of appeals in *Deckard v. Mathers*.[38] The court held that pursuant to Trial Rule 56(E), it was within the discretion of the trial judge whether to permit a witness to testify. The court stated there was therefore no abuse of discretion in refusing the testimony.

In *Thompson v. Abbett*,[39] the court of appeals discussed the question whether, in a breach of contract suit, a defendant's claim qualified as a counterclaim or merely an affirmative defense. In addressing this question, the court stated that, consistent with

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[35]The court cited several federal cases with similar problems under Federal Rule of Civil Procedure 12(b)(6), which for all practical purposes is identical to Indiana's motion to dismiss. Generally, federal courts have considered a federal rule 12(b)(6) motion to encompass matters contained in the complaint. *See, e.g.*, Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956). Once material outside the pleadings is presented to, and not excluded by, the court, the motion is treated as a motion for summary judgment. *See, e.g.*, Smith v. United States, 362 F.2d 366 (9th Cir. 1966); Allison v. Mackey, 188 F.2d 983 (D.C. Cir. 1951).

[36]277 N.E.2d 814 (Ind. Ct. App. 1972).

[37]Defendants clearly failed to set forth specific facts demonstrating a genuine issue to the court. It is not enough for a pleader to state "there is a genuine issue" without defining that issue.

[38]284 N.E.2d 92 (Ind. Ct. App. 1972).

[39]290 N.E.2d 468 (Ind. Ct. App. 1972).

prior Indiana case law,[40] there are two tests to determine if the material pleaded constituted a counterclaim. The first test, the court said, is whether the defendant is entitled to an affirmative judgment. Secondly, would the defendant be able to continue to trial on his claim in the event the plaintiff dismissed his cause of action?

The court stated that a reading of the defendant's pleading showed that it fulfilled the requirements of a counterclaim and was not merely an affirmative defense. The court noted that the prayer for relief set forth a request for affirmative relief in the form of a money judgment. Additionally, the counterclaim passed all tests for stating an independent cause of action.

The court of appeals gave a significant interpretation to the Trial Rules which touch upon counterclaims in *Commercial Credit Corp. v. Miller.*[41] In that case the plaintiff, Commercial Credit, brought suit for the immediate possession of an automobile, and defendants filed a counterclaim. The counterclaim was captioned "Cross-complaint," and was not, therefore, a "denominated counterclaim" in the language of Trial Rule 7(A)(2). Nevertheless, the court held that, pursuant to Trial Rule 8(D), the plaintiff was in default for failing to file a reply to the counterclaim. The court stated that: "we note that [defendants] have captioned their counterclaim a 'Cross-complaint.' However, under the current Rules of Procedure, the court is to treat the motions and pleadings for what they actually are, irregardless of how they are captioned."[42]

It should be observed that the real issue is not how a court should treat a pleading or a document, but what is the effect to be visited upon a party for failing to reply. In short, it was not the trial court which defaulted, but the party; hence how a court treats a pleading within its scope of judicial flexibility, is quite a different matter than how a party must respond. In any event, a rule of practice would seem to derive from this case: *always file a reply.*

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[40]The court cited State *ex rel.* Ziffrin v. Superior Court, 242 Ind. 246, 177 N.E.2d 898 (1961), as establishing the two tests for determining a counterclaim.

[41]280 N.E.2d 856 (Ind. Ct. App. 1972).

[42]*Id.* at 860 n.1. *See* De Vito v. Hoffman, 199 F.2d 468 (D.C. Cir. 1952) (a pleading denominated a "supplemental complaint" was treated as a counterclaim).

In *Aldon Builders, Inc. v. Kurland,*[43] the trial court concluded, after specially finding facts, that among the parties there was a rescission of their agreement. The appellant claimed error. The court of appeals agreed because the record failed to disclose that the issue of a rescission was ever raised or litigated. The court of appeals held that, consistent with Trial Rule 15(B), when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if they were raised by the pleadings. However, a mere failure to object is not the only requirement necessary to raise an issue by implication. Both parties must litigate the new issue, and the evidence which supports the presence of that new issue must not be adduced by asking questions about an issue already pleaded. In that way, the court indicated, a party will be given some notice that an issue not pleaded, or raised in a pretrial order, is before the court.[44]

In the case of *Hawkins v. Kourlias,*[45] the plantiff brought an action for ejectment and defendant filed a counterclaim. On appeal the plaintiff contended that the jury verdict and the judgment were not within the scope of the pleadings for the evidence submitted. The court of appeals disagreed and pointed out that at the conclusion of the defendant's evidence, defense counsel made a motion to amend all pleadings to conform with the evidence. The record showed that all pleadings were amended to conform to the evidence, and thus the court found no error in the point raised.

Trial Rule 15 received further interpretation in *Ryser v. Gatchel,*[46] which involved the incorrect naming and designation of a party. The case arose on appeal from a summary judgment order, and during the course of the opinion the court discussed the "relation back doctrine" of Trial Rule 15(C) and the method by which the question of whether or not a defendant had or should have had notice of the filing of an action could have been raised, although it was not so raised in the trial court.

The court stated that the plaintiff should set forth sufficient facts to show whether the originally misnamed defendant had

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[43]284 N.E.2d 826 (Ind. Ct. App. 1972).

[44]*Id.* at 832. The court held that notice is particularly important when "the new issue is not unequivocally clearly the evidence being submitted." *Id. See* Hacker v. Review Bd., 271 N.E.2d 191 (Ind. Ct. App. 1971).

[45]282 N.E.2d 551 (Ind. Ct. App. 1972).

[46]278 N.E.2d 320 (Ind. Ct. App. 1972).

"received such notice of the institution of the action" and whether defendant "knew or should have known . . . the action would have been brought against him"[47] so as to raise the question pursuant to Trial Rule 15(C). The court said, however, that such was not the situation in the case on appeal, and therefore, the court did not determine the question.

The supreme court provided significant guidelines regarding the usage of the "Lazy Judge Rule" (Trial Rule 53.1) in the case of *Lies v. Ortho Pharmaceutical Corp.*[48] In two separate holdings the court established several principles. First, the procedure outlined in Trial Rule 53.1 is the appropriate vehicle for correcting the deficiency of failure to rule a posttrial motion. The court said that Trial Rule 53.1 should be read in conjunction with Trial Rule 63(A). Second, the filing of briefs or memoranda relative to motions on file will not extend the time permitted a trial judge under Trial Rule 53.1(A) for ruling upon the motion.[49] If additional time is required for briefing and consideration in the trial court, counsel should agree pursuant to the Trial Rule and the ruling date should extend to the date set pursuant to the order book entry which is made in accordance with the agreement. Otherwise, the supreme court said, the trial court has no alternative but to rule even without full consideration of the briefs. Alternatively, the trial court could apply to the supreme court for an extension of time pursuant to the rule. Third, when a praecipe is filed pursuant to this rule, it may be withdrawn by the party who filed it, subject, of course, to a praecipe being filed by another party; and once notice is filed in the supreme court it may be quashed only by a motion filed in the supreme court. Finally, the court held that the trial court may not adopt a rule which is inconsistent with these rules or which is an impingement thereon. The court referred to Rule 6 of the Circuit and Superior Courts of Marion County, which generally stated that counsel shall give five days' written notice prior to the expiration of the thirty-day period found in Trial Rule 53.1.[50] Relying on

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[47]IND. R. TR. P. 15(C).

[48]284 N.E.2d 792 (Ind.), *petition for withdrawal of opinion denied,* 286 N.E.2d 170 (Ind. 1972).

[49]Whenever the judge shall delay a ruling beyond thirty days, the clerk shall, upon the filing of a praecipe by an interested party, give written notice to the judge and the supreme court of the withdrawal of the motion. The withdrawal and disqualification are effective as of the time of the filing of the praecipe. IND. R. TR. P. 53.1(B).

[50]Lies v. Ortho Pharmaceutical Corp., 286 N.E.2d 170, 172 (Ind. 1972).

Trial Rule 81,[51] the supreme court stated that that trial court rule was invalid because it was inconsistent with the Trial Rules.

Rolf v. Rolf[52] also involved Trial Rule 53.1. In this case, the defendant in the action filed a praecipe to withdraw the action from the court because ninety-two days had elapsed after submission of the issues and a motion. The trial judge stated in an affidavit that he was in the process of preparing both findings of fact and conclusions of law. The trial court also stated that prior to the time the praecipe was filed he had entered a judgment for the plaintiff on the bench docket.

The supreme court held that an entry of judgment on the bench docket would not be a sufficient entry to satisfy this rule, that the entry which should have been effected was upon the order book, and that, therefore, the praecipe should have been considered as timely filed because there was in fact no order book entry. The court stated specifically that when a party is acting without notice that a judgment is forthcoming and when there is nothing in the clerk's office (in the order book), or in the "work in process" which would indicate a judgment or ruling had been entered, the praecipe should be deemed effective when filed. The court stated that that procedure would be fairer to all parties than any other.[53]

D. Pretrial Procedures and Discovery

In the case of *Martin v. Grutka,*[54] the trial court entered a summary judgment *at a pretrial conference.* On appeal, the appellants argued, in part, that there was inadequate notice of the summary judgment proceeding and that the pretrial conference was not a proper place for it. The court of appeals held that even if there were no prior notice (in fact the motion for summary judgment was made over four months before it was considered at the pretrial conference), and even without actual notice that the summary judgment would be considered at the pretrial conference, the appellants must be deemed to have had constructive

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[51]Trial Rule 81 specifically allows local courts to make and amend local rules which are not inconsistent with the Trial Rules.

[52]287 N.E.2d 865 (Ind. 1973).

[53]The court held that a party will not be required to check the judge's bench docket and that the timeliness of the praecipe should be determined from the records maintained in the clerk's office. *Id.* at 867.

[54]278 N.E.2d 586 (Ind. Ct. App. 1972).

notice because of Trial Rule 16(A), which provides in part that the trial court may consider any matter at the pretrial conference which may aid in the disposition of the action.

The court of appeals in *Troxel v. Otto*,[55] held that an isolated, inadvertent remark or statement by counsel, even though prejudicial, may not constitute reversible error, but that a persistent attempt to influence a jury by irrelevant and prejudicial comments, especially after the trial court has ruled such conduct improper, is misconduct causing reversal. In this case there was repeated reference to another accident which killed the deceased. The court also indicated that alert counsel may protect himself against possible misconduct by means of a pretrial order determining admissibility whenever trial preparation discloses evidence of a highly prejudicial nature which may or may not be admissible.[56] Here, the court implicitly recognized a procedure known as a *motion in limine.*

In the case of *Burris v. Silhavy*,[57] the court of appeals explicitly recognized as a part of Indiana civil practice the motion in limine. The case in which this arose was a personal injury action, which was tried a second time. Prior to the second trial, the defendants filed a motion in limine in which they sought a protective order concerning reference to certain evidence in the case by the plaintiffs or plaintiffs' counsel. The order was granted and trial proceeded before a jury.

On appeal the plaintiff-appellant raised the question whether Indiana would recognize the use of a motion in limine. The court stated that the use of a motion in limine emanates from the inherent power of the trial court to exclude or admit evidence in the furtherance of its obligation to administer justice in the case. Thus the court said motions in limine are a part of Indiana practice although not specifically recognized by either statutory or procedural rules. Concerning the motion, the court stated that it is used either before or after the beginning of a jury trial as a protective order prejudicial questions and statements. The purpose in filing the motion is either to suppress evidence or to instruct opposing counsel not to offer it in order to prevent prejudicial questions and statements in the presence of a jury.

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[55]287 N.E.2d 791 (Ind. Ct. App. 1972).

[56]*See* IND. R. TR. P. 16(A),(J).

[57]293 N.E.2d 794 (Ind. Ct. App. 1973).

The supreme court in *Sacks v. American Fletcher National Bank & Trust Co.*,[58] had before it on a motion to transfer the question whether or not a motion to dismiss should be automatically granted if an indispensable party was absent in the litigation. The defendants moved to dismiss a complaint, which alleged in part a derivative action, on the grounds that the receiver of the corporation involved had not been made a party, leave of the receivership court having been sought and denied, and the receiver is an indispensable party to the stockholder's derivative action.

The supreme court, citing *Ross v. Bernhard*,[59] held that a corporation is a necessary party in a derivative suit, and that if the corporation is in the hands of a receiver at the time, then the receiver is a necessary party, in that he represents the corporation. Further, as a condition precedent, leave to sue the receiver must be obtained from the receivership court. However, the court held that the absence of a party called indispensable does not mean that the case shall automatically be dismissed. The court also stated that this alone is *not* sufficient reason to sustain a motion to dismiss. Rather, the trial court must determine whether it is feasible to join the party, and if not, dismissal would not necessarily follow.

Indiana Trial Rule 32(A) (3) (c), provides, in part, that a deposition of a witness, whether or not a party, may be used for any purpose by a party, if the trial court finds that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.[60] The court of appeals discussed this provision in *Schoeff v. McIntire*.[61] In this case the appellee-plaintiff brought suit for injuries sustained while riding in a friend's automobile. Prior to trial, the appellant's counsel took the plaintiff's deposition, all of which was offered at trial and admitted over objection. The objection was on the ground, among others, that the plaintiff's deposition could not be used in that the basis for use was not shown. There was no reason that plaintiff could not come to court,

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[58]279 N.E.2d 807 (Ind. 1972).

[59]396 U.S. 531 (1971). The corporation is an indispensible party, and failure to make the corporation a party leaves the stockholder without a cause of action and the court without jurisdiction. 13 W. FLETCHER, PRIVATE CORPORATIONS § 5977, at 456 (perm. rev. ed. 1970).

[60]Testimony by deposition is less desirable than actual oral testimony and should be used only when the nonparty witness is not available or when exceptional circumstances necessitate its use. G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749, 755 (9th Cir. 1962).

[61]287 N.E.2d 369 (Ind. Ct. App. 1972).

defendant argued, if the plaintiff could go downtown and otherwise perform daily tasks.

The trial court admitted the depostion. The plaintiff presented the testimony, on the point, of a doctor who said that plaintiff suffered a congestive heart failure and that in his judgment to appear and testify would be injurious to her health. The court of appeals held that the record was sufficient to justify the trial court's finding that the witness was unable to attend for reasons of sickness and infirmity. Thus the deposition was fully admissible.

In the case of *Wynder v. Lonergan,*[62] a personal injury action, the defendant took the deposition of the plaintiff's doctor, parts of which were offered into evidence by the plaintiffs. The trial court excluded parts of the deposition because it constituted hearsay evidence, even though there was no objection by the defendant at the time the deposition was taken. The court of appeals held[63] that, contrary to the plaintiff's argument, there was no waiver by the defendant in failing to object at the deposition. The court held that Trial Rule 32(B) is qualified and limited by Trial Rule 32(D)(3), in that the latter provision sets out eight grounds for objection,[64] and objection to inadmissible testimony is not waived by failing to object at the deposition unless the objection falls within one of the eight categories, which was not the case here.

The supreme court in *Chustak v. Northern Indiana Public Service Co.,*[65] discussed Trial Rule 34 and the possibilities of waiving the rights therein. In that case, a proceeding was commenced to appropriate a right-of-way for electrical transmission lines. The defendant in the action filed a request to produce documents pursuant to Trial Rule 34. Thereafter, the defendant filed an objection to the eminent domain proceeding and a motion to produce the documents previously designated. The parties pro-

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[62]286 N.E.2d 413 (Ind. Ct. App. 1972).

[63]The court also held that, pursuant to Trial Rule 32(C), a party does not make a witness "his own" by taking his deposition.

[64]Trial Rule 32(D)(3)(a)-(c) requires reasonable objection to: (1) competency of a witness, (2) competency, relevancy, or materiality of testimony, (3) manner of taking depositions, (4) form of questions and answers, (5) errors in oath or affirmation, (6) conduct of the parties, (7) other form defects, and (8) form of written questions submitted under Trial Rule 31.

[65]288 N.E.2d 149 (Ind. 1972), *noted in* 6 IND. L. REV. 781 (1973).

ceeded to an evidentiary hearing upon the objection at the conclusion of which the court, without ruling on the motion to produce, ordered the appropriation and appointed appraisers.

The supreme court stated that it could not assume that the trial court overruled the written motion to produce, because no ruling appeared. However, the court held that by proceeding without protest and without a ruling, the defendant waived any error that might have been averted. The court then extensively discussed Trial Rule 34 and pointed out that the defendants were seeking discovery of the plantiff's computations concerning the width of the desired right-of-way. Since the computations were not made in preparation for litigation, but rather in the ordinary course of the utility company's business, the discovery was controlled by Trial Rule 34, and pursuant to that rule the computations were discoverable.[66]

The court of appeals, in *Hiatt v. Yergin*,[67] established the definitive guidelines for trial by jury in Indiana. In this case, plaintiff filed suit asking for specific performance as well as damages and made a general demand for trial by jury. That is, plaintiff demanded trial by jury on issues formed on the pleadings in the case.

The court stated that the primary issue[68] was whether there was a right to trial by jury in causes in which one or more of the issues of fact are of exclusive equitable jurisdiction and others are not. The basic problem in the case was whether, under the new rules, equity, having once acquired jurisdiction in a dispute, would also litigate the legal issues raised in the case. Thus the court was confronted with the question of whether the federal cases of *Beacon Theaters, Inc. v. Westover*,[69] and *Dairy Queen, Inc. v. Wood*,[70] would be used to expand the right of trial by jury when it did not exist

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[66]The court also stated that a party may not wait until the last possible moment to act and then, in reliance upon the rules of discovery, expect the court to halt the proceedings in order to accommodate that party's motion. *Id.* at 154.

[67]284 N.E.2d 834 (Ind. Ct. App. 1972). It is this writer's opinion that *Hiatt* will become a leading case on the subject of trial by jury under the merged system of law and equity and notice pleading.

[68]The court, after extensively reviewing Indiana statutory and case law, also held that Trial Rule 38(A) governs both Trial Rules 38(C) and 39 (A)(2).

[69]359 U.S. 500 (1959).

[70]369 U.S. 469 (1962).

at common law. Those United States Supreme Court cases held generally, that when legal issues are raised with equitable issues, the legal issues shall be tried first by a jury. This means that a finding by the jury would be binding upon the court in a subsequent dispute at equity.

The court of appeals rejected those decisions for the reason that the decisions were not pursuasive even in the federal judicial system and were contrary to both the common law and Indiana common law.[71] Therefore, the court stated that because issues at law would not automatically be elevated for trial purposes over issues in equity, the question was how, given merged systems, is a trial court to determine whether or not there is a right to trial by jury. The court answered this question in the following manner: "Where the pleadings are of the notice variety, the trial court must necessarily turn to the totality of the proceedings before it to ascertain whether the claim of the party seeking a jury trial is essentially equitable or legal in nature."[72] The court stated that Trial Rule 16(A)(1) provides an excellent opportunity for the trial court to develop the issues by requiring the attorneys to participate in a pretrial conference for that purpose.[73]

E. Trial and Judgment

The court of appeals in *McClure v. Austin*[74] articulated the proper standard of appellate review of cases resulting in a judgment on the evidence (directed verdict). The court held that a judgment on the evidence entered by a trial court may be affirmed if there is a total absence of evidence or reasonable inferences therefrom in favor of the plaintiff upon the issues. If there is *any* evidence or reasonable inferences drawn therefrom which might support the plaintiff, then the judgment on the evidence is improper.

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[71]The court of appeals reasoned that since the seventh amendment to the United States Constitution applies only to civil trials in federal courts, the states may develop their own body of law concerning the right to trial by jury in civil matters. 284 N.E.2d at 849.

[72]*Id.* at 847.

[73]IND. R. TR. P. 16(A)(1) provides that, except in criminal actions, the court may, at its discretion, and shall, upon the motion of any party, direct the attorney for the parties to participate in a conference before the court to consider simplification of the issues.

[74]283 N.E.2d 783 (Ind. Ct. App. 1973).

In the case of *Estes v. Hancock County Bank*,[75] the plaintiff brought suit against the defendant bank and its president alleging the tort of malicious prosecution. The jury returned a verdict against the bank and in favor of the bank president. Thereafter the plaintiff and the bank each made a motion for a judgment on the evidence, but upon different grounds.

The supreme court held that the effect of both parties' asking for a judgment on the evidence pursuant to Trial Rule 50 was to withdraw the case from the jury and to submit the case to the court for its determination. The court stated that the case would then be considered as if it had been tried without a jury. The court also held that because parties failed (and neither party so moved) to ask for a new trial, but asked instead for a final determination by the trial court, the scope of review would be limited to a consideration of the trial court's judgment as entered. By implication, the court stated that the failure to ask specifically for a new trial would foreclose granting thereof in the court of appeals. The case would seem to be contrary to the language found in Trial Rule 50(C).

Trial Rule 52(A) was judicially clarified by the court of appeals in two 1972 decisions. In *Colonial Life & Accident Insurance Co. v. Newman*,[76] the appellant argued that pursuant to Trial Rule 52(A), a trial court should be required to set out its reasoning, showing how the facts found are related to the conclusions so to render an understanding of the final judgment. The court of appeals held, consistent with the language of the rule, that the trial judge is not so mandated.

The rule was further delineated in *In Re Adoption of Graft*,[77] wherein the question was raised whether a trial court, when trial is to the court, must in *all* cases enter findings of fact and render conclusions of law thereon pursuant to Trial Rule 52(A). The court of appeals held that the trial court is not required to make special findings of fact unless requested pursuant to the rule. Furthermore, the rule does not require that the trial court make conclusions of law. Specifically, the rule states that upon its own motion, or the written request of any party filed with the trial court prior to the admission of evidence, the court shall find

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[75]289 N.E.2d 728 (Ind. 1972).

[76]284 N.E.2d 137 (Ind. Ct. App. 1972).

[77]288 N.E.2d 274 (Ind. Ct. App. 1972).

specially and state its conclusions thereon.[78] The court stated that a waiver was entirely possible unless the request was made to the trial court before the admission of evidence in the case.

In the case of *Buell v. Budget Rent-A-Car, Inc.*,[79] a question was raised on appeal whether the judgment entered was improper because it was inconsistent with the pleadings in the case. That is, the judgment entered was for a money judgment whereas the complaint was solely for declaratory relief to determine whether taxes were due and if so to determine the method used for collection. The treasurer of Marion County argued that the judgment did not conform to the pleadings. The court of appeals answered that a plaintiff is not limited to a recovery or a theory of recovery which is designated in his complaint.[80]

In *Bloom's Lumber & Crating, Inc. v. James*,[81] the supreme court held that a ruling of a trial court in a case which was tried to the court, which ruling shall constitute the findings of fact and judgment entered, must be entered of record to be effective. The court said that the trial court speaks only through its official records, the primary record being its order book. Litigants are charged with notice of what the order book contains.

The court also said that the absence of an order book entry can be corrected nunc pro tunc,[82] but that such an entry does not contemplate an entirely new entry when made. That is, a

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[78]The fact that the trial court is not required by Trial Rule 52(A) to make special findings of fact, unless requested, presents no change from prior procedural law. *Compare* IND. R. TR. P. 52(A) *with* ch. 38, § 394, [1881] Ind. Acts. Spec. Sess. 240 (repealed 1970). *See* Vogel v. Harlan, 277 N.E.2d 173 (Ind. Ct. App. 1971); Arnett v. Helvie, 267 N.E.2d 864 (Ind. Ct. App. 1971); Langford v. Anderson Banking Co., 258 N.E.2d 60 (Ind. Ct. App. 1970). There is, however, a difference between Trial Rule 52(A) and the corresponding federal rule 52(a). The federal rule requires special findings of fact and conclusions of law in all actions tried to the court without the intervention of a jury.

[79]277 N.E.2d 798 (Ind. Ct. App. 1972).

[80]The rule that "plaintiff must recover on the theory of his complaint or not at all" was abrogated in Indiana in Morrison's S. Plaza Corp. v. Southern Plaza, Inc., 252 Ind. 109, 246 N.E.2d 191 (1969). Plaintiff is bound by the allegations in his complaint only in that he may not, over objection, prove facts which are irrelevant to issues raised in the pleadings. *See* Wyler v. Lilly Varnish Co., 146 Ind. App. 91, 252 N.E.2d 824 (1969).

[81]285 N.E.2d 822 (Ind. 1972).

[82]*See* Leonard v. Broughton, 120 Ind. 536, 22 N.E. 731 (1889); Chrissom v. Barbour, 100 Ind. 1 (1885).

written memorial or entry must exist in order to establish a basis for effecting a correction.[83]

The issue arose when the defendants' proceeded pursuant to Trial Rule 53.2 to remove the trial judge after the case was tried, because it was under advisement more than 90 days prior to the filing of a praecipe with the clerk for removal of the trial judge and the appointment of a special judge. The chronological sequence was that the trial court exceeded the ninety day period for having a tried case under advisement and on the 107th day the trial court decided the case but made no entry. Then, fourteen days later, the court notified the plaintiff of its decision and entered it upon its bench docket. Thereafter, the defendant requested that the case be withdrawn, as stated above. After that request was made, the trial court stated to the clerk that judgment had been rendered prior to the filing of the praecipe and proceeded to enter a judgment nunc pro tunc, back dated to the 107th day.[84]

The issue as to whether a verdict can be impeached by a juror's affidavit was before the court of appeals in *Anderson v. Taylor*.[85] The court considered the question whether jurors' affidavits stating that the jury, specifically eight members thereof did not understand the meaning of the word "wanton" and revealing that they had asked the bailiff for a dictionary, would be reviewed to impeach the verdict. The court held that the law for many years has been settled that a juror can not impeach his verdict by an affidavit.[86]

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[83]The court continued, "*But entries may not be entered nunc pro tunc from thin air.*" 285 N.E.2d at 825. *See* Cook v. State, 219 Ind. 234, 37 N.E.2d 63 (1941).

[84]It was against this background that the supreme court developed its holdings. It was further asserted that counsel did not, prior to the filing of his praecipe, indicate to the court that he desired rulings in the pending case. The supreme court stated that he was not required to do so. *See* Lies v. Ortho Pharmaceutical Corp., 284 N.E.2d 792 (Ind.), *petition for withdrawal of opinion denied*, 286 N.E.2d 170 (Ind. 1972), *noted at* p. 36 *supra*.

[85]289 N.E.2d 781 (Ind. Ct. App. 1972).

[86]For example, the Indiana Supreme Court had previously stated:

> A jury's verdict may not be impeached by testimony of the jurors. Even the slightest consideration of such practice under these circumstances would create an intolerable situation and no jury verdict would ever be lasting or conclusive.

Wilson v. State, 253 Ind. 585, 591, 255 N.E.2d 817, 821 (1970). *See also* Spannuth v. Cleveland, C.C. & St. L. Ry., 196 Ind. 379, 148 N.E.2d 410 (1925); Mitchell v. Parks, 26 Ind. 354 (1866); Jessop v. Werner Transp. Co., 147 Ind. App. 408, 261 N.E.2d 598 (1970).

F. Appeal

In the case of *City of Mishawaka v. Stewart,*[87] an appeal was taken to a circuit court from a determination by the Board of Public Works and Safety of the City of Mishawaka. After that court's decision was rendered, an appeal was taken to the court of appeals. In the court of appeals, the question was raised whether a motion to correct error filed in the trial court was (a) a condition precedent to the appeal, and (b) the correct motion, in view of the proceeding, to file in trial court. The court of appeals held that a motion pursuant to Trial Rule 59(G) was correct and that it was a condition precedent to perfecting an appeal from the circuit court.[88]

In the case of *Ver Hulst v. Hoffman,*[89] the plaintiff timely moved under Trial Rule 59 to correct error. After the sixty-day period expired, plaintiff moved to amend the motion to correct errors. This point was raised on appeal, and the court of appeals held, in an opinion by Judge Sharp, that the plaintiff-appellant could not amend the motion to correct error because the sixty-day period had run.[90] Conversely, the court said the motion could be amended or supplemented within the sixty-day period.

In *Brennan v. National Bank & Trust Co.,*[91] a motion to dismiss the appeal was filed because appellant failed to file a praecipe designating what was to be included in the record of proceedings, which was to be filed within thirty days after the trial court's ruling on the motion to correct error. The appellant argued that the purpose of Appellate Rule 2(A) was to assure that appeals shall be submitted within ninety days after the motion to correct error, and that in this case the appeal was submitted within ninety days, with no extension of time requested. Thus, appellant said that he should not be penalized because the praecipe

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[87]291 N.E.2d 900 (Ind. Ct. App. 1973).

[88]Bradburn v. County Dep't of Pub. Welfare, 266 N.E.2d 805 (Ind. Ct. App. 1971); Lows v. Warfield, 259 N.E.2d 107 (Ind. Ct. App. 1970).

[89]286 N.E.2d 214 (Ind. Ct. App. 1972).

[90]The sixty-day period allowed by Trial Rule 59(C) is mandatory, as was the thirty-day period under the prior rules. *Compare* Brunner v. Terman, 275 N.E.2d 553 (Ind. Ct. App. 1971), *with* Smith v. Spitznogle, 142 Ind. App. 575, 236 N.E.2d 184 (1969). As to the prior rule regarding amended or supplemental motions filed after the expiration date, see Beck v. State, 244 Ind. 237, 170 N.E.2d 661 (1960); Smith v. First Nat'l Bank, 104 Ind. App. 299, 11 N.E.2d 58 (1937).

[91]288 N.E.2d 573 (Ind. Ct. App. 1972).

was not filed within thirty days after ruling on the motion to correct error. The court of appeals held that the thirty days praecipe rule was mandatory and the failure to file meant that the right of appeal was forfeited. The court therefore dismissed the appeal.

In *Miles v. State,*[92] the court of appeals affirmed a conviction in a case in which, on appeal, the error alleged was the insufficiency of the evidence. It was further alleged that there was no transcript of the evidence included in the record and no approved statement of the evidence pursuant to Appellate Rule 7.2(A)(3)(c). The court of appeals held that the conviction must be affirmed because when the only question raised was sufficiency of evidence, it was imperative that transcript of the evidence and an approved statement of the evidence be provided.[93] Otherwise, the court said that the only alternative would be to *guess* whether the trial court should be reversed or sustained. Because these procedures were not followed, the conviction was affirmed.

Bell v. Wabash Valley Trust Co.[94] held that because a praecipe was not filed, pursuant to Appellate Rule 2, within thirty days after the overruling of a motion to correct error, the appeal was not effective. The suit was originally filed to terminate a trust, which eventually resulted in a trustees' statement with a judgment rendered thereon. That judgment was subject to the right of appeal. The appellants filed a motion to correct error which was granted in part and overruled in part. No praecipe was filed until approximately sixty-eight days after ruling upon the motion to correct error. The court of appeals stated that because of Appellate Rule 2(A) requiring a praecipe within thirty days, the appeal must be dismissed pursuant to the appellee's motion.

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[92]284 N.E.2d 551 (Ind. Ct. App. 1972).

[93]Under Appellate Rule 7.2, the appellant must present a sufficient record to allow a meaningful review. Johnson v. State, 283 N.E.2d 532 (Ind. 1972); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970). If a transcript is unavailable, the proper procedure is to obtain a factual statement of the evidence pursuant to Appellate Rule 7(A)(3)(c). Quinn v. State, 281 N.E.2d 478 (Ind. 1972). If these procedures are not followed and appellant challenges his conviction on sufficiency of the evidence, the appeal must be dismissed. When no evidence is placed on the record, no question is presented on appeal. Calvert v. State, 251 Ind. 119, 239 N.E.2d 697 (1968); Short v. State, 234 Ind. 17, 122 N.E.2d 82 (1954); Messersmith v. State, 217 Ind. 132, 26 N.E.2d 908 (1940).

[94]290 N.E.2d 454 (Ind. Ct. App. 1972).

In the case of *In re Estate of Moore,*[95] the court of appeals held that an oral request to the court reporter to prepare a transcript did not comply with the requirement of Appellate Rule 2(A) that an appeal be initiated by filing a praecipe with the clerk of the trial court. The rule further requires that a copy of a praecipe shall be served promptly upon the opposing parties. The court therefore stated that the rule required that a praecipe be a written document filed with the clerk. Thus, the case was dismissed, although all other papers and briefs were timely filed.

The opinion in *Softwater Utilities, Inc. v. LeFevre,*[96] contained language which should be highlighted for the benefit of all attorneys in Indiana:

> In the recent case of In re Estate of Moore (1973), Ind. App., 291 N.E. 2d 566, the trial judge changed the record to show the praecipe filed several days before it actually was filed. In this case, the trial judge changed the record to show that the Motion to Correct Errors was overruled several days later than it actually was overruled. In both cases, the purpose of changing a record appears to have been the same, namely, to circumvent the application of Rule AP. 2(A).[97]

In the *Softwater Utilities* case, the appellants stated that the notice of the overruling of the motion to correct error was never received, although that fact was disputed.

The effect of the court's opinion is that regardless of whether the notice is received by a losing party, pursuant to Trial Rule 72(D) and Appellate Rule 2(A), the right to appeal will be forfeited unless the praecipe is filed within thirty days after the *ruling* on the motion to correct error. Thus, time does not run from the time when notice of that ruling is received by the party adversely affected.

In the case of *Dzur v. Northern Indiana Public Service Co.,*[98] the supreme court considered Trial Rule 62(D) and Appellate Rule 6(B), in connection with an appeal taken from an interlocutory order. The appellee filed a motion to dismiss or affirm in which it stated, in part, that the appeal should be dismissed because

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[95]291 N.E.2d 566 (Ind. Ct. App. 1973).

[96]293 N.E.2d 788 (Ind. Ct. App. 1973).

[97]*Id.* at 790.

[98]278 N.E.2d 563 (Ind. 1972).

the bond therefor was not filed within the ten days specified by statute.[99]

The supreme court held that the bonding requirement of the statute was *not* jurisdictional; no appeal bond was necessary under the rules providing for appeal from interlocutory orders.[100] The supreme court also stated that the failure to file the bond might be a basis for dismissing the appeal if some prejudice was shown to the appellee. However, none was shown, nor did the appellee contend that it was prejudiced by the late filing of the bond required by statute.

In *Murphy v. Indiana Harbor Belt Railroad*,[101] the appellant filed its brief with the clerk of the court of appeals by depositing it in the mail on May 22, 1972, the last day in the case for filing. Service of a copy was made upon the appellee's counsel in his office on the next day, May 23, 1972, by personal delivery. The question[102] was whether the appellant met the requirement of Appellate Rule 12(B) that copies of all papers filed by any party shall, at or before the time of filing, be served by a party or a person acting for him on all the parties of the appeal.

It was obvious that the rule was not literally complied with and thus the court faced the question whether to dismiss the appeal. The court of appeals stated that it saw no reason for an automatic dismissal for the failure of a party to serve the opposing counsel at or before the time of filing. The court held that it is within the discretion of that court to effect a dismissal if the conditions of the case so dictated; here, such was not the case.[103] The court stated that the only rule which mandates dismissal once jurisdiction is conferred in an appellate court is Appellate Rule 8.1(A).[104]

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[99]IND. CODE § 32-11-1-5 (1971).

[100]Federal rule 73(d), upon which Trial Rule 62(D)(2) is based, has been similarly interpreted. W.H. Lailer Co. v. C.E. Jackson Co., 75 F. Supp. 827 (D. Mass. 1948).

[101]284 N.E.2d 84 (Ind. Ct. App. 1972).

[102]There was no issue as to the timeliness of the *filing* of appellant's brief since it was clearly filed within the requisite period.

[103]The court warned, however, that this opinion should not be interpreted as an invitation for appellate counsel to abuse the rules and inferred that a future court retains the power to dismiss for bad faith abuse of the rules. 284 N.E.2d at 87.

[104]Appellate Rule 8.1(A) directs the clerk to enter an order dismissing the appeal if appellant fails to file his brief within thirty days after filing the record.

In the case of *Anthrop v. Tippecanoe School Corp.*,[105] the supreme court reaffirmed its opinion in *Richards v. Crown Point Community School Corp.*,[106] in which it pointed out the bases for the appeal of interlocutory orders, as found in Trial Rule 72 and Appellate Rule 4(B). The court stated that in order to take an interlocutory appeal, the entry or order appealed must fit under the penumbra of an appealable interlocutory decree as established in the statute.

The court stated in this particular case that there was no interlocutory appeal available, because the appellants attempted to effect an appeal of a trial court entry which was made at the appellants' request upon a "Motion To Determine Aggregate Award of Appraisers" in a condemnation proceeding. The supreme court stated that the trial court's particular entry did not fall within the categories of interlocutory appealable orders found in the statutory provision. In short, it said that the trial court's entry was nothing more than an interpretation of the report of the appraisers in the case. Hence it was not appealable as either a final or an interlocutory order.

Lashley v. Centerville-Abington Community Schools[107] presented an appeal from an interlocutory-type order in which no motion to correct error was filed pursuant to Trial Rule 59(G). The order appealed from was one which overruled the appellant's objections to the appellee's complaint for the condemnation of real estate for school purposes. The argument was made on appeal that appellate jurisdiction could be invoked by an assignment of error in the court of appeals. The record of proceeding in the case was filed on November 1, 1972, and the appellant attempted to file an assignment of error in January 1973.

The court of appeals dismissed the appeal, but in doing so appeared to revive the old assignment of error practice as a jurisdictional prerequisite to an interlocutory appeal. The court said

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[105]277 N.E.2d 169 (Ind. 1972).

[106]269 N.E.2d 5 (Ind. 1971). Appellate Rule 4(B) provides for appeal in the following cases: (1) for payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of debt documents or things in action, (2) for the delivery of the possession of real property or the sale thereof, (3) granting, or refusing to grant, or dissolving or overruling motions to dissolve preliminary injunctions, or the appointment of receivers, and (4) orders or judgments upon writs of habeas corpus not otherwise authorized to be taken directly to the supreme court.

[107]293 N.E.2d 519 (Ind. Ct. App. 1973).

that the timely filing of the record and the assignment of error has long been held to be a jurisdictional act and that without the assignment of error the appellant has not invoked the jurisdiction of the court on appeal. The holding would appear to be inconsistent with Appellate Rule 3(A).[108]

In the case of *Burcham v. Singer*,[109] the court of appeals restated a principle known as the "law of the case," which requires that the decision of the court of appeals rendered upon a given state of facts become the law of the case applicable to such state of facts. The court said that upon a new trial, if new evidence were introduced and new facts presented, then there would be a different case and the trial court would not be conclusively bound by the previous decision. However, if the cause is submitted for retrial upon the same facts upon which the decision was originally rendered, then the decision of the appellate court remains the law of the case and the trial court and an appellate court upon a subsequent appeal would be bound thereby. The principle was applicable in this case because after the case had once been before the court of appeals and remanded, no new facts or evidence were presented to the trial court. The only evidence was the evidence and pleadings filed and introduced in the original trial, as well as the decision of the court of appeals interpreting that evidence and pleadings in the former trial.

In *Alderson v. Alderson*,[110] the court gave notice by example of the significance of Appellate Rule 11(B)(2)(d), which provides that "error" which may serve as a basis for transfer from the court of appeals to the supreme court may include "that the decision of the court of appeals correctly followed ruling precedent of the supreme court, but that such ruling precedent is erroneous or is in need of clarification or modification . . . ."[111] The court overruled the doctrine of indivisibility in divorce appeals, and in so doing pointed out that the court of appeals had followed ruling precedent and was not in contravention thereof. However, the court held, for reasons stated in the opinion, that the petition to transfer would be granted "pursuant to this Court's inherent

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[108]Appellate Rule 3(B) specifically provides that the appellate court has jurisdiction on the date the record of proceedings is filed with the clerk of the supreme and appellate courts. *See generally* State v. Bridenhager, 276 N.E.2d 843, 844 (Ind. 1972).

[109]277 N.E.2d 814 (Ind. Ct. App. 1972).

[110]281 N.E.2d 82 (Ind. 1972).

[111]IND. R. APP. P. 11(B)(2)(d).

authority to change any ruling precedent once the appeal has been terminated in the Appellate Court."[112] The court then cited Appellate Rule 11(B)(2)(d), which became effective January 1, 1972.

The meaning of the rule, and the case, is clear. It is that the supreme court by rule, and case law, has established an appellate procedure by which it may review and redetermine precedents in Indiana, in cases which do not—in the court of appeals—conflict with former cases or precedents. Hence, the attorney may seek review in the supreme court on transfer of a case which adheres to precedent and which petitioner argues should be overturned or changed.

In the case of *Weldon v. State*,[113] the supreme court held that an order denying a motion to intervene was a final judgment from which an appeal would lie. The sustaining of a motion to strike a petition of intervention would also be a final judgment. The court stated that if a motion to intervene were granted, the controversy would not have ended and no appeal would lie at that point. It should be noted that after the trial court overruled the motion to intervene, the appellants filed a motion to correct errors prior to the appeal—a procedure which is required and to which the court gave its tacit approval.

In *Thompson v. Thompson*,[114] the supreme court held that pursuant to Indiana Code section 33-1-9-2[115] the trial courts of the State of Indiana are empowered to waive the cost of publishing summonses in divorce cases and that the refusal to do so was, on the facts of the cases before it, error. In these cases, the plaintiffs filed actions for divorce, and in each a petition was presented to the trial court that the actions be prosecuted as a poor person and thus that the filing fees, including the cost of publishing summons, be waived. The trial court determined that it had no authority to waive the cost of publication.

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[112]281 N.E.2d at 83. *See generally* Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969), which held that the supreme court of the state has the inherent constitutional duty to act as the final authority as to the law in the state.

[113]279 N.E.2d 554 (Ind. 1972).

[114]286 N.E.2d 657 (Ind. 1972).

[115]IND. CODE § 33-1-9-2 (1971) provides that any person entitled to institute a civil action may file a written statement under oath that, due to his poverty, he is unable to pay court costs or give security and seek waiver of such cost security.

On appeal, in addition to holding that the cost of publication could be waived,[116] the court held that the action of the trial court —the entry of orders refusing to waive costs of publishing summons—was a "final order" or judgment, in the sense that all of the issues were disposed of in the trial court. It was such an order that it was appealable as a final order or judgment; hence, no extraordinary writ would lie.

In *Indiana Alcoholic Beverage Commission v. Progressive Enterprises, Inc.*,[117] a question was raised whether the order appealed from was in law appealable to the supreme court. The appellee challenged the court's jurisdiction, contending the case an attempted appeal from a temporary restraining order which was not appealable. The court pointed out, however, that a second order was entered by the trial court which was, even though entitled a temporary restraining order, in fact a preliminary injunction. The court stated that it is the substance of the order which controls, not its caption, and that an order which is entered after notice and after an evidentiary hearing, as in the instant case, is in fact a preliminary injunction from which an appeal will lie. Accordingly, the court sustained its jurisdiction in that particular question.

In the case of *Johnson v. Jackson*,[118] the court of appeals considered the question of whether the statutory provision found in Indiana Code section 34-2-7-1 provides for a final order. That provision states that in all receiverships, the receiver, within such time as may be fixed by an order of the court, shall file with the court an account in final settlement.

In this case the receiver filed his account of all charges and credits with the court on April 15, 1970. The trial court entered an order dated June 4, 1971, which complied with the statute, and the question arose as to whether the June 4th order was a final order. The court of appeals held that it was not a final order in that it did not dispose of the proceeding and that pursuant to statute, a creditor or other interested party could file an objection or exception to the account or report. The final accounting

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[116]The trial court found as a fact that appellants could not pay the costs.

[117]286 N.E.2d 836 (Ind. 1972).

[118]284 N.E.2d 530 (Ind. Ct. App. 1972).

was not filed under October 2, 1971; hence the interim order was not a final order.[119]

The case of *City of Hammond v. Board of Zoning Appeals*,[120] set out several important principles which are operative when a trial court sustains a motion to dismiss on the ground that there was no jurisdiction in the court to entertain the action. The City filed an action against the Zoning Board, and pursuant to a Trial Rule 12(B)(1) motion, the trial court dismissed the action. Then the City filed a motion to reconsider, which was not passed upon, because the trial court granted leave to file an amended complaint. Thereafter, the Zoning Board renewed the motion to dismiss, which was sustained, and the former order of dismissal was reinstated. It was dated March 25, 1971 and a motion to correct errors was filed on June 28, 1971.

On appeal the court held that the first motion to dismiss under Rule 12(B)(1) was a final judgment and that a motion to reconsider will not toll the time requirement for filing a motion to correct error under Trial Rule 59 because Trial Rule 53.3 (then Trial Rule 53.2(B)) states that a motion to reconsider shall not extend the time for any further required or permitted action. The court also held that, pursuant to Trial Rule 15(A), a party can move to amend a dismissed complaint within sixty days from granting the 12(B)(1) judgment. If the leave to file an amended complaint is granted, that *will* toll the sixty day period under Trial Rule 59.

The factual sequence should again be noted: the second motion to dismiss was granted on June 24, 1971, but the trial court's order was to reinstate the first dismissal, entered on March 25, 1971. The motion to correct errors was filed on June 28, 1971, and under this case it was timely because the second dismissal came after the complaint was amended.

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[119]Citing State v. Burton, 112 Ind. App. 268, 44 N.E.2d 506 (1942), the court stated:

> A final judgment is one that disposes of a cause both as to the subject matter and the parties so far as the court has the power to dispose of it. An interlocutory order is one which does not so dispose of the cause but reserves or leaves some question or direction for future determination.

284 N.E.2d at 533.

[120]284 N.E.2d 119 (Ind. Ct. App. 1972).

Henceforth, the trial court practice should be to enter a second dismissal as of the date of its actual entry and not to "revive" the former order of dismissal. The reason is essentially one of court record keeping and timeliness on appeal, that is, the party's concern is a timely motion under Trial Rule 59. It may in fact have been timely, but the record may not show that it was, if the trial court does no more than "reinstate" the former dismissal. Hence, the trial court should enter its order of dismissal on the amended complaint anew.

III. Contracts and Commercial Law*

A. Scope of the Uniform Commercial Code

In *Helvey v. Wabash County REMC*[1] the Indiana Court of Appeals determined that electricity was "goods" within the meaning of Indiana Code section 26-1-2-105.[2] Plaintiff brought suit for breach of express and implied warranties and alleged certain damages caused to his household appliances by defendant's furnishing electricity of voltage higher than warranted. The suit was filed four years and two months after the incident in question occurred. The trial court entered summary judgment for defendant on the ground that Indiana Code section 26-1-2-725, a four-year statute of limitations, applied and barred the suit. On appeal, plaintiff argued that furnishing electricity was not a transaction in goods, but a furnishing of a service, and that the six-year statute of limitations for accounts and oral contracts[3] should apply.

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*Judith T. Kirtland.

[1]278 N.E.2d 608 (Ind. Ct. App. 1972).

[2]This section provides in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. . . .
>
> (2) Goods must be both existing and identified before any interest in them can pass. . . .

[3]Ind. Code § 34-1-2-1 (1971).