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I. PLEADING

A. *Joinder of Actions*

In two important decisions rendered during the survey period the Tennessee Supreme Court considered some of the aspects of joinder of actions under present circuit court practice. In the first of these, *Necessary v. Gibson*,[1] plaintiff joined a count for personal injuries resulting from defendants' alleged negligence with a count seeking recovery in contract based upon alleged promises of defendants to pay plaintiff for her injuries and expenses arising out of the same accident. The trial court sustained a demurrer upon the ground that the counts were repugnant and inconsistent. The Tennessee Supreme Court reversed, holding that under existing statutes[2] such joinder is permitted, and that the contrary rule existing at common law is no longer in effect. The court indicated that separate trials can be ordered if "distinct" or "diverse" issues are presented. The court construed one of the statutes[3] as permitting such joinder only when the two counts or claims arise out of the same incident or transaction so as to be "intimately related," but said that the other statute[4] would authorize joinder of entirely separate claims growing out of unrelated transactions. Such joinder, however, would in all cases be subject to the existing rule forbidding repugnancy—"the affirmation of a cause of action in one count and the denial of that cause of action in another count."[5] The allegations in the present case were held not to violate this rule.

This case should be considered with the case of *Oman Construction Co. v. Tennessee Central Ry.*,[6] decided on the same date. There the plaintiff sued three defendants. In the first count of the declaration, plaintiff alleged breach of contract by all of the defendants and sought damages allegedly caused thereby. In the second and third counts all three defendants were sued in tort for alleged joint and concurring negligence. The supreme court held, however, that the allegations of the first count were insufficient to state a cause of action in contract as to one of the defendants. The demurrer of that defendant to that count was accordingly sustained. The court then held that a further demurrer by this defendant to the entire declaration was good and should be sustained on ground of misjoinder—that is, that the tort counts against all defendants were improperly joined with the contract count which properly pertained only to the other two defendants. The court stated that it is a prerequisite to joinder of different causes of

1. 370 S.W.2d 550 (Tenn. 1963).
2. TENN. CODE ANN. §§ 20-801, -809 (1956).
3. TENN. CODE ANN. § 20-809 (1956).
4. TENN. CODE ANN. § 20-801 (1956).
5. 370 S.W.2d at 556.
6. 370 S.W.2d 563 (Tenn. 1963).

action in the same declaration " 'that all of the causes should affect all parties to the action, both parties defendant and parties plaintiff.' "[7] The court ruled, however, that only the party misjoined could raise the question, and overruled demurrers of the other two defendants as to whom all three counts were held applicable.

This decision certainly may be considered as limiting the situations in which joinder is permissible and would confine the rule of *Necessary v. Gibson* to cases where all of the joined claims affect all of the parties to the suit. It has raised questions as to the long accepted practice of suing alleged joint tortfeasors in an ordinary tort action, but of inserting in the declaration various counts describing separately the negligent actions (especially statutory violations) of the several defendants. For example, it is quite common for plaintiff to sue *A* and *B* jointly in a "common-law" count, then to add a statutory count against *A* alone and a separate statutory count against *B*. Does this practice violate the rule of the *Oman* case? Must each count "affect all parties to the action" in this situation?

It should be remembered that both the *Necessary* case and the *Oman* case involved the joinder of contract claims with tort claims. Neither was actually concerned with the joint tortfeasor problem. The accepted practice of stating different theories of liability against different defendants resulting from the same transaction was not expressly disapproved by the *Oman* decision, although admittedly the broad language of the opinion could be construed to apply to such cases.

B. *Amendment of Pleadings and Intervention of Parties*

In *Fidelity Bankers Trust Co. v. Chapman Drug Co.*,[8] after defendant in a chancery suit had filed a sworn answer to the original bill and after proof had been taken and the cause argued, defendant sought to file an amendment to its answer setting out a new and different defense to the action. The chancellor disallowed the proposed amendment, and the court of appeals affirmed. The appellate court pointed out that the allowing of amendments is largely within the discretion of the trial judge, and his action is reversible only when there is a clear abuse of discretion. Amendments as to form are, of course, readily permitted. An amendment to a sworn pleading, setting up claims contrary to the original pleading and to the sworn testimony is much less likely to be granted, however, and no abuse of discretion in this respect was found in the present case.[9]

7. 370 S.W.2d at 574, quoting from 1 AM. JUR. 2d, *Actions* § 123 (1962).
8. 366 S.W.2d 528 (Tenn. App. E.S. 1962).
9. For a holding that a circuit judge was within his discretion in disallowing an amendment to a declaration after a demurrer had been sustained, see Daniels v. Talent, 370 S.W.2d 515 (Tenn. 1963).

In the same case, after the cause had been argued, a motion was made to permit the intervention of certain individuals to assert a claim against the estate of which complainant was the executor. The suit had been filed by complainant as such executor on behalf of this estate, which was being administered in the probate court and which was solvent. The chancellor denied the petition to intervene on the ground that new and extraneous issues would be injected, not germane to the original issues and that the intervening claim was matter for a separate original bill or claim in the probate court. The court of appeals found no abuse of discretion in this ruling and affirmed.

C. *Demurrer*

1. *Construction of Pleading.*—In *Jackson v. Kemp*,[10] the plaintiff sued for personal injuries and expenses resulting from an automobile accident. The accident had occurred more than one year prior to the filing of the suit, and by demurrer the defendant interposed the one-year statute of limitations applicable to personal injury actions in tort.[11] The trial court sustained this ground of the demurrer. The supreme court, however, held that the gravamen of the claim was for breach of contract rather than for tort, so that a six-year statute of limitations governed.[12] Plaintiff alleged that he had been promised by defendant, an insurance claims manager, that if he would not employ an attorney to file suit on the claim, the insurance carrier would compensate him for his injuries and expenses in the automobile accident. Plaintiff alleged his forbearance to sue in reliance on this promise for more than one year and claimed a subsequent breach by defendant. The court pointed out that such forbearance constitutes valid consideration for a promise to pay.[13] It further held that defendant's promise had induced plaintiff's forbearance, so that defendant would be estopped to plead the one-year statute.[14]

A second ground of the demurrer which had also been sustained by the trial court was that the subject matter of the alleged contract was so vague and indefinite that the contract could not be enforced. Again the supreme court disagreed, holding that plaintiff could establish his damages in the contract action in the same manner as he could do in a tort action for personal injuries. The fact that his damages were unliquidated was held to be no bar to the suit, and the court stated that defendant could raise the same defenses in resisting the action as could be raised if the suit were in tort, insofar as liability or damages

10. 365 S.W.2d 437 (Tenn. 1963), 31 TENN. L. REV. 249 (1964).
11. TENN. CODE ANN. § 28-304 (1956).
12. TENN. CODE ANN. § 28-309 (1956).
13. Williams v. McElhaney, 203 Tenn. 602, 315 S.W.2d 106 (1957); RESTATEMENT, CONTRACTS §§ 75, 76 (1932).
14. Approving the principle stated in RESTATEMENT, CONTRACTS § 90 (1932).

were concerned. In effect the result seems to be that plaintiff was permitted to proceed as though his case were one in tort for personal injuries, with defendant merely being estopped to raise the one-year statute of limitations but being otherwise free to assert any defenses to the merits which he might have.

D. *Set-off and Counterclaims*

The liberal Tennessee statute permitting the assertion of "every claim or demand against the suing parties" by plea of setoff or by counter-declaration in actions between a resident and a non-resident[15] was applied in a case decided by the court of appeals.[16] Plaintiff, a resident of Ohio, sued a local bank for the proceeds of a savings account. By way of setoff defendant averred that the deposit in question was the proceeds of government bonds wrongfully redeemed by the plaintiff through the bank and that the bank had been compelled to reimburse the federal government for the amount of the bonds. The circuit court sustained the plea and the court of appeals affirmed. Under the terms of the statute referred to, any kind of claim may be set up by way of defense or counterclaim, whether arising out of the same or a different transaction, and whether liquidated or not. There is no requirement of "mutuality" between the original claim and the setoff when the requisite diversity of residence exists.[17]

II. JURISDICTION AND VENUE

A. *Local Actions*

A localizing provision of the general venue statutes was held to affect the actual jurisdiction or power of a circuit court to entertain an action brought in violation of the statute.[18] The statute provides that when the parties to an action are residents of the same county, the action shall be brought in the county of their residence.[19] In the present case a tort action was instituted in a circuit court in a different county from that in which both parties resided. Defendant filed a general issue plea to the merits of the action. Thereafter he was permitted, over plaintiff's objection, to withdraw his plea and file a plea in abatement challenging the "jurisdiction" of the court because of the residence of both parties in another county. The circuit court sustained the plea in abatement. In affirming, the supreme court stated

15. TENN. CODE ANN. § 20-1008 (1956).

16. Marlowe v. First State Bank, 371 S.W.2d 826 (Tenn. App. E.S. 1962).

17. Even if non-residence of the opposite party is not known to the pleader, the benefit of the statute is available if in fact there is a diversity of residence at the time of the filing of the plea of setoff or the counterclaim. Sliger v. Parks, 196 Tenn. 676, 270 S.W.2d 319 (1954).

18. Curtis v. Garrison, 211 Tenn. 339, 364 S.W.2d 993 (1963).

19. TENN. CODE ANN. § 20-401 (1956).

that the residence of both parties in the same county converts an otherwise transitory action into a local action. The issue ceases to be merely one of venue. Improper venue, of course, may normally be waived in transitory actions, and must be raised by plea in abatement before a plea to the merits is entered.[20] But in local actions, the suit must be brought in the county where the subject matter lies, and it cannot be maintained in any other county, even by consent of the parties.[21] Accordingly, in the instant case the supreme court held that defendant could not be said to have waived the question by his general appearance and plea. Jurisdiction of the "subject matter" was lacking in the county of suit, and any judgment rendered by it would have been beyond its power and void, according to the opinion.[22]

The localizing statute, of course, is a salutory one, designed to prevent unfair tactics in suing a defendant away from his home and "among strangers."[23] Nevertheless, it is a venue statute, and the holding that it is sufficiently forceful to curb the power of a trial court of general jurisdiction seems to give undue importance to a seemingly procedural provision. It would seem that if the defendant did not raise the question of improper venue by an appropriate preliminary plea, the court should not be without power to enter a valid judgment binding upon the parties.

B. *Equitable Actions in Circuit Court*

In the somewhat unusual case of *Hewqley v. Trice*,[24] a claim was filed against an estate in the probate court. The executrix of the estate denied the claim and demanded a jury trial. Consequently the case was transferred to circuit court for trial as provided by statute.[25] Because the claim presented numerous items involving a complicated accounting, the circuit judge treated it as an equitable action, withdrew the issues from the jury, and decided them himself. On appeal, this action was affirmed. The court of appeals found that there was no material evidence introduced to create an issue for jury decision in any event, even if the action were regarded as legal in nature. In the alternative, however, it pointed out that the circuit court has statutory authorization to hear equitable causes unless the defendant objects by

20. TENN. CODE ANN. § 20-406 (1956).

21. Keeble v. Loudon Util., 370 S.W.2d 531 (Tenn. 1963); Shelby County v. Memphis, 211 Tenn. 410, 365 S.W.2d 291 (1963); Mayor of Nashville v. Webb, 114 Tenn. 432, 85 S.W. 404 (1904).

22. To the same effect, that a plea in abatement may be sustained after a general appearance when it challenges the jurisdiction of the court over the subject matter, see Caton v. Pic-Walsh Freight Co., 211 Tenn. 334, 364 S.W.2d 931 (1963).

23. Curtis v. Garrison, 211 Tenn. 339, 343, 364 S.W.2d 933, 935 (1963).

24. 369 S.W.2d 741 (Tenn. App. M.S. 1962).

25. TENN. CODE ANN. § 30-517 (1956).

demurrer.[26] In equity cases there is no right to a jury trial in cases involving complicated accounting.[27] The court of appeals held that the statute transferring to the circuit court probate claims where there is a jury demand[28] does not compel the circuit judge to submit issues to a jury if the action is equitable in nature. The form of action is not fixed as one at law, and the circuit judge shall proceed with it as any other case—treating it as legal or equitable according to its nature.

C. *Probate Court—Restoration of Sanity*

In a case of first impression the Tennessee Supreme Court held that a probate (or county) court in this state can restore the competency of a person adjudged insane in another state, where the applicant has resided in Tennessee for one year before filing his petition.[29] The court recognized that an adjudged incompetent cannot normally change his domicile or legal residence, because of his disability. Therefore he remains the ward of court in which he was adjudged. A Tennessee statute provides that if an incompetent comes into Tennessee, his return to the state where he was adjudged may be demanded.[30] There is a one-year limitation upon this procedure, however,[31] and the court found a legislative intent in this limitation that after passage of the one-year period the incompetent might apply to Tennessee courts for his restoration. The local courts were held to have jurisdiction to entertain and decide the issues presented under such a petition.

III. PRE-TRIAL, TRIAL AND POST-TRIAL PROCEDURES

A. *Discovery Depositions*

In the case of *Marlowe v. First State Bank of Jacksboro*,[32] the court of appeals held that a non-resident plaintiff who selects local courts as a forum must normally present himself for oral examination in this state at his own expense when defendant requests his pre-trial deposition. He may, of course, apply to the court for relief if this imposes an undue burden or hardship upon him, and the court may make such order regarding the taking of the deposition as the situation requires.[33] In the instant case, no such application had been made, and the plaintiff was accordingly required to bear her own travel expenses.

26. TENN. CODE ANN. § 16-511 (1956).

27. Greene County Union Bank v. Miller, 18 Tenn. App. 239, 75 S.W.2d 49 (E.S. 1934).

28. TENN. CODE ANN. § 30-517 (1956).

29. *In re* Chaffee, 211 Tenn. 88, 362 S.W.2d 467 (1962).

30. TENN. CODE ANN. § 33-1004 (1956).

31. TENN. CODE ANN. § 33-1010 (1956).

32. 371 S.W.2d 826 (Tenn. App. E.S. 1962).

33. TENN. CODE ANN. § 24-1205 (Supp. 1963).

B. *Examination of Witnesses*

In *Cobb v. Waddell*,[34] defendant assigned as error the refusal of the circuit judge to permit the questioning of a witness on redirect examination as to matters not previously touched upon in direct or cross-examination. The court of appeals held that the matter was within the discretion of the trial judge and found no abuse of discretion and no harmful error in any event in his ruling. The proposed inquiry had to do with efforts of a police officer to deliver a traffic citation to plaintiff following an automobile accident.

C. *Separation of Issues in Jury Trial*

One of the most significant cases reported during the survey period was *Winters v. Floyd*.[35] The suit was begun as a tort action for personal injuries. By special plea defendant set up a release executed by plaintiffs. In their replications, plaintiffs attacked the validity of the release. Upon motion of defendant, the trial judge severed and tried separately the issues concerning the validity of the release. The court of appeals held that this procedure was erroneous and sustained plaintiffs' assignments of error based thereon. Relying upon a recent decision of the Tennessee Supreme Court,[36] the court held that the right of jury trial, as guaranteed by the state constitution, includes the right to have all issues of fact submitted to the same jury at the same time. The court indicated that the trial court might constitutionally sever separate "causes of action," but held that it could not separate and try independently certain fact issues surrounding the same cause of action. Having reached this decision upon the basis of a constitutional question, the court went further and in dictum disapproved the practice of trying separate issues even if constitutionally permissible. The court expressed doubt as to whether less prejudice to an insurance carrier would really result from separate trials, and indicated that the trial judge could hold to a minimum the references to insurance personnel in obtaining a release—at least as to the "insurance capacity" in which an adjuster acted on behalf of the defendant.

Probably a number of trial lawyers and judges would question some portions of this opinion, insofar as the discussion of efficient judicial administration or jury prejudice is concerned. It is true that jurors generally know of the widespread carriage of liability insurance. Nevertheless, most defense attorneys have felt that it would be prejudicial to the defendant to have to try before the same jury the validity of a release obtained by a claims adjuster and also the issues of liability and damages. It has generally been felt that if the release were held

34. 369 S.W.2d 743 (Tenn. App. W.S. 1963).
35. 367 S.W.2d 288 (Tenn. App. M.S. 1962).
36. Harbison v. Briggs Bros. Paint Mfg. Co., 209 Tenn. 534, 354 S.W.2d 464 (1962).

invalid—particularly if found to have been fraudulently obtained or the result of sharp practice—the jurors who so found would be more likely to resolve against the defendant the other issues in the case than would a separate jury. Inasmuch as the real basis for the decision in the instant case seems to be the constitutional right of jury trial, however, the discussion of trial procedure is a secondary matter. If, in fact, there is a violation of constitutional right in separating issues of this sort, no further discussion of the procedure would seem necessary.

D. *Reading of Pleadings and Argument of Counsel*

By statute certain practices of counsel in presenting a case were expressly authorized.[37] These include the use of a blackboard for the purpose of summarizing damages, the argument of a monetary value for pain and suffering in personal injury cases where support for such argument exists in the record, and the reading of the amount sued for in the declaration. Of these, probably the second is the only really controversial practice, and there is still open the question of how to determine when there is a sufficient evidentiary basis to support an argument of this nature.

E. *Dismissal for Lack of Prosecution*

In *White v. College Motors, Inc.*,[38] the trial judge dismissed two damage suits for lack of prosecution. Ten terms of court had elapsed between the service of process and the filing of a declaration. Defendants promptly filed a plea, and five more terms of court elapsed before the cases were dismissed upon motion of defendants. Nearly five years had passed between the filing of suit and the dismissal. The supreme court held that under these circumstances the trial judge might well have concluded that the actions had been abandoned. His dismissal of the suits was held proper even though prior notice of the motion to dismiss was not given plaintiffs by defense counsel.

Probably one of the areas of circuit court procedure most in need of modernization is the practice under which suits may be begun merely by having a summons issued.[39] Of course if the plaintiff does not promptly plead, the defendant may move to dismiss, but such dismissal does not go to the merits.[40] Consequently the defendant gains little by making the motion. The result is that many suits are begun by summons and lie dormant for months or years without action of any sort. Perhaps a requirement of the filing of a complaint in order to begin an action might deter the filing of many non-meritorious

37. TENN. CODE ANN. §§ 20-1326 to -1328 (Supp. 1963).
38. 370 S.W.2d 476 (Tenn. 1963).
39. TENN. CODE ANN. § 20-201 (1956).
40. TENN. CODE ANN. § 28-106 (1956).

actions. A regular policing of the docket by the trial judges might also help eliminate many suits which are filed in the hope of obtaining nuisance-value settlements and with no real expectation of proceeding to trial.

F. *Motion for New Trial*

It is generally assumed in Tennessee that a motion for new trial—the most important post-trial step taken in the trial court under existing practice—must be in writing. Probably most local court rules so require. In all events good practice dictates that the motion be written and, of course, filed within the time allowed by statute[41] and by local rules. In the case of *Horn v. Commercial Carriers, Inc.*,[42] however, the court of appeals held that if the trial court accepts and acts upon an oral motion for new trial, the appellate courts will accept this and will not dismiss an appeal in error or decline to review the record below merely because there was no written motion for new trial. The record in that case affirmatively showed that a motion had been timely made and overruled by the trial judge; it did not show that the motion was in writing or any rule of the trial court requiring such motion to be in writing. Accordingly the appellate court overruled a motion to dismiss the appeal and reviewed the case on its merits.

G. *Consent Decree*

The binding effect of a consent decree was considered by the Tennessee Supreme Court in *Third National Bank v. Scribner*.[43] In 1954 the parties to the litigation had been parties to a suit which had terminated in a consent decree, defining the duties of a trustee under a testamentary trust and ratifying certain leases. In this case an attempt was made to set aside the earlier decree, although there was no allegation of fraud or mutual mistake. Both the trial court and the appellate court held that the prior decree was binding and determinative. A consent decree is in the nature of a contract of record, made by the parties and approved by the court. It is binding and conclusive upon the parties and is similar to a judgment in its force and effect. One basis of the attack in the present case was that the trust was "spendthrift," so that the beneficiary could not consent to a violation of its terms. Although both the chancellor and the supreme court found that there was capacity to make the contract in question, an earlier decision by the supreme court makes clear that the beneficiary of a spendthrift trust can bind himself by

41. TENN. CODE ANN. § 27-201 (1956).
42. 365 S.W.2d 908 (Tenn. App. E.S. 1962).
43. 370 S.W.2d 482 (Tenn. 1963).

consent decree to a construction of the trust instrument from which he cannot later depart.[44]

H. *Revival and Survival of Actions*

The distinction between the revival of an action brought by the decedent before his death and a wrongful death action was discussed in *Gipson v. Memphis St. Ry.*[45] There the injured person sued for her injuries, but subsequently died from an independent cause. Her suit was revived in the name of the next of kin, who amended and alleged that death had been due to the injuries out of which the suit arose. Both the trial and appellate court held as a matter of law that there was no causal connection between the injuries and the death. Since there was no actionable wrongful death, the only remaining claim was the original one for the injuries sued upon in the original action. The controlling statutes, however, require that such an action must be revived in the name of the personal representative of the deceased,[46] and this had not been done. Had a causal connection between these injuries and the subsequent death been established, the case would have fallen within the provisions of the wrongful death statutes and could have been prosecuted by either the next of kin or the personal representative for their benefit.[47] This is a rather nice distinction and one that might easily be overlooked. Accordingly it would seem wise, in cases involving close issues as to causal connection between injury and death, to revive the original action in the name of the personal representative. Regardless of whether the evidence does or does not establish a connection between the injury and the death, the personal representative can proceed with the suit.

I. *Distribution of Condemnation Proceeds*

A case of first impression and one that may be of widespread interest in the handling of condemnation proceeds where there are owners of different estates in the land taken is *State ex rel Moulten v. Burkhart.*[48] There the state, as condemnor, paid into court a sum of money alleged to be the amount due the owners. The property taken was under commercial lease, but the petition did not specify the value of the separate interests of the lessor and lessee. The authorizing statute provides that the petition need not specify the interests of the various defendants in the condemnation proceeding.[49] The lessee,

44. Burton v. Burton, 208 Tenn. 11, 343 S.W.2d 867 (1961).
45. 364 S.W.2d 110 (Tenn. App. W.S. 1962).
46. TENN. CODE ANN. §§ 20-602, 20-618 (1956).
47. TENN. CODE ANN. § 20-607 (1956).
48. 370 S.W.2d 411 (Tenn. 1963).
49. TENN. CODE ANN. § 23-1530 (Supp. 1963).

however, filed a motion to dismiss unless there was a specification of the interests, averring that appraisers for the state had separately valued the leasehold. In the alternative, the lessee sought to withdraw from the court the amount allegedly allotted to it in the appraisal, in full settlement of its claim.[50] The trial court entered an order denying the lessee's motion, reciting that the condemnor did not oppose the motion but that the lessor opposed it. On appeal, the supreme court reversed. It observed that the condemning authority is not obligated to fix separate valuations upon the different real property interests. Where, however, it admittedly has done so and does not oppose the withdrawal of the amount set for one of the interests, then the owner of that interest should be permitted to withdraw the amount allotted to him; he should not have to await a trial of the valuations of the other interests involved. The owners of the other interests could not be prejudiced by the withdrawal; accordingly in the present case the lessor's disagreement afforded no legal basis for denial of the lessee's application to withdraw.

IV. Appeal and Error

A. *Appealable Orders*

In *Knox County v. Burroughs*,[51] the supreme court reiterated the well-settled rule that there can be no appeal in law cases from interlocutory orders of a trial court. Discretionary appeals are permitted by statute in equity cases, whether on trial in the circuit or chancery court,[52] but there is no comparable provision in law cases. In the present case, a plea in abatement was overruled in a condemnation case. The supreme court held that this was not an appealable order since it clearly was not a final judgment of the law court. The court indicated that it would prefer to pass upon the issues presented upon the proposed appeal, but it was unable to do so under existing procedures. Of course the underlying reason for disallowing interlocutory appeals—the piecemeal and successive review of issues in the same cause—is unquestionably sound in most instances. Clearly, however, there are instances where vital and determinative issues are raised by preliminary pleadings in law courts. Appeals from interlocutory orders could sometimes be extremely useful in obtaining authoritative rulings before the parties are put to the expense of trial on the merits. A statute allowing such appeals, in the discretion of the trial judge, would seem to be as necessary and proper in law cases as in chancery practice.

50. Tenn. Code Ann. § 23-1531 (Supp. 1963).

51. 369 S.W.2d 734 (Tenn. 1963).

52. Tenn. Code Ann. § 27-305 (Supp. 1963).

B. *Writ of Error*

The right of a party to have his case reviewed by the appellate courts on writ of error when he files an appeal bond too late to perfect an appeal in the nature of a writ of error was reiterated in *Ward v. North American Rayon Corp.*[53] Where the appealing party files in the appellate court a properly certified copy of the transcript, together with a proper bond and assignments of error within one year of the judgment below, he is entitled to review on writ of error.[54] Since the period for perfecting an appeal in the nature of a writ of error is relatively short,[55] a party might be deprived of an effective means of review were it not for the "escape valve" of filing the record for review on writ of error, where he or his attorney inadvertently or for some other cause failed to file a bond or pauper's oath within the time limit for perfecting an appeal in the nature of a writ of error.[56] The scope of review under the two procedures is essentially the same, but the writ of error does not automatically supersede the judgment below;[57] the appeal in the nature of writ of error, duly perfected, automatically suspends the enforcement of the judgment appealed from.[58]

C. *Errors Not Assigned by Counsel*

In *Carter v. Jett*,[59] the court of appeals reversed a trial court decree upon the basis of error not assigned by counsel for appellant. Although this power of the appellate courts is not frequently called into play, it clearly exists and is appropriately exercised in the proper administration of the functions of a reviewing court. It is provided for in the rules of both the supreme court[60] and the court of appeals.[61]

D. *Disposition on Appeal*

1. *Effect of Judgment of Appellate Court.*—An unusual procedural situation was presented in the case of *Sanders v. Loyd.*[62] There had been an action and cross-action in a general sessions court, arising out of the same automobile accident. Both actions were dismissed at the hearing. Only the original plaintiff appealed from this judgment. In the circuit court, however, by inadvertence it had been assnmed

53. 211 Tenn. 535, 366 S.W.2d 134 (1963).
54. TENN. CODE ANN. §§ 27-601 to -612 (1956).
55. TENN. CODE ANN. § 27-312 (1956).
56. See Sanders v. Loyd, 364 S.W.2d 369, 370 (Tenn. App. M.S. 1960).
57. TENN. CODE ANN. § 27-611 (1956).
58. GILREATH, HISTORY OF A LAWSUIT § 445 (8th. ed. 1963).
59. 370 S.W.2d 576 (Tenn. App. M.S. 1963).
60. TENN. SUP. CT. R. 15(2).
61. TENN. CT. APP. R. 12.
62. 364 S.W.2d 369 (Tenn. App. M.S. 1960).

that both parties had appealed. When trial was had in that court, the circuit judge dismissed the original plaintiff's suit and granted judgment for the "cross-plaintiff" (the original defendant, who had not appealed from sessions court). On appeal this result was reversed by the court of appeals which purported to dismiss both actions. Thereafter the original defendant and cross-plaintiff sought to have his sessions suit reviewed in circuit court by writ of certiorari. The circuit court had granted the writ, taking the view that the previous order of the court of appeals had not amounted to a review of this action on the merits and that the action in reality had remained in the sessions court all the while. The court of appeals in the present opinion reversed this holding, and held that its previous judgment, dismissing both suits, was final and binding upon all parties. Even if erroneously entered, the judgment had not been modified and became final, so that no further orders or proceedings could be had in any other court. Unless and until the order of dismissal was modified or vacated (and this had not occurred), it was operative, and the circuit court was without authority or jurisdiction to proceed further, particularly in view of the fact that no order of remand or mandate had ever issued from the appellate court to the lower court.

2. *Effect of Reversal of Directed Verdict Below.*—In *Baggett v. Louisville & N. Ry.*,[63] there had been a directed verdict for defendant in the circuit court. The circuit judge had let the case go to the jury. received a jury verdict for plaintiffs, and had then set aside the verdict and entered judgment for defendant. The court of appeals reversed, holding that jury issues were presented under the evidence. Upon authority of previous Tennessee case law, however, the court held that it had no power to reinstate a jury verdict which had not received approval of the trial judge.[64] Accordingly it simply remanded the cause for a new trial on the merits.

3. *Enforcement of Supreme Court Judgments.*—In 1962 the Tennessee Supreme Court had rendered a decision upholding the constitutionality of certain ordinances of annexation.[65] It denied a petition to rehear and an application for a stay order. Petition for certiorari was filed in the United States Supreme Court, but that Court also, on two occasions, denied applications for a stay order. Thereafter the losing parties in the previous suit filed the present proceedings in chancery to enjoin various city officials from enforcing the ordinances. The supreme court granted defendants' petition for certiorari, issued an order superseding any action taken or to be taken in the second

63. 365 S.W.2d 902 (Tenn. App. W.S. 1962).
64. Smith v. Tucker, 203 Tenn. 305, 311 S.W.2d 807 (1958).
65. State *ex rel.* Stall v. City of Knoxville, 211 Tenn. 271, 364 S.W.2d 898 (1962).

suit, and permanently enjoined the complainants from in any way interfering with the previous judgment entered by the supreme court.[66] In its opinion the court pointed out that it has both statutory[67] and inherent authority to issue whatever writs or processes may be necessary to enforce its judgments.

4. *Effect of Reversal of Court of Appeals.*—In *Warren v. Crockett*,[68] a circuit judge had directed a verdict for defendant at the conclusion of plaintiff's proof. Thereafter he granted a new trial, and there was a verdict for plaintiff. The court of appeals held that the first action of the trial judge had been correct, and accordingly entered judgment for defendant as on a directed verdict. The supreme court reversed this ruling, holding that a jury issue was presented and that a directed verdict on the record of the first trial was improper. Inasmuch as defendant had assigned errors on the record of the second trial, however, and these had not been reviewed by the court of appeals, the supreme court remanded the cause to that court for consideration of the record in the second trial of the cause.

V. FEDERAL COURTS

A. *District Courts*

1. *Pleading—Relation Back of Amendment.*—In *Roberson v. Bitner*,[69] there was an insufficient allegation of diversity of citizenship in the original complaint. Defendant sought to have the suit dismissed, but plaintiff moved to amend so as to state adequately a basis of federal jurisdiction by reason of diversity. The state statute of limitations had expired between the time of filing suit and the date of the amendment. The district court, however, held that the amendment would be allowed. Since the amendment showed that at the date of the filing of suit facts existed under which the court had jurisdiction, the court's jurisdiction became "operative" at the date of the original action; the subsequent running of the statute of limitations did not bar the suit, and the amendment related back to the date of the original complaint.

2. *Jurisdiction*—(a) *Lack of Diversity.*—In the case of *Howard v. United States*,[70] plaintiff sued the United States under the Federal Tort Claims Act for injuries sustained by her in a post-office building. The federal government leased the building, and plaintiff joined the landowner as an additional defendant. The district court dis-

66. State *ex rel.* Stall v. City of Knoxville, 211 Tenn. 428, 365 S.W.2d 433 (1963).
67. TENN. CODE ANN. §§ 16-102, 16-305, 27-801 (1956).
68. 211 Tenn. 172, 364 S.W.2d 352 (1962).
69. 218 F. Supp. 764 (E.D. Tenn. 1963).
70. 214 F. Supp. 263 (E.D. Tenn. 1963).

missed the suit as to him, however, since both he and the plaintiff were residents of Tennessee, and no separate or independent basis of federal jurisdiction existed as to that defendant.

(b) *Lack of Separate Claim.*—Two non-resident defendants were sued along with a resident defendant in a Tennessee state court.[71] They sought to remove the action to the district court. Plaintiff, however, was also a Tennessee resident, so that complete diversity of citizenship between the parties was lacking. The non-residents contended that as to them there existed a separate and independent claim, which was removable under the federal statutes.[72] From an examination of the pleadings, however, the district court found only that there were allegations of one threatened wrong to plaintiff by all of the defendants through an interlocking series of transactions. Since the state court had already issued a preliminary injunction in the case, and since a separate and independent claim was not found to exist as to the non-residents, the court remanded the entire cause to the state court for further proceedings.

(c) *Corporation Doing Business in State.*—In *Trussell v. Bear Mfg. Co.*,[73] a foreign corporation which had not qualified to do business in the state and which had no physical facilities in the state was nevertheless held to be "doing business" in the state so as to be amenable to service of process through the Tennessee Secretary of State.[74] The corporation sold its products to a Tennessee jobber, its representatives had meetings in Tennessee with the jobber's salesmen, and supervised the installation of equipment sold by the jobber. This representative was found by the court not to be an independent contractor but to be under the control of the foreign corporation. The corporation was found to be doing substantial, continuous intrastate business under all of the circumstances.[75]

B. *Court of Appeals*

1. *Jurisdiction—Non-Resident Motorist Statute.*—In a case of first impression under the Tennessee non-resident motorist statutes,[76] the Court of Appeals for the Sixth Circuit held that a non-resident who had come to Tennessee to purchase a new automobile and who was driving it to her home under dealer's "drive-out" license tags, was subject to process in Tennessee when she was involved in an accident with another vehicle on the highways of this state.[77]

71. Laughters v. AMF Pinspotters, Inc., 215 F. Supp. 109 (E.D. Tenn. 1963).
72. 28 U.S.C. § 1441(c) (1958).
73. 215 F. Supp. 802 (E.D. Tenn. 1963).
74. TENN. CODE ANN. §§ 20-220, 48-293 (1956).
75. For a state court decision on the same subject during the survey period, see Atchison, T.&S.F. Ry. v. Ortiz, 50 Tenn. App. 317, 361 S.W.2d 113 (W.S. 1962).
76. TENN. CODE ANN. §§ 20-224 to -234 (Supp. 1963).
77. Williams v. Kitchin, 316 F.2d 310 (6th Cir. 1963).