Vanderbilt Law Review

Volume 16
Issue 4 *Issue 4 - October 1963*

Article 7

10-1963

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In this article the author discusses the Tennessee law as to the relative positions of employers and third party tortfeasors in workmen's compensation situations. After discussing the employer's right to subrogation to his employee's right of action, the employer's right to a lien on any recovery in such an action, and the right of the third party to indemnity from the employer, he concludes by treating the problem of joint and successive employers, taking special note of the heretofore untapped resources of the Tennessee Second Injury Fund.

I. Third Party Actions and Employers' Subrogation

Although it provides an injured workman a relatively assured recovery of prescribed benefits, the Tennessee Workmen's Compensation Act, like that of most jurisdictions, provides benefits which are quite small compared to the awards usually made in tort actions. Consequently, if there is some person other than the employer who may be responsible in tort to the injured workman, the latter generally desires to bring a damage suit against such third party.

Often, however, difficult questions arise in determining who are third parties subject to such suits. The right of the employer or his workmen's compensation insurer to reimbursement or to credit upon future compensation liability for compensation benefits paid must also be resolved, as well as adjustment of fees between the attorney for the employee-plaintiff and the attorney for the employer or insurer. Further, the right of a third party who has been held liable to an injured employee to seek indemnity at law or by contract from the employer may often lead to surprising results. It is not uncommon, for example, for an employee to receive a large judgment against a third party, and for the latter in turn to obtain indemnity for the full amount plus interest, costs, and attorney's fees from the employer of the injured man by reason of an express or implied contract of indemnity existing between the employer and the third person. Such cases have arisen with frequency during the past few years—to such an extent, indeed, that an employer or his insurer should give careful consideration to the consequences before urging an injured employee to bring

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a third-party action. The "exclusive remedy" provisions so frequently found in workmen's compensation statutes may well shield the employer from direct tort liability to an injured workman or his family, but the shield may prove vulnerable indeed to an indemnity suit by a third party who has been held liable to the injured workman in tort.[1] These problems will be considered in subsequent sections of this article.

In Tennessee, prior to 1949, an injured employee could not receive workmen's compensation benefits and at the same time pursue a third-party action. He had to make a "binding election" between the two types of recoveries—the two being deemed mutually exclusive.[2] The Tennessee statutes were amended in 1949, however, to permit the employee to recover workmen's compensation benefits without surrendering his rights against third parties.[3] Even without the aid of this legislation, it had not been uncommon for an employer to make a special agreement with an employee whereby the employer would make payments equivalent to compensation benefits to the employee, with the express provision that the employee should be free to pursue a third-party action. In some instances the employee agreed to reimburse the employer if he succeeded in the damage suit, and in other cases the employer waived any claim for reimbursement.[4]

The 1949 amendment obviated the necessity for special agreements of this sort, and expressly provided that the employee might take compensation benefits and at the same time sue any third person who might be legally liable to him. The employer or his insurer was given a lien upon any recovery made in the third-party action, and the right to intervene therein to protect the lien. If the third-party action were not brought by the injured workman (or his dependents, in death cases) within one year from the date of the injury, the claim was automatically "assigned" to the employer or his insurer for the purpose of seeking reimbursement from the third party for compensation paid or payable to the employee.[5]

1. Even where the employee's action is unsuccessful, there may be liability by the employer to the third party for attorney's fees and suit expenses incurred by the third party in defense of the employee's suit. Bielawski v. American Export Lines, 220 F. Supp. 265 (E.D. Va. 1963); Anuot., 7 L. Ed. 2d 1071 (1962).

2. Workmen's Compensation Act § 14, Tenn. Pub. Acts 1919, ch. 123, § 14. Under this statute, if the employee did take workmen's compensation benefits, the employer was permitted to sue the third party to obtain reimbursement.

3. Tenn. Pub. Acts 1949, ch. 277, § 1 (now TENN. CODE ANN. § 50-914 (Supp. 1963)).

4. See, *e.g.*, Keen v. Allison, 166 Tenn. 218, 60 S.W.2d 158 (1933) (employer waived any claim for reimbursement); International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W.2d 854 (W.S. 1948) (employer to be reimbursed out of recovery).

5. Tenn. Pub. Acts 1949, ch. 277, § 1, (now TENN. CODE ANN. § 50-914 (Supp. 1963)).

The 1949 legislation remains the basic foundation for third-party actions by injured workmen in Tennessee, although some significant amendments were added in 1963. Among these is a provision that the attorney representing the employee in a successful third-party action shall be entitled to a reasonable fee for his services and shall have a first lien on the recovery. If the employer or his insurer has engaged separate counsel to represent the employer in securing recovery against the third person, then "a court of competent jurisdiction shall, upon application, apportion said reasonable fee between the attorney for the workman and the attorney for the employer, in proportion to the services rendered."[6] This amendment may help to eliminate an area of possible friction between plaintiffs' attorneys in tort actions and subrogation counsel for compensation carriers. Such carriers frequently employ their own counsel to represent their interest in third-party actions, but the allocation of fees between the different attorneys has frequently been a difficult problem.

The 1963 legislation also clarified somewhat the nature and extent of the subrogation rights of the employer or his compensation carrier. The statute provides that if the employer has paid compensation benefits to the employee, he shall have a lien against the recovery made in the third-party action. If the net third-party recovery "exceeds the amount paid by the employer, and the employer has not, at said time, paid and discharged his full maximum liability for workmen's compensation under . . . this title, the employer shall be entitled to a credit on his future liability, as it accrues, to the extent the net recovery collected exceeds the amount paid by the employer."[7] Such credit is allowed whether or not the employer has intervened in the third-party action.[8]

In a significant interpretation of the third-party statutes, the Tennessee Supreme Court held that the subrogation claim of the employer extends not only to statutory medical benefits and compensation payments, but by contract may include extra-legal medical payments as well.[9] At the time of the accident in that case, the applicable statutes fixed the limit of mandatory medical benefits at 800 dollars.[10] The employer carried workmen's compensation insurance coverage for its employees, with an endorsement providing benefits in excess of the statutory medical allowance up to 10,000 dollars for each employee.

6. TENN. CODE ANN. § 50-914 (Supp. 1963).
7. *Ibid.*
8. *Ibid.* For a construction of the statutes in Tennessee as they existed prior to 1963, see Martin v. McMinnville, 369 S.W.2d 902 (Tenn. App. M.S. 1962), discussing the allocation of attorneys' fees and the nature and extent of the right of subrogation.
9. United States Fid. & Guar. Co. v. Elam, 198 Tenn. 194, 278 S.W.2d 693 (1955).
10. The limit is now 1800 dollars with an additional amount up to 700 dollars in the discretion of the court. TENN. CODE ANN. § 50-1004 (Supp. 1963).

Under this coverage the insurer paid medical expenses for an injured employee in the amount of 9,060 dollars and forty cents. It intervened in his third-party action and sought a lien for the excess as well as for the statutory benefits. The trial court held that the subrogation lien extended only to the mandatory statutory allowances, but the supreme court reversed. The court pointed out the social desirability of the employer's providing the additional coverage, and held that the employee was a third-party beneficiary thereof. The insurance contract contained a general subrogation clause, entitling the carrier to subrogate upon any right of recovery vested by law in either the employer or any employee-beneficiary. The court held that the beneficiaries of the policy took its burdens as well as its benefits and that they were bound by the subrogation clause insofar as the excess benefits were concerned; as to the statutory benefits, subrogation was allowed as a matter of law.

The employer's right of subrogation upon the employee's third-party recovery exists whether the employee recovers "by judgment, settlement, or otherwise."[11] This provision has been given effect according to its terms and subrogation has been allowed in cases where an employee settled with a third party in exchange for a release[12] and where he obtained settlement under a covenant not to sue.[13]

A. *Who Are "Third Persons"?*

The third-party statutes permit recovery by the injured workman or his dependents in cases where legal liability is created "against some person other than the employer."[14] Just who is such a third person is not defined by the statutes, although there are some provisions which bear upon the point.

An important decision of the supreme court interpreting the statutes held that a fellow employee engaged in the scope of his employment is not a "third person" and not subject to a common-law action by an injured employee.[15]

In the case of *Pierce v. United States*,[16] it was held that the United States may be subjected to third-party suits under the Federal Tort Claims Act,[17] despite the fact that the injured workman had received

11. TENN. CODE ANN. § 50-914 (Supp. 1963).
12. Millican v. Home Stores, Inc., 197 Tenn. 93, 270 S.W.2d 372 (1954).
13. Sturkie v. Bottoms, 203 Tenn. 237, 310 S.W.2d 451 (1958).
14. TENN. CODE ANN. § 50-914 (Supp. 1963).
15. Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 328 (1954). For contrary authority in other jurisdictions, see Martin v. Theockary, 220 F.2d 900 (5th Cir. 1955). A physician selected by the employer may not be deemed a fellow employee and may therefore be subject to a common-law action. Garrison v. Graybeel, 202 Tenn. 567, 308 S.W.2d 375 (1957).
16. 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956).
17. 28 U.S.C. § 1346 (1958).

benefits under the state workmen's compensation law. The holding seems perfectly proper, inasmuch as there is no limitation in the Tennessee law or in the FTCA upon the point. Liability was imposed upon the United States as landowner for violation of a "non-delegable" duty toward employees of a contractor in connection with high-tension electric wires.

One of the leading Tennessee cases upon the subject, as well as upon the general topic of landowner liability, is *International Harvester Co. v. Sartain.*[18] Although it arose before the 1949 third-party statute was enacted, its interpretation of the workmen's compensation statutes is still quite important. In that case International Harvester as landowner let several independent contracts in connection with the construction of a building upon its premises. An employee of a subcontractor was seriously injured when he came into contact with a high-tension electric line which had allegedly been improperly located by one of the prime contractors. The injured workman was permitted to maintain a common-law action for damages against both the landowner and the separate contractor—the latter not being in the "chain" of contract with plaintiff's employer so as to be "insulated" from tort liability under other provisions of the compensation act. The landowner was held liable upon the basis of violation of a "non-delegable" duty to the injured man, and the contractor for its negligence in locating the uninsulated power line.

There have been several other cases in Tennessee in which landowners have been held liable to employees of contractors or subcontractors upon the theory that such persons are invitees and are entitled to the benefit of certain duties by the landowner in making the premises safe for work.[19]

There are obvious limits to such liability, however. One well-recognized limitation is that a landowner normally has no duty to make safe for a contractor or his employees the very thing or condition which the injured worker is engaged to repair or build.[20] And of course the landowner-defendant may also have the benefit of the usual defenses in tort actions, such as lack of negligence on his part or contributory negligence by the plaintiff.[21]

18. *Supra* note 4.

19. *E.g.*, Bowaters So. Paper Corp. v. Brown, 253 F.2d 631 (6th Cir. 1958) (employee of independent contractor); Shell Oil Co. v. Blanks, 46 Tenn. App. 539, 330 S.W.2d 569 (E.S. 1959) (painter injured when steel pole on owner's premises collapsed while being painted; defect in pole known to owner but not to painter or his employer who had the painting contract).

20. See Shell Oil Co. v. Blanks, *supra* note 19; Annot., 31 A.L.R.2d 1375 (1953); RESTATEMENT (SECOND), TORTS § 422 (Tent. Draft No. 7, 1962).

21. Cart v. Coal Creek Mining & Mfg. Co., 153 F. Supp. 330 (E.D. Tenn. 1957); Monday v. Reed, 47 Tenn. App. 656, 341 S.W.2d 755 (E.S. 1960).

Further, the compensation act itself has long provided that principal or intermediate contractors and subcontractors are liable for compensation benefits to the employees of their subcontractors injured while "engaged upon the subject-matter of the contract."[22] Liability is imposed upon such contractors to the same extent as upon the immediate employer. The statute applies only to injuries which occur "on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management."[23] Obviously, since such contractors have liability under the compensation law,[24] they are not "third parties" subject to common-law actions.[25]

As pointed out above, a landowner frequently is deemed a third party, subject to common-law actions. It is entirely possible, however, for a landowner to be deemed a "contractor" or "principal contractor," so as to be liable for compensation benefits to an injured employee,[26] and by the same token to be shielded from tort liability to such employee.[27] Ordinarily the landowner is not so shielded, but if he is engaged in the "building business," he may be deemed to be a contractor, so that the exclusive remedy of an injured worker would be under the compensation law.[28] Of course, in view of the unlimited exposure in common-law tort actions, this may be a desirable result from the standpoint of the defendant; and it is entirely possible that many employers would prefer to be held "contractors" with the limited exposure of compensation benefits, than to be deemed "third persons" subject to tort actions.

Other instances of third-party actions are found in common-carrier cases. In several cases the shipper of goods has been held liable to employees of carriers for negligence of the shipper in stowing a cargo for carriage.[29] As hereinafter pointed out, however, the shipper may

22. TENN. CODE ANN. § 50-915 (1956).

23. *Ibid.* An important construction of the term "premises" is found in Davis v. J & B Motor Lines, 193 Tenn. 233, 245 S.W.2d 769 (1951), where a highway was held to constitute the premises for a hauling contract.

24. Bowling v. Whitley, 208 Tenn. 657, 348 S.W.2d 310 (1961) (prime contractor liable for compensation benefits to employee of subcontractor even though latter had too few employees to be subject to compensation law).

25. Adams v. Hercules Powder Co., 180 Tenn. 340, 175 S.W.2d 319 (1943).

26. Clendening v. London Assur. Co., 206 Tenn. 601, 336 S.W.2d 535, *rehearing denied*, 206 Tenn. 613, 337 S.W.2d 693 (1960).

27. Billings v. Dugger, 362 S.W.2d 49 (Tenn. App. M.S. 1962).

28. In the case of Rutledge v. Burrum (Tenn. 1962, unreported), the Tennessee Supreme Court carried to extreme lengths the concept of "contractor." The court held that the defendant, who was building a home for himself and not for sale, and who was acting as his own "contractor," was liable for compensation benefits to a workman injured on the job. Two of the justices dissented, and on petition for rehearing the court reversed itself and dismissed the suit, withdrawing from publication its origiual opinion.

29. General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir.), *rehearing denied*, 272

be able to obtain indemnity from the carrier-employer in such cases, thus shifting the burden of tort liability to the latter.

II. Indemnity Actions by Third Persons Against Employers

The Tennessee Workmen's Compensation Act contains an "exclusive remedy" provision similar to that found in many such acts, providing that the statutory compensation benefits shall "exclude all other rights and remedies" of an injured employee or his dependents, "at common law or otherwise," on account of the injury or death of the employee.[30]

By the terms of an amendment in 1961, the exclusive remedy provisions apply to a minor "whether lawfully or unlawfully employed."[31] This amendment would seem to shield an employer from common-law liability to minors employed in violation of the various child labor statutes, and at the same time assure such minors of workmen's compensation benefits.

Under the terms of this provision, it has been held that the wife of an injured workman may not recover from the employer for loss of consortium of her husband.[32] The Tennessee Supreme Court expressed doubt as to the existence of such an action at common law in this state, but held that no such right could be exercised in any event against an employer operating under the compensation act.

Despite the existence of the "exclusive remedy" provisions of various state compensation acts, however, it has been held that such statutes may not operate to deprive injured employees of "federally-created" rights under various federal statutes, or in admiralty.[33]

One of the most important problems in connection with the exclusive remedy provision is whether this statute shields the employer from actions for contribution or indemnity by third parties who have first been held liable in tort to injured employees.[34] Such liability of the employer may be claimed by reason of a contractual relationship between the employer and the third person (indemnity by express or implied contract); or it may be claimed by reason of statutory or common-law principles, such as a statutory right of contribution among tortfeasors, or legal indemnity by reason of an alleged active-passive tortfeasor relationship. It is obvious that if the employer is required to reimburse the third party, wholly or in part, then to that extent the

F.2d 624 (4th Cir. 1959), *cert. denied*, 361 U.S. 964 (1960). The opinion of the district court is reported at 170 F. Supp. 698 (W.D. Va. 1959).

30. Tenn. Code Ann. § 50-908 (Supp. 1963).

31. Tenn. Code Ann. § 50-908 (Supp. 1963).

32. Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952).

33. See, *e.g.*, Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962); Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D. La. 1962).

34. See Note, 13 Vand. L. Rev. 772 (1960); 4 Vand. L. Rev. 379 (1951).

burden of a tort judgment is being shifted to the employer. Indirectly he is being made to pay for his employee's injuries in a manner different from that specified in the workmen's compensation statutes.

Although the Tennessee appellate courts have not themselves passed upon the question of an employer's liability to third persons despite the exclusive remedy feature of the Tennessee statutes, there has been an important construction of the Tennessee law by the United States Court of Appeals for the Fourth Circuit. In *General Electric Co. v. Moretz*,[35] it was held that the exclusive remedy provision does not shield the employer from liability; he may have to indemnify third persons by reason of contractual relationships between him and the latter.

In the *Moretz* case, a shipper of goods was held liable to a truck driver injured when the cargo shifted in transit and caused an accident. Liability was imposed because of negligence of the shipper in loading the cargo. The injured employee had received workmen's compensation benefits from the trucking company's insurer. The latter intervened and asserted its subrogation lien in the third-party action of the employee against the shipper. The shipper then sought and obtained indemnity from the trucking company on the theory that the contract of carriage had implicit in it an obligation of the trucking firm to indemnify the shipper. By accepting the cargo for carriage, the carrier was said impliedly to have contracted to see that it was properly loaded and safe for the journey. The primary burden of seeing that this was done was held to rest upon the carrier. Therefore full indemnity was allowed to the shipper against the carrier. The court expressly disallowed the carrier's claim that its exclusive liability was fixed by the Tennessee compensation law.[36]

Of course, the United States Supreme Court has for several years been broadening the scope of employer liability to indemnify third persons who have been held liable to injured workers. Through the device of implying a contract of indemnity from an agreement to do a job in a workmanlike manner, the Court has readily imposed upon stevedoring companies an obligation to indemnify shipowners held liable to stevedore employees, and has declined to shield an employer from such liability merely because the employer's liability to his own employee is exclusively fixed in a compensation statute.[37] The *Moretz*

35. *Supra* note 29.

36. Reversing the lower court on this point. See the district court opinion, 170 F. Supp. 698 (W.D. Va. 1959).

37. See, *e.g.*, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). In later cases the duty to indemnify has been extended to third persons not in direct privity of contract with the employer. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423 (1959). For possible limits on the obligation to indemnify, however, see Atlantic &

case seems consistent with these holdings and will probably be followed by the Tennessee courts.

Further, there has been a noticeable trend in recent years in the interpretation of indemnity or hold-harmless agreements. Liability is being readily imposed in many cases under such agreements where it was denied in earlier years. Such agreements are found in nearly every major construction contract. Formerly an indemnity agreement was interpreted so as to make the indemnitor liable only when his own negligence or fault caused loss to the indemnitee.[38] The indemnitor was usually not required to reimburse the indemnitee for the consequences of the latter's own negligence unless the contract so specified in clear terms. More recently, however, courts have been inclined to impose liability upon an indemnitor under an indemnity agreement, whether the loss resulted from his own or from the indemnitee's fault, or from both.[39] The *Ryan, Moretz,* and related cases discussed above may be regarded as part of this broader trend. In many cases where the employer is made to respond to a third party, the third party has first been found negligent toward an injured employee. He is then allowed to recover from the employer under an express or implied indemnity agreement, despite the third party's own antecedent and causative negligence; he is being indemnified in such instances against his own negligence by virtue of his contract with the employer.

In general, there has not been the same tendency to impose indemnity liability upon employers under tort principles as has been found in the field of contractual indemnity. It is well settled in Tennessee, for example, as in several other states, that a "passive" tortfeasor can recover full indemnity from an "active" joint tortfeasor.[40] It might be possible, therefore, for a "passive" third party who had been held liable to an employee to seek indemnity from an employer on the theory that the latter was an "active" joint wrongdoer. This might be asserted where there was no indemnity contract or perhaps as an alternative theory of liability. The tendency here, however, has been to hold the employer shielded from liability by the "exclusive

Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962) (where owner's fault found by jury to have caused injury and not to have been attributable to any breach of contractual duty by stevedoring company, owner held not entitled to indemnity).

38. See generally 27 Am. Jur. *Indemnity* § 15 (1940); *id.* (Supp. 1963); Annot., 175 A.L.R. 12, 18, 37 (1948).

39. See, *e.g.*, Alamo Lumber Co. v. Warren Petroleum Corp., 316 F.2d 287 (5th Cir. 1963), *affirming* Maeon v. Warren Petroleum Corp., 202 F. Supp. 194 (W.D. Tex. 1962); Southern Natural Gas Co. v. Wilson, 304 F.2d 253 (5th Cir. 1962); Spence & Howe Constr. Co. v. Gulf Oil Corp., 365 S.W.2d 631 (Tex. 1963). See also General Acc. Fire & Life Assur. Corp. v. Smith & Oby Co., 272 F.2d 581 (6th Cir. 1959), *rehearing denied,* 274 F.2d 819 (6th Cir. 1960).

40. Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933).

remedy" features of compensation statutes.[41] The same result has been reached generally where contribution, rather than indemnity, has been sought from the employer.[42] At the present time, therefore, the employer's principal risk of "back-door" liability seems to lie in the field of contract rather than tort, though it must be remembered that the courts are far from loathe to imply a promise to indemnify.

III. Liability of Joint and Successive Employers

The Tennessee statutes expressly provide for apportionment of workmen's compensation benefits among joint employers of an injured workman.[43] Where, however, there are successive employers, and the injured workman sustains injury while in the employment of both, the Tennessee Supreme Court has expressly declined to allow contribution or apportionment between the two employers.[44] The last employer is held in such cases to take the employee as he finds him, and is liable for any aggravation or reinjury without any sharing of responsibility by former employers.[45] Of course, the principle of apportionment or contribution is denied by statute in occupational disease cases.[46]

A seldom-tapped but useful resource in limiting the exposure of a second employer under the Tennessee Workmen's Compensation Act is the Second Injury Fund.[47] The statute creating the fund refers to the loss of or loss of use of "another member" by an employee who has previously suffered the loss of or loss of use of a hand, arm, foot, leg, or eye. The second injury must result in total permanent disability. In a recent decision, however, the Tennessee Supreme Court held that the second "member" may consist of the back or other portion of the body than those listed in connection with the first injury.[48] Possibly the decision will make more readily available the resources of this fund, which has accumulated to sizeable proportions but which is rarely used.

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41. 2 Larson, Workmen's Compensation Law § 76.10 (1961); Note, 13 Vand. L. Rev. 523, 539 (1960).

42. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); Annot., 53 A.L.R.2d 977 (1957); Note, 13 Vand. L. Rev. 772, 782 (1960). For cases on contribution among tortfeasors generally in Tennessee, see Huggins v. Graves, 210 F. Supp. 98 (E.D. Tenn. 1962); Davis v. Broad Street Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950).

43. Tenn. Code Ann. § 50-1012 (1956).

44. Baxter v. Smith, 364 S.W.2d 936 (Tenn. 1962).

45. In an earlier decision the Tennessee Supreme Court had imposed "joint and several" liability upon successive employers in connection with an eye injury. J. E. Greene Co. v. Bennett, 207 Tenn. 635, 341 S.W.2d 751 (1960). The *Baxter* case appears to modify, if not to overrule entirely, the earlier case.

46. Tenn. Code Ann. § 50-1106 (1956).

47. Tenn. Code Ann. § 50-1027 (1956).

48. Stovall v. General Shoe Corp., 204 Tenn. 358, 321 S.W.2d 559 (1959).