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Torts—1961 Tennessee Survey (II)

*John W. Wade**

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The twenty tort cases decided during the shorter survey period this year all involved negligence actions.[1] Most of the cases involved the application of established rules or standards to new fact situations, some of them being fairly routine. Only two cases were of striking significance.[2]

I. Duty—Vendor-Vendee Relationship

The only case presenting a duty problem probably is the only case presenting a new development. *Belote v. Memphis Development Co.*[3] raised the question of the duty owed by the vendor of a new house to a

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1. The case of State v. Guinn, 347 S.W.2d 44 (Tenn. 1961), was a prosecution for criminal libel, but the holding that charging a district attorney with "Hitler-like tactics" is libel per se would be relevant to a civil action for defamation. The case of Carne v. Maryland Cas. Co., 346 S.W.2d 259 (Tenn. 1961), discussed in text accompanying note 64 *infra*, might possibly be treated as a fraud action rather than one in negligence.
2. Belote v. Memphis Dev. Co., 346 S.W.2d 441 (Tenn. 1961), discussed in text accompanying note 3 *infra*; Justus v. Wood, 348 S.W.2d 332, *aff'd on second rehearing*, 349 S.W.2d 793 (Tenn. 1961), discussed in text accompanying note 21 *infra*.
3. 346 S.W.2d 441 (Tenn. 1961).

purchaser. Following the early case of *Smith v. Tucker*,[4] the Tennessee court has consistently held against repeated attacks that the vendor is under no duty to use care to make the property safe or to warn of a defective condition.[5] *Belote*, however, indicates a break in the hitherto impregnable wall. Defendant had built a house, covering up a ceiling hole for an attic fan with a piece of plywood so that it could not be seen and the daughter of the purchaser fell through it. The lower court granted a directed verdict on the basis of *Smith v. Tucker*, but the supreme court reversed on the basis of section 353 of the *Restatement of Torts*, which provides that a vendor who "conceals or fails to disclose" a dangerous condition is subject to liability if he "knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk."[6]

The new rule is a wholesome development because, as the court itself puts it, "this exception . . . certainly is reasonable and just . . . ,"[7] and it is also more consistent with the advanced position of the Tennessee court in the landlord and tenant situation.[8]

II. Standard of Care—Infants

Bailey v. Williams[9] involves the standard of care required of an infant. Defendant, a 7-year-old boy, threw a piece of wire at a spider; it hit the 8-year-old plaintiff in the eye, putting it out. There was a jury verdict for the defendant below, based on the court's instruction that he was "presumed to be incapable of negligence, and the burden is on these plaintiffs to overcome that presumption by showing that . . . the defendant, had the capacity to be negligent, depending upon his mental development, his experience, his ability to reason and think, and all other circumstances . . . ."[10] The instruction was held correct and the verdict was affirmed.[11]

4. 151 Tenn. 347, 270 S.W. 66 (1925).

5. See Evens v. Young, 196 Tenn. 118, 264 S.W.2d 577 (1954); McIntosh v. Goodwin, 40 Tenn. App. 505, 292 S.W.2d 242 (W.S. 1954). And see the criticism of the *Evens* decision in Wade, *Torts—1954 Tennessee Survey*, 7 Vand. L. Rev. 951, 968-69 (1954); Trautman & Kirby, *Real Property—1954 Tennessee Survey*, 7 Vand. L. Rev. 921, 930-34 (1954); Comment, 24 Tenn. L. Rev. 1170 (1957).

6. Restatement, Torts § 353 (1934). The provision has been slightly broadened in the new *Restatement*. See Restatement (Second), Torts § 353 (Tent. Draft No. 5, 1960).

7. 346 S.W.2d at 443. For a recent, very thorough treatment of the whole problem, see Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1961). Mr. Bearman was counsel for the defendant in the *Belote* ease.

8. See note 45 *infra* and accompanying text.

9. 346 S.W.2d 285 (Tenn. App. E.S. 1960).

10. *Id.* at 287.

11. For discussion of the prior Tennessee authorities, sec Wade, *Torts—1953 Tennessee Survey*, 6 Vand. L. Rev. 990, 995-96 (1953).

III. NEGLIGENCE PER SE—TRAFFIC CASES

Tennessee follows the majority view that violation of a criminal statute is normally to be treated as negligence per se.[12] Under this view, the jury is not given the usual standard of what a reasonable prudent person would do under like circumstances but is told that conduct which is in violation of the statute is negligent. Problems arise in interpreting the language of the statute and in determining whether the statute is to be treated as a safety measure and whether it was intended to protect the class of persons to which the plaintiff belongs against the type of danger which came to pass.[13]

Three cases during the survey period involved the doctrine. They are all traffic cases, and they illustrate most of the problems. *Smith v. Murphy*[14] involved a car collision at an intersection, each party suing the other. The statute provided that when two vehicles enter an intersection at approximately the same time the driver of the vehicle on the left shall yield the right-of-way.[15] The court construed the phrase, "at approximately the same time," to apply "'when it would appear to a person of ordinary prudence . . . that if the two continued on their respective courses, at the same rate of speed, a collision would be likely to occur,'" so that the "'question does not necessarily depend upon which vehicle enters the intersection first.'"[16] It was therefore held to be error to direct a verdict against the driver of the car on the right.

In *Borden v. Daniel*,[17] the statute prohibited stopping a car upon the paved part of a highway when it was practical to have the vehicle completely off the paved part and required in any event that the unobstructed width of the highway be at least eighteen feet.[18] Defendant, a rural mail carrier, stopped at a mailbox as far off the road as he could get because of the mailbox; his left wheels were still on the pavement and there were only fifteen feet of unobstructed highway. While defendant was selling stamps to a girl who had been holding plaintiff, a 4-year-old boy, by the hand, the girl let plaintiff go. Plaintiff walked down the road a little way and started across it, when another car, coming from behind the defendant, ran over him.

The court held for the defendant on two grounds. (1) It construed

12. See, *e.g.*, Wise & Co. v. Morgan, 101 Tenn. 273, 48 S.W. 971 (1898).

13. See generally 2 HARPER & JAMES, TORTS § 17.6 (1956); PROSSER, TORTS § 34 (2d ed. 1955); RESTATEMENT (SECOND), TORTS §§ 286, 288 (Tent. Draft No. 4, 1959).

14. 346 S.W.2d 276 (Tenn. App. E.S. 1960).

15. TENN. CODE ANN. § 59-828 (1956).

16. 346 S.W.2d at 278, quoting Shew v. Bailey, 37 Tenn. App. 40, 49, 260 S.W.2d 362, 366 (E.S. 1951). Cases on right-of-way at an intersection are collected in Annot., 175 A.L.R. 1013 (1948).

17. 346 S.W.2d 283 (Tenn. App. E.S. 1960).

18. TENN. CODE ANN. § 59-859 (1956).

the statute as not applying to a "mail carrier engaged in the discharge of his duties" who stops "as far off the paved portion of the highway as he can get."[19] (2) It held that the statute, while intended as a safety measure, "was not aimed at the protection of pedestrians."[20]

The third case, *Justus v. Wood*,[21] is the one which gave the supreme court the most trouble during the survey period. There was a vigorous dissenting opinion and separate opinions were written on two petitions to rehear.

Defendant had left his car parked on a highway, leaving the ignition unlocked and the keys in it. The car was stolen by one Lane, who four hours later ran into the plaintiff. Lane was intoxicated and was driving at a very high speed, trying to elude a highway patrolman who was chasing him for a traffic violation and did not know of the theft. The trial court sustained a demurrer to the declaration, relying on *Teague v. Pritchard*,[22] decided by the court of appeals in 1954.

At common law the majority rule is clearly in accord with the holding in the *Teague* case.[23] But in the meantime there had been enacted in Tennessee the Uniform Vehicle Code. The Tennessee Code now provides:

> No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.[24]

Judge Swepston, dissenting, thought that the statute should make no difference. He called attention to the fact that the section as originally drawn had in it the phrase "removing the key" after the word "ignition" and that this had been stricken by amendment.[25] Thus, he argued, the statute, as enacted, must not have been intended by the legislature to prevent theft by an adult, since it must have realized that a thief would easily be able to start the car without the key. The point is not an easy one, since it is hard to understand what the legislature had in mind in

19. 346 S.W.2d at 285. The court took "judicial notice of the custom, if not necessity, for mail carriers to stop under such circumstances to discharge their official duties and that usually no adequate pull-off space is provided." *Ibid.*

20. *Ibid.*

21. 348 S.W.2d 332, *aff'd on second rehearing*, 349 S.W.2d 793 (Tenn. 1961), 29 TENN. L. REV. 468 (1962).

22. 38 Tenn. App. 686, 279 S.W.2d 706 (W.S. 1954); *cf.* Morris v. Bolling, 31 Tenn. App. 577, 218 S.W.2d 754 (E.S. 1948) (liability imposed at common law when intoxicated passenger left in car).

23. Cases are collected in Annot., 51 A.L.R.2d 633 (1957). See especially Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).

24. TENN. CODE ANN. § 59-863 (1956).

25. 348 S.W.2d at 336, citing TENNESSEE SENATE JOURNAL 1056 (1955). The *Senate Journal* entry simply records the action without giving any reasous. The section in the Uniform Vchicle Code, from which this section was taken, has in it the total phrase, "locking the ignition and removing the key."

striking the phrase or what it thought the omission might accomplish.[26] The majority opinion entirely disregards this problem, however, and treats the case as if the phrase were still in the Tennessee statute, citing cases with such a statute as being directly in point.

Assuming that the majority is correct in its interpretation of the modified statute, and that it is to be construed as if it read, "locking the ignition and removing the key," there still remains the question as to the effect of the statute when a thief takes the car and injures a third party. A number of courts have treated the problem as solely one of proximate cause and have held that the intervening criminal act of the thief cuts off liability.[27] But in cases of violation of a criminal statute the most helpful way of approaching this problem is to contemplate the purpose in enacting the statute. Was it a safety statute? If so, what class of persons was it intended to protect against what hazards?[28] Some courts have suggested that the statute was intended only to prevent theft of the car—to save the loss by the owner and the expenditure of money by the police in trying to recover it.[29] On the other hand, the statute is in the middle of a safety code,[30] and most of the phrases in the particular section itself have to do with preventing the improper starting of the car by careless or irresponsible persons, children or thieves.[31] It is important to remember that a statute may have more than one purpose.[32] The section could well have been drafted both to save the owner from his loss and to prevent the traffic

26. Locking the ignition and leaving the key in would eliminate no hazard at all. Perhaps the ignition should not be regarded as locked if the key was still in it, but this would not explain the legislative action.

Of course if it could be shown that the thief would have taken the car whether it had the keys in it or not, because of his skill in short-circuiting the ignition, then failure to lock the ignition or remove the key was not a cause in fact of the theft under the principle of *causa sine qua non*.

27. See, *e.g.*, Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So. 2d 243 (1956); Hersh v. Miller, 169 Neb. 517, 99 N.W.2d 878 (1959). Additional cases are found in Annot., 51 A.L.R.2d 633, 662 (1957).

28. In addition to the authorities cited at note 13 *supra* see Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949).

29. See, *e.g.*, Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945).

30. In the Uniform Vehicle Code, this is section 11-1101. This is in the middle of chapter 11, entitled "Rules of the Road," and all of the sections in it are devoted to setting out safety measures. The Tennessee act is taken from the Uniform Vehicle Code. As the court indicates on the second petition to rehear, the "legislature in enacting this statute provided in the very first sentence of the caption of the Act that the purpose of this Act is 'to promote highway safety by regulating the operation of vehicles in Tennessee . . . .' Pub.Acts 1955, c. 329." 349 S.W.2d at 794.

31. If the car had been started by a young child, or by sky-larking teenagers taking it for a joy ride, there would have been no difficulty in finding that the statute was a safety measure, passed to prevent people from being hurt by incompetent or reckless driving. Should the court engraft a judicial exception to the statute in case of an adult thief when there is no language in the statute to base it on?

32. See, *e.g.*, Hines v. Foreman, 243 S.W. 479, 483-84 (Tex. Comm'n App. 1922), discussing the several purposes involved in a statute prohibiting a muffler cut-out.

hazard created when a thief seeks to make a getaway with a stolen vehicle. The remarkably large number of reported cases in the appellate courts involving an action against an owner when a thief stole a car with the key in it and promptly injured another party, indicate that this is a real hazard. The Uniform Vehicle Code has been carefully drafted and revised by the National Committee on Uniform Traffic Laws and Ordinances, and there is every reason to believe that they had this traffic hazard in mind.[33]

If this is true, then in the case where the thief injures a person while seeking to make his getaway, especially if being chased by the police, there should be liability. A hazard which the statute was enacted to avert has materialized, and there is no reason to talk about proximate cause or intervening criminal acts. The intervening criminal act was one of the hazards motivating the passage of the statute.

This reasoning, followed by several courts,[34] would indicate that liability is proper in the thief case. So the majority held in the *Justus* case. But it still reached an unusual result, somewhat inconsistent with previous Tennessee authority. Tennessee follows the negligence per se rule. If the criminal statute is applicable, the jury is told that violation of it is negligence within itself, and the jurors have only to decide whether the defendant violated the statute. In the *Justus* case, however, the court appears to be holding that the issue must be submitted to the jury whether the defendant was reasonable in leaving the car unlocked with the key in—whether he might reasonably have anticipated that the thief would have stolen the car and run into the plaintiff.[35] This sounds as if the court is adopting the evidence-of-negligence rule under which the jury has the function of determining whether the defendant's conduct was reasonable, and it is told to consider the existence of the criminal statute as only one of the circumstances of the case. This is distinctly a minority rule, not heretofore followed in Tennessee, and I think it unlikely that the court here really intended to abandon the established doctrine of negligence per se.

One further question remains in the *Justus* case, perhaps the most difficult one. The accident occurred four hours after the thief had stolen the car. Can lapse of time be regarded as sufficient to take the case outside the

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33. The phrase, "locking the ignition and removing the key," was not in the original Uniform Vehicle Code, but was added in 1934 to what is now section 11-1101 of the code. Minutes of the National Committee on Uniform Traffic Laws and Ordinances do not set forth a reason for the addition, but several members of the committee have indicated their understanding that one of the reasons for the addition was the promotion of traffic safety.

34. See, *e.g.*, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954), 8 VAND. L. REV. 151 (1954).

35. There is language in several places appearing to indicate this. See, *e.g.*, 348 S.W.2d at 335, 338; 349 S.W.2d at 794.

hazard which the statute was intended to avert—or, as it is often put, to break the chain of causation? Of course the answer is in the affirmative if there is sufficient lapse of time. If the thief had run into the plaintiff four weeks instead of four hours after stealing the car, no court would be likely to hold liability on the part of the defendant. Where should the line be drawn? Clearly it should include the situation where the thief is trying to make his getaway.[36] Perhaps it should be expanded to include the whole period from the time the thief takes the car until he parks it and leaves it for a while. But it would often be difficult if not impossible for the plaintiff to prove either of these matters, and it might be better to draw a more arbitrary line, but one which could be more easily proved—say, the same day, or a period of twenty-four hours. And, if this seems too arbitrary, it is still possible to select a more flexible standard and to lay down a formula that the defendant will be liable for an accident occurring within a reasonable period after the thief takes the car.[37] What is a reasonable time might be determined by the court or by the jury, and might depend upon various circumstances introduced in proof. Perhaps this is what the majority of the supreme court had in mind when it held that a jury question was presented in the *Justus* case. On an interpretation of this nature, the case would be more easily reconciled with previous authority in the state on the subject of negligence per se.

IV. Automobiles

In addition to the three cases on negligence per se, there are several others involving alleged negligence in the operation of an automobile. *Williams v. Jordan*[38] produced a split in the supreme court. Defendant parked his car on a parking space at the side of a street, went into a house

36. The court in the instant case quotes the following from a law review discussion: "[M]uch depends on whether the injury was sustained during the course of the flight of the thief, or after he made his getaway. This point . . . may well be a determining factor. If the operator of a motor vehicle is negligent in making his vehicle easy to steal, then does not the owner likewise create a risk that the thief will be under fear of apprehension until the theft is consummated; that he will be excited and perhaps even panic-stricken due to the fear of capture; and that his state may well cause him to drive poorly and perhaps even recklessly until he is well away from the scene of the theft?" 348 S.W.2d at 334, quoting from 24 Tenn. L. Rev. 395, 397 (1956), commenting on Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (W.S. 1954). In Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948), the court indicated that if liability is to be imposed at all it should go no further than in the case of the getaway.

37. As in the case of time, similar positions might be taken regarding geographical distance. It might be in the same city or same part of the city, or a reasonable distance away. In Liberto v. Holfeldt, 221 Md. 62, 155 A.2d 698 (1959), both time (five days) and distance ("a considerable distance across the city") were involved, and the court held no liability.

38. 346 S.W.2d 583 (Tenn. 1961), 29 Tenn. L. Rev. 472 (1962).

across the street, stayed about five minutes, then came back, got into the car and drove off. At the time he parked there were children playing in the yard on that side of the street some distance away and a mother and child were on the porch of the house. It developed that a 13-month-old boy had crawled under the car, and he was killed as it was driven off. Plaintiff obtained a verdict in the trial court; but the supreme court reversed and dismissed the case on the ground that there was not sufficient evidence of negligence to go to the jury, since there was no reason to anticipate children in the immediate vicinity of the car. A dissenting opinion stressed the fact that defendant had seen that there were children not too far away and urged that he was under a duty to use care to see that none were around when he drove off. The two opinions discuss similar cases from all parts of the country.

In *Pickett v. Murphy*,[39] the court again reversed a jury verdict for the plaintiff and held that there was not sufficient evidence to go to the jury. The case involved a collision between two trucks engaged in hauling for highway construction. The colliding trucks were going in opposite directions and each was trailing another truck in front of it. The opinion analyzed the evidence in detail and "concluded that there is no more than a scintilla of evidence to support the verdict for the plaintiff."[40]

On the other hand a jury verdict for the plaintiff was upheld in *Colwell v. Jones*.[41] The case involved a fact situation suitable for a comic strip if it had not resulted in tragedy. Deceased was standing about four feet behind a truck which was stalled in the middle of a narrow country road. Defendant came around a curve over 100 feet in front of the truck and saw it and the plaintiff; but instead of trying to stop he drove off the side of the road into a lespedeza field. Apparently at the same time plaintiff, seeing that defendant was not going to stop, jumped off the side of the road and ran into the field, too. The car struck him and injured him severely so that he lived in a paralyzed condition for a year and then died. A verdict for $10,000 was sustained.

In *O'Keefe v. Walker*,[42] involving a collision at an intersection, a jury verdict for the defendant was affirmed.

V. Animals

In *Grace Provision Co. v. Dortch*,[43] defendants were held liable for negligence in allowing a bull to escape from a slaughter house and to injure the plaintiff. The evidence of negligence held sufficient for the jury

39. 346 S.W.2d 579 (Tenn. 1961).
40. *Id.* at 582.
41. 346 S.W.2d 450 (Tenn. App. M.S. 1960).
42. 350 S.W.2d 295 (Tenn. App. W.S. 1961).
43. 350 S.W.2d 409 (Tenn. App. M.S. 1961).

verdict included the following: The bull escaped from the scales pen and got into a building, where it was chased from room to room without closing an open door through which it escaped again. Defendant shot at it with a .22 rifle, which merely made it angry. After it was caught in an area surrounded by a wire fence, more shots with the .22 rifle caused it to lunge at the top of the fence, ride it down and escape again. An employee of the defendant then ran into the bull twice with an automobile, knocked it down but failed to stop it. Running down the street, the bull tossed the plaintiff. After this, it was killed with a high powered rifle. Defendant kept on hand no rope, chains or other equipment to capture escaped animals.

The animal in *Fortune v. Holmes*[44] was a riding horse which threw plaintiff while she was receiving her first lesson in riding. There was conflicting testimony as to whether the defendant should have used a snaffle bit rather than a curb bit for a beginner; there was also testimony that the instructor gave improper instructions in telling plaintiff to kick the horse to show who was boss, and that he should have provided a lead rope after the horse once reared up. A jury verdict for the plaintiff was affirmed.

VI. LANDLORD AND TENANT

In *Grizzell v. Foxx*,[45] plaintiff, a tenant in an apartment building owned by defendant, was going from the building to the garage in the rear when she slipped and fell on snow and ice. A jury verdict for plaintiff was affirmed. The court reiterated the Tennessee position that a landlord has a duty to use reasonable care to keep common passageways in good repair and safe condition; and while it recognized that there is a split of authority as to whether this duty applies to snow and ice, it aligned itself with the cases holding that the duty does apply.

Evensky v. City of Memphis[46] appears to suggest, though not clearly to hold, that a landlord is not liable for a dangerous condition of the premises created by an independent contractor in working on them.

VII. BAILMENTS

In *Southeastern Steel & Tank Maintenance Co. v. Luttrell*,[47] defendant hired plaintiff to weld the water jacket on a large air compressor. Defendant indicated that his employee had made the compressor ready for welding. Actually the crank case had not been drained and had inflammable material in it, and the oil pump had been removed from the engine block,

44. 348 S.W.2d 894 (Tenn. App. W.S. 1960).
45. 348 S.W.2d 815 (Tenn. App. E.S. 1960).
46. 350 S.W.2d 76 (Tenn. App. W.S. 1961).
47. 348 S.W.2d 905 (Tenn. App. E.S. 1961), 29 TENN. L. REV. 460 (1962).

leaving an opening into the crank case. While plaintiff was doing the welding, his torch ignited the inflammable gases and the explosion caused serious injury to him. A jury verdict for plaintiff was affirmed, on the ground that the defendant could have been found negligent in failing to make the machine safe or to warn plaintiff of the danger.

VIII. PROFESSIONAL SERVICES

Redwood v. Raskind[48] involved a so-called malpractice action against a neurosurgeon. Defendant performed a disc surgery operation on plaintiff, after which an orthopedic surgeon fused two vertebra together. Plaintiff continued to have serious trouble with his legs over several years and was treated unsuccessfully by other doctors. Finally another neurosurgeon performed an exploratory operation and found an extruded piece of material from the disc on the other side from that on which defendant had operated. The removal of this material eliminated the pain, but the muscles to the foot had become atrophied. There was testimony to the effect that this extraneous material could not have gotten there as a result of the operation performed by defendant on the left side. A directed verdict for defendant was affirmed. The court held that there was no showing of negligence or lack of skill on the part of the defendant. At most, defendant was guilty of an erroneous diagnosis of the cause of the trouble, but other doctors who treated the plaintiff had experienced the same difficulty. In declaring that "the law credits the medical practitioner with the presumption that he has discharged his full duty,"[49] the court is apparently intending to say no more than that the plaintiff has the burden of proving negligence on the part of the defendant. Surely it does not mean that the plaintiff must not only meet this burden but must also offer additional evidence to rebut a presumption.[50]

In connection with the burden of proving negligence in an action for negligence in rendering services, the case of *Evensky v. City of Memphis*[51] is interesting. A secondhand gas-fired, electrically operated ceiling heater had been installed by a plumber and connected by an electrician. It had proved defective in operation, and plaintiff had both parties inspect it. After inspection, each declared that his part of the work was satisfactory, but the heater continued to give defective service and soon burned a store down on a holiday. The court held that a directed verdict for the defendants was proper. It said that

48. 350 S.W.2d 414 (Tenn. App. W.S. 1961), 29 TENN. L. REV. 464 (1962).
49. *Id.* at 417, citing Young v. Dozier, 4 Tenn. App. 148 (M.S. 1926).
50. On negligence actions against doctors in general, see McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959), in PROFESSIONAL NEGLIGENCE 13 (Roady & Anderson, eds. 1960).
51. 350 S.W.2d 76 (Tenn. App. W.S. 1961).

> even if we were to assume that, as between themselves, one or the other of them was negligently responsible for the manner in which the heater operated, and that such faulty operation was the proximate cause of the fire . . . the evidence would not establish, as between the two of them, which, if either of them, was responsible for the faulty operation of the heater. In that situation, a verdict against either of them would have been based on guess work or speculation, which the authorities in this State do not permit.[52]

The situation here is to be distinguished from that where the plaintiff proves that both defendants were negligent and that one or the other was the one to cause his injury. Then, under such authorities as *Summers v. Tice*,[53] the burden of proof is placed on each of the defendants to show that he did not cause the injury.

IX. RAILROAD STATUTE

Two cases involved application of the Tennessee Railroad Precautions Statute.[54] In *Southern Ry. v. Hutchings*,[55] plaintiff, a 12-year-old boy, was struck by a step protruding from a caboose of a freight car, and the question was whether he came within the provision of subsection 4, requiring designated precautions "when any person, animal, or other obstruction appears on the road." A divided court held that he did.

On the other hand, in *Ori v. St. Louis-S.F. Ry.*,[56] the state court of appeals held that this provision was inapplicable when the plaintiff undertook to cross the tracks after it was too late for compliance with the statute.[57] The court also held that the statute was being complied with even though the train of passenger cars was being pushed by a locomotive in the rear, when the front car had a head-light, and equipment for blowing the whistle, ringing the bell, and applying the air brakes, and there was a man in front who controlled the train.[58]

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52. *Id.* at 79. The weight of the holding is somewhat diminished by the fact that the court had previously held that the directed verdict was warranted by contributory negligence on the part of the plaintiff. This means that there is no particular point in considering whether the doctrine of res ipsa loquitur might have been applicable.

53. 33 Cal. 2d 80, 199 P.2d 1 (1948), 2 VAND. L. REV. 495 (1949). Two parties negligently shot at a bird and one of the shots hit plaintiff's eye. As a result of the ruling on burden of proof both defendants were held liable. See also RESTATEMENT (SECOND), TORTS § 433C (3) (Tent. Draft No. 7, 1962).

54. TENN. CODE ANN. § 65-1208 (Supp. 1961).

55. 288 F.2d 837 (6th Cir. 1961).

56. 348 S.W.2d 809 (Tenn. App. W.S. 1961).

57. For treatment of the earlier cases on this problem see Wade, *Torts—1955 Tennessee Survey*, 8 VAND. L. REV. 1131, 1144-45 (1955).

58. The case also holds that when an action under the Precautions Statute is set out in the same count with a common law action, the count must be treated as stating solely a common law cause of action.

X. DEFENSES

1. Contributory Negligence.—As in the case of evaluation of defendant's conduct, the determination of whether the defendant was contributorily negligent is normally for the jury, and its verdict will control.[59] Sometimes, however, as in *Evensky v. City of Memphis*,[60] the court rules as a matter of law that a plaintiff was contributorily negligent. In this case plaintiff, proprietor of a store, knowing that a gas heater was defective, left it operating over a holiday period when the store was closed.

In *Colwell v. Jones*,[61] involving a traffic collision, the court of appeals suggested that the jury must have mitigated damages in accordance with the unique Tennessee doctrine of remote contributory negligence in awarding $10,000 for the death of a 36-year-old man.

O'Keefe v. Walker[62] holds that contributory negligence is a proper defense under the general issue when plaintiff had not filed a motion to require the defendant to plead his defenses specially.

2. Immunities.—In *Webb v. Blount Memorial Hospital*,[63] the court held that a hospital owned by a county and operated as an eleemosynary institution was immune to tort liability. The opinion reviews the Tennessee cases involving governmental and charitable immunity.

3. Death of Party Injured.—In *Carne v. Maryland Casualty Co.*,[64] action was brought for defendant insurance company's "negligence and bad faith" in failing to settle a claim against the insured within the policy limits. The insured had paid the excess amount, but had died before bringing this action, which was commenced by his representative. The court held that the action sounded in tort rather than contract. As such, the cause of action did not survive the death of the injured party at common law.[65] The court considered the several Tennessee survival statutes and found none of them applicable.[66] It therefore held that the lower court was

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59. Southeastern Steel & Tank Maintenance Co. v. Luttrell, 348 S.W.2d 905 (Tenn. App. E.S. 1961), discussed in text accompanying note 47 *supra;* Grizzell v. Foxx, 348 S.W.2d 815 (Tenn. App. E.S. 1960), discussed in text accompanying note 45 *supra.*

60. 350 S.W.2d 76 (Tenn. App. W.S. 1961). See text accompanying notes 46, 51 *supra.*

61. 346 S.W.2d 450 (Tenn. App. M.S. 1960).

62. 350 S.W.2d 295 (Tenn. App. W.S. 1961).

63. 196 F. Supp. 114 (E.D. Tenn. 1961).

64. 346 S.W.2d 259 (Tenn. 1961).

65. At common law, "there was no survival of the death of either [party] in the case of . . . negligent personal injuries, even though the negligence itself was a breach of contract." PROSSER, TORTS 707 (2d ed. 1955).

66. Section 20-601 provides that there shall be no abatement when the cause of action survives (apparently at common law). Section 20-602 applies only to a cause of action already commenced before the death of the party. Section 20-603 is concerned with death of the tort-feasor. Section 20-607 is the wrongful death statute and applies only when death results from the tortious acts of the defendant.

correct in sustaining a plea in abatement. The decision appears to indicate a gap in the survival statutes which should be filled at the next legislative session.