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Torts -- 1961 Tennessee Survey

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TORTS—1961 TENNESSEE SURVEY

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The tort cases reported during the past year were of unusual interest. A number of them dealt with points of first impression in this state. Others represent developments of the law designed to bring it into harmony with changing conditions, as in the application of the res ipsa loquitur doctrine to the unexplained fall of an airliner, or in the clarification of the duties of an automobile driver to a mere licensee in the vehicle. While the basic pattern for justice in the field of torts has been worked out by our courts with much care and wisdom, occasional modifications are needed. Developments are more feasible in tort law than in areas such as real property or contracts, for in the tort field there is less risk of upsetting arrangements entered into on the faith of an existing rule. As to torts, it is helpful to bear in mind that "the courts have power to change their judge-made rules" and often there is no necessity to wait for a statute "with its usual attention to minutia."[1]

I. NEGLIGENCE

A. Proof—Inference of Negligence—Res Ipsa Loquitur

1. Fall of Commercial Aircraft.—Perhaps the most significant decision during the year was *Capital Airlines, Inc. v. Barger*[2] involving application of the doctrine of res ipsa loquitur to an unexplained airplane crash. A four-motored plane approaching an airport runway to make a landing suddenly nosed down at a low altitude and crashed to the ground. All of the passengers and crew perished, and the cause of the crash could not be determined. The issue was whether the case was properly submitted to the jury in the absence of any specific evidence of negligence. The court held that it was properly submitted and that the jury, under the doctrine of res ipsa loquitur, could properly infer negligence on the part of the defendant. The opinion points out that the defendant's pilot had exclusive control of the plane, that there was no evidence of any unusual weather conditions or of any structural defects in the plane, and that as a common carrier the defendant was under a duty to exercise the highest degree of care.

Although the accident occurred in Michigan the court applied Tennessee law, since the doctrine of res ipsa loquitur has been re- early decisions, in common with those in most other courts of the law of the forum. Examination of the Tennessee law showed that garded in this state as a matter of evidence to be determined by the country, adopted the view that the res ipsa loquitur doctrine could not be applied to an unexplained airplane crash. So in *Boulineaux v.*

1. See SEAVEY, COGITATIONS ON TORTS 57 (1954).
2. 341 S.W.2d 579 (Tenn. App. E.S. 1960); 28 TENN. L. REV. 282 (1961).

City of Knoxville[3] the Tennessee Court of Appeals stated, in a case decided in 1935 involving the fall of a sightseeing plane, that the doctrine should not be applied, "for it is a common and not an unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of any act upon the part of the operator." The supreme court considered the matter eight years later in *Towle v. Phillips.*[4] That decision involved a small plane with dual controls, one of which was accessible to the deceased passenger, with the result that the usual element of exclusive control was lacking, but the court seems to reject the application of the doctrine in airplane cases generally, remarking that "we are not as yet in respect to the care and operation of aircraft in a position where the doctrine of cases dealing with stagecoaches or trolley cars or steam railways can be applied."

In finding these earlier statements inapplicable, the court of appeals emphasized the enormous development of aviation in recent years, with the result that today airplanes compete vigorously with other means of transportation and are regarded as reasonably safe. The court then observed that accomplishment and liability are inseparable, and "that the principles governing liability of other common carriers should now be equally applicable to transport planes operating as such," and proceeded to apply the res ipsa doctrine. This well-reasoned decision is in accord with the more recent ones elsewhere[5] and represents a needed development from the position of the earlier decisions, which were made with specific reference to aviation in its beginning stages. It may be, however, that the res ipsa loquitur doctrine still would not be applied to private planes, operated by persons with less specialized knowledge than that possessed by a common carrier and not under a common carrier's duty to exercise more than ordinary care.

2. Cattle Escaping to Highway.—Escaping cattle continue to create danger on the highways. In this year's case, *Moon v. Johnston,*[6] a 2,000 pound bull found its way out of an enclosure and while crossing a well-travelled highway tangled with a tractor-trailer. The bull suffered only a bloody nose but the vehicle went out of control and overturned, with resulting injury to the driver and considerable property damage. Following last year's case, *Overbey v. Poteat,*[7] the court first held that since the cattle owner had a lawful fence, he was

3. 20 Tenn. App. 404 (1935).
4. 180 Tenn. 121, 172 S.W.2d 806 (1943).
5. See PROSSER, TORTS § 42, at 203 (2d ed. 1955); 6 AM. JUR. *Aviation* § 77 (1950); Annot., 6 A.L.R.2d 528 (1949).
6. 337 S.W.2d 464 (Tenn. App. E.S. 1959); 28 TENN. L. REV. 290 (1961).
7. 332 S.W.2d 197 (Tenn. 1960); See Wade, *Torts—1960 Tennessee Survey,* 13 VAND. L. REV. 1269, 1278 (1960).

not liable unless negligent in allowing the animal to escape. The new issue was whether under all the circumstances there was sufficient evidence of negligence to submit the case to the jury. It appeared that shortly after the bull escaped the gate nearest the highway was found open, although the wooden board used as a latch was pushed all the way in, as when the gate was in a fastened position. There was testimony from one of the defendant's employees that about forty-five minutes prior to a report of the bull's escape the gate was shut and the latch securely fastened.

The plaintiff contended that the latch was of inadequate design, with the result that the bull might have opened the gate. Since there was no damage of any sort to the fence the court thought that a jury could not reasonably find that the bull itself opened the gate. The court then considered and rejected the plaintiff's contention that the res ipsa loquitur doctrine should be applied and upheld a directed verdict for the cattle owner.

The res ipsa loquitur doctrine is applied only where the circumstances are such "that the common experience of mankind indicates that without negligence there could have been no accident."[8] The question therefore is whether cattle are likely to escape from a proper enclosure without negligence on the part of the owner or his employees. In *Bender v. Welsh*[9] the Pennsylvania court held that where a horse escaped to a highway and was struck by a car, and there was no evidence as to how the horse got outside of its enclosure, the case should go to the jury. In fact, it appears that most courts have held that where an accident occurs because of cattle on the highway a presumption of negligence arises, sufficient to carry the case to the jury.[10] This view is supported by the practical difficulties faced by the injured plaintiff in trying to discover evidence of specific acts of negligence in a locality where he is apt to be a stranger. Even when the doctrine of res ipsa loquitur is applied, a cattle owner who introduces evidence as to the adequacy of his fences and gates may well be able to satisfy a local jury that the inference of negligence has been rebutted. The Tennessee courts evidently consider, however, that in this situation, as in the soft drink bottle cases, the possibilities of tampering by third parties are sufficient to preclude the operation of the res ipsa doctrine.

3. Inference From Skidding.—The court refused in *Shepherd v.*

8. See Comment, *Res Ipsa Loquitur in Tennessee,* 22 TENN. L. REV. 925, 942 (1953).
9. 344 Pa. 392, 25 A.2d 182 (1942).
10. See Annots., 45 A.L.R. 505 (1926), 140 A.L.R. 742 (1942), 34 A.L.R.2d 1285 (1954).

Bell[11] to permit an inference of negligence in an automobile case from the fact that a car skidded. There the plaintiff was a guest in a car driven by the defendant on a wet highway. As the defendant rounded a curve, the car struck a "slick spot" and went into a skid, striking a car coming from the other direction with resulting injuries to the plaintiff. At the moment of impact the defendant's car extended about two feet across the center line. The plaintiff conceded that the defendant was traveling at a normal speed and that his driving was "all right" both before and after the skid. There was no allegation of any defects in the car. Under these circumstances the trial court directed a verdict for the defendant and this action was affirmed on appeal. The opinion observes that the evidence of negligence was "reduced to the mere fact that the car skidded," and concluded that "res ipsa loquitur does not apply because the slippery condition of the pavement and the unanticipated slick spot account for and explain the loss of control of the vehicle."

The rule that in the absence of specific evidence of negligence the fact of skidding will not be enough to get the case to the jury, in a case brought by a rider in the car, is supported by other authority in Tennessee and elsewhere.[12] On the other hand, in the non-guest situation, as where a driver skids into a pedestrian crossing the street, the courts are apt to let a case of this kind go to the jury without specific evidence of negligence.[13] This distinction seems to be based on the thought that a guest should expect less in the way of precautions from the driver than should a person on the highway. Since, however, there is no guest statute in Tennessee relieving the host from injury to the guest in the absence of something more than ordinary negligence, the distinction seems questionable. The Tennessee court has said, however, that "in these guest cases there has been so much abuse of hospitality that the tendency has been to restrict rather than to extend the rule as to the liability of a host to his guest."[14] Furthermore, in the present case the plaintiff certainly made it difficult for the court to decide in his favor by his perhaps ill-advised admission that the defendant's driving was "all-right."

4. Position of Vehicles After Accident.—Another point of first impression was involved in *McCollum v. Guest.*[15] There the plaintiff's decedent was killed in a collision between the defendant's automobile

11. 337 S.W.2d 243 (Tenn. App. E.S. 1959); 28 TENN. L. REV. 422 (1961).
12. See Grizzard v. O'Neill, 15 Tenn. App. 395 (M.S. 1932); Annots., 58 A.L.R. 264, 266 (1929), 113 A.L.R. 1002, 1005 (1938).
13. National Cash Register Co. v. Leach, 3 Tenn. App. 411 (E.S. 1926); Annot., 58 A.L.R. at 272, 274, 278 (1929), 113 A.L.R. at 1016, 1019, 1021 (1938).
14. See Hatch v. Brinkley, 169 Tenn. 17, 80 S.W.2d 838 (1935).
15. 343 S.W.2d 359 (Tenn. 1960).

and a truck operated by the co-defendants. Although the record showed that two persons had witnessed the collision, the plaintiff elected to rely on two other witnesses who could testify only as to the position of the vehicles after the accident, and even as to this their testimony was in conflict. The court of appeals, reversing the trial judge, thought that this testimony was sufficient for submission of the case to the jury, but the supreme court reversed. The decision is supported by a Nebraska case[16] which refers to the impossibility of determining from the position of the vehicles just where they collided.[17] A refusal to permit the requested inference seems particularly in order where, as here, the testimony of eyewitnesses to the accident was available. Probably the testimony of these actual witnesses was not utilized either because it tended to indicate that the decedent himself was driving and was at fault.

5. *Vehicle Leaving Road at Curve.*—The doctrine of res ipsa loquitur was involved in another automobile case, *Whitley v. Hix*,[18] where the defendant driver came to a curve in the road and failed to make the turn, with resulting injuries to the plaintiff who was in the back seat. The defendant testified, "I just lost control of the car. That's all." Under these circumstances the trial judge ruled that this was a res ipsa case, and decided further that the defendant was guilty of negligence as a matter of law. On appeal it was asserted that the jury should have been allowed to infer either negligence or the lack of it, as in *Sullivan v. Crabtree*[19] where the jury found for the defendant. As the opinion points out, however, in that case there were factors which might explain the loss of control at the curve, such as some unexpected loose gravel into which the vehicle suddenly ran and a broken surface on one side of the highway. In the present case the supreme court considered, as did the trial judge, that the inference of negligence from the general circumstances of the accident was so strong that a finding of due care would be unreasonable. The opinion fully recognizes that the usual effect of the doctrine of res ipsa loquitur is simply to get the case to the jury, but refers to the equally well established principle that where the circumstances giving rise to the doctrine not only support an inference of negligence but suggest negligence so strongly that no other finding would be reasonable, a verdict may be directed for the defendant.[20] Since it was clear from

16. Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N.W. 445 (1935).
17. Reference also was made to a standard work which points out the "complexity of forces and resultants" after a collision of moving vehicles. 10 BLASHFIELD, ENCYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6555, at 401 (1955).
18. 343 S.W.2d 851 (Tenn. 1961); 28 TENN. L. REV. 582 (1961).
19. 36 Tenn. App. 469, 258 S.W.2d 782 (1953).
20. Hydes Ferry Turnpike Co. v. Yates, 108 Tenn. 428, 67 S.W. 69 (1901);

the defendant's own testimony in the present case that the loss of control was not due to any mechanical failure of the car, or any sudden illness, or any negligence on the part of another driver, it is not surprising that the directed verdict was sustained.

The decision in the *Whitley* case serves to clear up a point which was left somewhat clouded by the decision of the court of appeals in *Smith v. Burks*.[21] It was there held that an unimvited person on the running board of a truck, attempting to assist the driver in getting the truck out of the mud, was a mere licensee and could not recover for ordinary negligence in the operation of the vehicle. As pointed out in an earlier survey article,[22] there are a number of Tennessee decisions which allow a mere licensee in the vehicle to recover for active negligence in its operation.[23] In the present case the court held, in line with these earlier decisions, that whether classed as an invitee or a mere licensee, the plaintiff could recover for ordinary negligence, and that "the rule with reference to liability to a licensee upon premises is not in point as to a plaintiff in an automobile . . . ." It still appears to be the Tennessee rule with reference to licensees on land that the only duty, even as to active conduct on the land, is to refrain from wanton or wilful injury,[24] but the present case makes it quite clear that the rule is otherwise as to a licensee in a motor vehicle. On that point the court quotes with approval a statement made in the decision of the court of appeals that if the law

> cannot grow more humane, and in the interest of certainty it should only grow by legislation, certainly it should not regress in this regard to the extent of permitting a driver to carelessly or negligently snuff out the life or maim forever a person riding with him as a guest in an automobile and escape liability therefor because he did not extend that person an invitation to get in the automobile with him.

B. Proximate Causation—Result Within the Risk

1. Cause in Fact.—Two cases bring out the point that negligence on the part of the defendant will not lead to liability unless it is a cause in fact of the accident that occurs. In the first of these, *Marsh v. Fowler*,[25] a boy of seventeen was employed by the defendants to work on a farm, and his duties included riding on horseback to drive cattle

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Coca-Cola Bot. Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1941); 2 HARPER & JAMES, TORTS § 19.11 (1956).

21. 305 S.W.2d 748 (Tenn. App. M.S. 1957); 25 TENN. L. REV. 515 (1958).

22. See Wade, *Torts—1958 Tennessee Survey*, 11 VAND. L. REV. 1399, 1407 (1958).

23. See, *e.g.*, Sandlin v. Komisar, 19 Tenn. App. 625, 93 S.W.2d 645 (M.S. 1935).

24. See Smith Packing Co. v. Tinnin, 340 S.W.2d 929 (Tenn. App. M.S. 1960), discussed at note 36 *infra*. See also 25 TENN. L. REV. 515, 516 (1958).

25. 340 S.W.2d 881 (Tenn. 1960).

to a barn to be fed. As he was remounting after opening a gate, a frisky calf ran between the legs of his horse, which thereupon stumbled and threw the plaintiff to the ground, with resulting injuries. There were numerous allegations of negligence, including one based on the fact that the plaintiff was required to handle too large a herd of cattle without adequate instructions, warnings or supervision. In holding that a demurrer was properly sustained the court held that there was no proximate causation, pointing out that "it cannot be said with any realism or confidence that if these defendants had exercised ordinary care, this accident would not have happened anyway." Since, as the court remarks, "there is no way to anticipate vagaries in the conduct of a calf" or to prevent the occasional stumble of a horse, it is difficult to see how the alleged carelessness bore any substantial factual relationship to this particular accident.

The other case which turns on cause in fact is *Kent v. Freeman*.[26] Kent had stopped his car to make a right turn. There was considerable evidence that he gave the required signal, both with his hand and his blinker, but the driver of the following truck testified that he did not see any signal. The truck was designed to carry about two tons but was loaded with seven and a half tons of asphalt. The driver testified that he saw Kent's car "setting on the road" as he came over a hill and approached a bridge. The intersection where the car was stopped was 150 feet beyond the bridge. The truck, in the words of the driver, "dropped off the hill" and struck the car in the rear. There were no signs of any skid marks. Under these circumstances the jury returned a verdict for the defendant in a suit by Kent, apparently on the ground that he did not give the required signal and was barred by contributory negligence. The injured passenger obtained a verdict of only $1,000 although her injuries were considerable.[27]

On appeal it was held that the damages awarded to the passenger were so inadequate as to indicate prejudice. The verdict against Kent, the driver, was also set aside on causation grounds. Since the defendant himself testified that he saw the plaintiff's car as soon as he came over the hill, it was held that even if the plaintiff failed to give a proper signal this was at most remote contributory negligence. The court stated on this point that since the defendant saw the plaintiff's car "stop in front of him when defendant was 150 feet from the stopped car the giving of a turn signal or the failure to give a turn signal, would not have changed the situation in the slightest and, therefore, as a matter of law, could not be regarded

26. 345 S.W.2d 252 (Tenn. App. M.S. 1960).
27. This aspect of the case is discussed at note 85 *infra*.

as the proximate cause, or a proximate contributing cause of the accident." In support of its decision the court cited *Harris v. Hendrixson*[28] and cases from other jurisdictions which bring out the point that there is no liability for failure to give a signal when a person has knowledge by other means of the very information which the signal would impart. It seems clear that in a case of this type the careless failure to give a signal has little or no connection with the accident, and that there is no causation in fact.

2. Patrolman Chasing Speeding Car.—Another case arose involving death resulting from pursuit of a traffic violator at high speed.[29] The plaintiff's decedent ran a red light in the town of Morristown at about 1:00 A.M., while driving on the left side of the street at thirty to thirty-five miles per hour. A police officer employed by the defendant town immediately started pursuit, flashing his spotlight without results. After the pursuit had continued for about a mile, at times at speeds up to fifty to sixty miles per hour, the deceased pulled his vehicle off the highway to the right and into a filling station. He then circled around the pumps and re-entered the street in front of the approaching cruiser, which struck his car broadside, causing his almost immediate death.

The trial judge told the jury that the officer was not entitled to the benefit of the statute authorizing emergency vehicles to exceed the speed limits,[30] for the reason that he did not use his siren as well as his visual signals, as required by the act. There was the further instruction that except in self-defense an officer has no privilege to shoot or wound a person guilty only of a misdemeanor in order to prevent his escape. It was on account of this latter instruction that a judgment for the plaintiff was reversed; this ruling from the bench, though a correct statement of the law, was not related to any facts introduced in evidence or even alleged in the pleadings and clearly was damaging to the defendant.

It is interesting to observe that neither the trial judge nor the appellate court took the position that the sole proximate cause of the accident was the conduct of the driver who was illegally refusing to stop. A federal court applying Tennessee law did take that position, somewhat questionably, in a situation which presented a much stronger case for recovery, since it was an innocent third party who was there killed in the chase.[31] Assuming there is negligence on the part of the officer, as there was in this case on account of failure to

28. 25 Tenn. App. 221, 155 S.W.2d 876 (M.S. 1941).
29. Mayor v. Inman, 342 S.W.2d 71 (Tenn. App. E.S. 1960).
30. TENN. CODE ANN. § 59-808 (1956).
31. United States v. Hutchins, 268 F.2d 69 (6th Cir. 1959); See Wade, *Torts —1960 Tennessee Survey*, 13 VAND. L. REV. 1269, 1270 (1960).

sound the siren, and as there might well be in other cases because the pursuit is at a high speed in a congested area, it would seem that an injury either to the person illegally refusing to stop or to an innocent third party is within the risk created by both parties to the chase, and a proximate result. Where, however, as in the present case, it is the speeding traffic law violator himself who is injured, the defense of contributory negligence would be available, and it is difficult to see how the jury could find that the decedent was free from such negligence. Perhaps the verdict was based on the conception, introduced by the erroneous instruction, that this case was similar to one of intentional shooting, where contributory negligence would not be an issue.

3. Improper Parking—Violation of Ordinance.—In *Woody v. Cope*[32] the court was concerned principally with the effect of the violation of an ordinance which prohibited parking within twenty feet of a crosswalk. A bus operated by one of the defendants had stopped within the prohibited distance to discharge and take on passengers. The driver of the bus had signaled to the plaintiff, a girl of fourteen, that it was safe to cross. She proceeded to a point where she could see around the bus, then continued across, and was struck by a car driven by the other defendant, whose car came from behind the bus. While another ordinance prohibited the passing of a parked vehicle, that ordinance was construed as not applicable to a four-lane highway, and the jury found that the automobile driver was not negligent.

The principal issue was whether the trial court had correctly directed a verdict in favor of the other defendant, the operator of the bus. In reversing that action, the court first held that the ordinance which prohibited stopping near an intersection applied to buses as well as to private vehicles, at least in the absence of a municipal designation of a stop within the twenty foot area. The court then considered whether violation of the ordinance was sufficient to take the case to the jury, or whether this particular accident was outside the risk which the statute was designed to prevent. On that point the court found that the purpose of the ordinance was "not only to afford motorists a better view of the cross walk, as conceded, but also to afford persons on the cross walk a better view of approaching vehicles." It was then concluded that the case "should have been presented to the jury on the question of negligence and proximate cause, particularly, on the question whether the stopping of the bus in violation of the ordinance created a condition that was a proximate or a contributing cause of the accident."

32. 338 S.W.2d 551 (Tenn. 1960); 28 TENN. L. REV. 425 (1961).

This instruction obviously emphasizes the matter of proximate cause. It may be that the reference to negligence should have been completely omitted, since violation of a traffic ordinance would seem to constitute negligence as a matter of law with reference to a person within the class protected by the legislation. As stated in one case, involving a railroad, failure to comply with an ordinance "is negligence per se, and will render the railway company liable, if its negligence was the proximate cause of the accident and injury."[33] This language indicates that on the trial of the case the jury should be instructed to find negligence and should consider only the matter of proximate causation, since the court clearly found that the pedestrian was within the class protected by the ordinance prohibiting parking too near the crosswalk.[34]

In another improper parking case, *Dunnivant v. Nafe*,[35] the accident was less closely related to the parking. The two defendants parked on opposite sides of the road near the crest of a hill in such a way as to create an evident danger to users of the road. The plaintiff, as he approached the crest of the hill, saw the two cars obstructing his passage. He was able to stop, however, and difficulty arose only after, "as a result of a brake failure," or for some other unexplained cause, "his automobile went out of control." It then rolled down the hill and ran off a bridge, with the result that one person was killed and two others were gravely injured.

It was held on appeal that there was no liability. The court indicated that if the plaintiff had run off the road to avoid a collision, or had been injured "in any other usual, normal way" a jury could find liability. Under the circumstances of this case, however, the court considered that the harm was outside the risk created by the defendant. It was stated in this connection that the defendants' negligence had "ceased to be operative, and was superseded by a new, independent intervening cause—'the brake failure,' or plaintiff's loss 'of control' of his car." It seems fairly clear that wrongfully forcing a car to stop on a hill, once the stop has been safely made, should not create liability for harm due to a subsequent loss of control which the plaintiff can not relate more directly to the sudden stop than he did in this case.

Violation of ordinances also was involved in *Smith Packing Co. v. Tinnin*[36] where a truck driven by the defendant's employee was engaged in delivering a load of hogs to a stockyard. At the stockyard

33. Memphis St. Ry. v. Haynes, 112 Tenn. 712, 81 S.W. 374 (1904).
34. See also Brown v. Wallace, 15 Tenn. App. 187 (E.S. 1932), where violation of a parking ordinance was regarded as negligence per se and the jury was directed to consider only the causation issue.
35. 334 S.W.2d 717 (Tenn. 1960).
36. 340 S.W.2d 929 (Tenn. App. M.S. 1960).

there was a loading platform about eighteen feet east of the sidewalk, reached by a narrow alley which was bounded on one side by the defendant's brick building, and on the other by a high board wall separating the alley from stock pens. The truck backed across the sidewalk and into the alley, which was only a little wider than the truck. The driver had no rear-view mirror and stated that he could not see back into the passage, but gauged his backing direction by looking at a pole near the entrance to the alley. There was much noise from cattle and from the shouts of traders. The driver testified, as did the decedent's brother, that he heard someone shouting as he backed into the alley, but thought that this was from the engine room of the defendant's building. He continued all the way back to the building platform, and then discovered that the plaintiff's husband had been crushed against the platform and was in a dying condition.

It was held that this case was properly submitted to a jury. In reply to the argument that the plaintiff was a trespasser or at most a licensee, entitled only to protection from wilful injury, the court stated that a jury could reasonably find that the decedent had been on the sidewalk, and was forced into the enclosed alley and caught there by the backing truck. It was then held that a jury could find either common law negligence from the way the truck was handled, or that they could base liability on the violation of either of two ordinances. One of these required trucks to have rearview mirrors; the other prohibited driving backwards across a sidewalk except at designated places. The court stated in this connection that "the jury could have taken the view that the absence of the rearview mirror as well as the backing of the truck across the sidewalk in the manner described in the proof was proximate negligence." It would seem that the violation of either of these ordinances would constitute negligence per se, and it seems equally clear that the accident which occurred was sufficiently within the risk to permit a finding of proximate causation. Doubtless the main defense relied on was that the decedent was at most a mere licensee on private land at the time he was injured. The case shows how courts as well as juries will seek diligently for indications that the decedent was not a mere licensee in order to avoid the harsh rule, now fortunately a minority one,[37] that a person so characterized may be carelessly killed.

C. Particular Relationships

1. Possessors of Land—(a) *Employees' Lift Within Area of Invitation.*—The distinction between an invitee and a licensee is de-

37. See 2 HARPER & JAMES, TORTS § 27.9, at 1475 (1956); PROSSER, TORTS § 77, at 448 (2d ed. 1955).

veloped in *Jack M. Bass & Co. v. Barker*,[38] where the issue was whether the plaintiff had gone beyond the area of invitation and thereby become a mere licensee or trespasser. He had left his car in a parking garage operated by the defendants while attending a dance. After the dance seventy-five to a hundred people arrived at about the same time to obtain their cars. With only three attendants on duty at the late hour when the dance ended, it would have taken these employees nearly two hours to bring down all of the needed cars from the ten floors of the building. Under these circumstances a number of the young men, including the plaintiff, used a man-lift in the garage, intended for use by employees only, to reach the upper floors of the garage and secure their own automobiles. As on previous occasions, the short-handed employees did nothing to keep these young men off the lift. The plaintiff had no difficulty with the lift while getting his car. When, however, he used it again to search for a companion who also was looking for the car, he was injured when he reached the top floor and a safety switch failed to work, with the result that he was thrown against the ceiling and fell to the floor.

Under these circumstances the trial judge allowed the jury to decide whether or not the plaintiff, at the time of the injury, was still an invitee or merely a licensee, protected only by a duty to avoid wilful injury or a trap. It was held, affirming the decision of the court of appeals, that "it was a question for the jury to determine whether the conduct of the defendant's agent in not taking any action to put a stop to the use of the man-lift by these young men amounted to an implied invitation in the sense that their being allowed to obtain their own cars by use of the ramp and the man-lift expedited the re-delivery of the bailed property." It was further determined that when the plaintiff went back to find his friend, "such act was a part of the same transaction and was likewise for the mutual benefit of the parties in concluding the transaction."

(b) Duty To Discover Broken Jar on Floor.—Another case arose this year involving application of the established duty of store owners to make their premises safe for customers.[39] The plaintiff, while pushing a cart, slipped on a broken glass of preserves. She was unable to establish that the defendant or its employees had caused the fall of the jar, and, as usual in such cases, there was no evidence of actual knowledge or notice of the dangerous condition. The issue was narrowed, therefore, to whether the jar had been on the floor long enough so that the defendant should have discovered

38. 343 S.W.2d 879 (Tenn. 1961).
39. Busler v. Cut Rate Supermarket No. 1, 334 S.W.2d 738 (Tenn. App. E.S. 1960); 28 TENN. L. REV. 430 (1961).

and remedied this condition. Another customer testified that he saw the broken jar four or five minutes before the accident. It was held on appeal that a verdict should have been directed for the defendant, on the ground that this evidence "was insufficient to establish constructive notice on the part of the defendant or its employees."

The decision is supported by an earlier one[40] where there was evidence that a basket over which the plaintiff tripped had been in the aisle for twenty to thirty minutes. A good deal seems to depend in these cases on the size of the store, the number of customers, and the nature and location of the dangerous substance, and more diligence seems to be required in recent cases than in the earlier ones with reference to discovery of obstacles dropped or knocked on the fioor.[41] The opinion in the present case does not pass on the defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law in failing to observe the broken jar, but since the cart was in front of her it seems unlikely that this was the case. If it had been shown that jars frequently had fallen from this shelf, failure to take proper precautions against a repeated condition might have constituted negligence.[42]

(c) Ladder Supplied to Contractor.—The decision in *Monday v. Reed*[43] deals with the situation where a landowner, without any duty to do so, was alleged to have furnished a ladder to an independent contractor working on the premises. The court held that the landowner was not liable for injuries caused by the defective condition of the ladder, since there was no contractual duty to furnish the equipment. It was found that even if the ladder was furnished to the contractor, or used by him with the knowledge of the landowner, there was no liability for harm to the contractor resulting from its defective condition, at least where the defect was as apparent to the plaintiff as to the defendant.

2. Railroads—(a) Precautions Act Not Retroactive.—With reference to the Railroad Precautions Act amendments,[44] the federal court of appeals in *Southern Ry. v. Miller*[45] sustained the ruling of a United States district judge[46] that these amendments should not be applied to an accident which occurred before their passage. The opinion recognizes that the provision about the shifting of the burden of proof

40. Gargaro v. Kroger Co., 22 Tenn. App. 70, 118 S.W.2d 561 (W.S. 1938).
41. See Annot., 61 A.L.R.2d 110 (1958).
42. Hubbard v. Montgomery Ward & Co., 221 Minn. 133, 21 N.W.2d 229 (1945).
43. 341 S.W.2d 755 (Tenn. App. E.S. 1960).
44. TENN. CODE ANN. §§ 65-1208, -1209 (Supp. 1959).
45. 285 F.2d 202 (6th Cir. 1960); 28 TENN. L. REV. 437 (1961).
46. See generally Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350, 1363 (1959).

from the railroad to the plaintiff, if taken by itself, might be regarded as solely remedial or procedural and therefore retroactive; it points out, however, that this provision is closely related to the others dealing with the need to establish proximate causation and freedom from contributory negligence, which clearly are "not merely procedural." The court then held that the act must be considered in its entirety and that the provision about burden of proof "is so inextricably a part of the totality of the Precautions Act as to be an integral part of the substantive right created" by that act. The general statute providing that "the repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced, under or by virtue of the statute repealed"[47] lent further support to the decision. It might be added that there is a general principle that an act will not be applied retroactively unless a legislative intent to this effect clearly appears.[48]

(b) Statute Concerning Harm to Livestock.—In further connection with railroads, the provisions concerning the killing and injuring of livestock[49] which placed numerous duties on the railroad, including the burden of proving "that the accident was unavoidable,"[50] have been repealed and replaced by a more reasonable provision. The new act states that "whenever livestock appears on the tracks as an obstruction ahead of a railroad train, it shall be the duty of the engineer, or the person in charge of the operation of the train, to blow the alarm whistle and apply the brakes, in order to prevent, if reasonably possible, the striking of the livestock."[51] Since trains are no longer the only instrumentalities that travel at "astonishing speeds" and are "powerful for mischief,"[52] the legislature evidently considers that they should not be handicapped by special laws not applicable to trucks, aircraft, and other competitors who are steadily taking away their business.

D. Joint Tort-feasors—Joint Liability From Concurrent Action—Conspiracy

In *Schoenly v. Nashville Speedways, Inc.*[53] one of two defendants was having an oval asphalt racetrack constructed and the other was the contractor for the work. While the track still was unfinished, and cluttered with some concrete blocks, both defendants invited state highway patrolmen on motorcycles to ride on the track. While one

47. TENN. CODE ANN. § 1-301 (1956).
48. Franklin v. Travelers Ins. Co., 155 F. Supp. 746 (E.D. Tenn. 1957).
49. TENN. CODE ANN. §§ 65-1223 to -1230 (1956).
50. TENN. CODE ANN. § 65-1226 (1956).
51. TENN. CODE ANN. § 65-1231 (Supp. 1961).
52. See East Tennessee & Ga. R. R. v. St. John, 37 Tenn. 524, 527 (1858).
53. 344 S.W.2d 349 (Tenn. 1961).

of the patrolmen, Graham, was so riding he struck a concrete block. This caused him to lose control and the motorcycle knocked down some scaffolding on which the plaintiff was standing while painting signs near the edge of the track, with resulting injuries. The plaintiff filed a claim against the state, based on the negligence of Graham, and was awarded five thousand dollars by the board of claims, on the theory that Graham and the defendants were joint tort-feasors.

In the present suit, the plaintiff alleged that Graham and the defendants were not acting in concert and were not joint tort-feasors, and that the defendants still were subject to liability. In rejecting this contention, the court observed that the negligence of the defendants and the negligence of Graham "were continuous and concurrent up to the moment of the injury," and that the injury to the plaintiff "was one single harm or injury, incapable of any logical division or apportionment." Under these circumstances the court concluded that the parties involved were in fact joint tort-feasors, with a resulting joint and several liability for the plaintiff's injuries, distinguishing the situation where each tort-feasor is liable only severally for that part of the harm which he has caused, as in *Swain v. Tennessee Copper Co.*[54] The court then applied the settled rule that while tort-feasors who are jointly and severally liable may be proceeded against separately to judgment, still the plaintiff can have but one satisfaction for his injury. The fact that satisfaction in this case was received from the board of claims rather than from a court was not regarded as significant, for the board is a quasi-judicial body, engaged in the granting of awards in the classes of claims set out in the statute, and the payment it orders is not a mere gratuity.

In *Franklin v. Green*,[55] it was quite evident that there was a joint liability, for all of the defendants were engaged in a common enterprise to defraud the plaintiffs by obtaining from them a deed to secure funds allegedly but not actually spent on the repair of the property of the grantors. There was a more significant conspiracy case, *McHendry v. Anderson*,[56] growing out of a motor vehicle accident. The plaintiff was injured while riding in a car which collided with a gravel truck. The truck was licensed in the name of Dickinson and was being driven by Anderson. In a suit based on the alleged negligent driving of Anderson the plaintiff amended his complaint to add as a defendant the Lehman-Roberts Company and to add a request for punitive damages against Dickinson and Anderson as well as the new defendant. It was alleged in these amendments that the Lehman-Roberts Company used numerous trucks in its business and

54. 111 Tenn. 430, 78 S.W. 93 (1903).
55. 342 S.W.2d 233 (Tenn. App. W.S. 1960).
56. 344 S.W.2d 769 (Tenn. App. W.S. 1960).

had wrongfully registered them in the name of Dickinson and other employees, designating the trucks as private haulers. It was asserted that this was done pursuant to a conspiracy between the defendants to avoid various statutes and regulations, including the regulations of the Public Service Commission and the Interstate Commerce Commission applying to contract haulers. Demurrers to these amendments were sustained by the trial court, but this decision was reversed by the court of appeals.

The principal ground for the demurrer was that the alleged conspiracy was not the proximate cause of the plaintiff's injury. The court's answer to this was that the negligent driving of the truck was in furtherance of the illegal conspiracy. It was found that the operation of "the gravel truck which injured plaintiff, as is alleged in plaintiff's amended declaration, must be held to be an integral part of the conspiracy." The court then applied the settled rule that where a tort is committed by one party to a conspiracy, all conspirators are equally liable.

Support for this decision was found in an earlier case involving a conspiracy to evade a retail ice tax on dealers by forming a dummy corporation. The corporation took out a manufacturer's license, and the retailers transferred their trucks to the corporation. A child was negligently injured by the driver of one of the ice trucks, and it was held that all of the conspirators, including the corporation, were liable for the injury.[57] In that case, however, punitive damages were not requested, and their appropriateness in the present case may be doubtful. While the Tennessee courts have been unusually liberal in allowing punitive damages, permitting them in some cases of gross negligence as well as cases involving malice or fraud, no earlier decision seems to sanction them in a case of this kind.[58] In *Franklin v. Green*[59] punitive damages were allowed, but there it was clear that the defendants had fraudulently schemed to obtain property belonging to the plaintiff, and were not engaged simply in a protective maneuver.

II. Defenses

A. Immunities

1. Effect of Annulment on Interspousal Immunity.—There were two significant decisions with reference to immunities, both involving points of first impression. In the first case, *Gordon v. Pollard*,[60] the

57. McCoy v. Willis, 177 Tenn. 36, 145 S.W.2d 1020 (1940).
58. See Comment, *Punitive Damages in Tennessee*, 27 Tenn. L. Rev. 381, 382 (1960).
59. 342 S.W.2d 233 (Tenn. App. W.S. 1960).
60. 336 S.W.2d 25 (Tenn. 1960).

plaintiff had been injured by the negligent driving of her husband. Thereafter the marriage was annulled on the ground that the license had been procured by fraud or misrepresentation, apparently as to the age of the girl, who was then only seventeen. The defense was that the tort occurred during coverture and that therefore the usual immunity should be applied. The plaintiff asserted that since the marriage had been annulled, it was void from the beginning and therefore should not bar the action. The court found, however, that the marriage was simply voidable, since it was not prohibited by any positive statute and was not against any strong public policy, and held that while the annulment of such a marriage might restore certain existing property or statutory rights, it did "not create in a spouse, husband or wife, a right to maintain an action against the other for a tort which occurred in Tennessee during the period when the status of the parties was husband and wife."

The rule that no cause of action arises for an interspousal tort recently has been reaffirmed in Tennessee.[61] This still represents the prevailing view in spite of the considerable arguments against this position advanced in standard texts.[62] Furthermore, the immunity doctrine ordinarily is applied even though the marriage has been ended by divorce,[63] although it would seem that in this situation one of the principal grounds asserted for the rule, the disruption of domestic harmony, would not be present.[64] It also would seem that there is little danger of collusion when the marriage has terminated. When the marriage is completely void suit has been permitted,[65] but since in the present case the court found that the marriage was simply voidable, it is not surprising that the same rule as that ordinarily applied in the divorce situation was followed. In so holding the court followed the prevailing view on this point.[66]

2. Suit by Representative of Deceased Based on Brother's Tort.— The other immunity case, *Herrell v. Haney*,[67] grew out of an automobile accident in which a boy of seventeen, Fred Haney, had caused the death of his younger brother, Tommy, by negligent driving. Both

61. Prince v. Prince, 326 S.W.2d 908 (Tenn. 1959); 27 TENN. L. REV. 422 (1960).

62. See PROSSER, TORTS § 101, at 674 (2d ed. 1955); 1 HARPER & JAMES, TORTS § 8.10, at 645 (1956).

63. Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 315 (1959).

64. See 1 HARPER & JAMES, TORTS § 8.10, at 645 (1956) where the authors state: "The rule denying recovery has been applied literally and blindly in many cases where the reason for the rule could not possibly apply inasmuch as there was no home to disrupt and no domestic harmony to disturb. The divorce cases are typical examples."

65. Blossom v. Barrett, 37 N.Y. 434 (1868).

66. See PROSSER, TORTS § 101, at 674 (2d ed. 1955).

67. 341 S.W.2d 574 (Tenn. 1960); 28 TENN. L. REV. 419 (1961).

of the boys were unemancipated. Suit was brought by the administrator of the deceased boy against Fred Haney. It was first held, in accordance with the generally accepted view,[68] that the established immunity in connection with suits between parents and children[69] should not be extended to suits between brothers. The court then considered the more difficult question of whether, since the parents would be the statutory beneficiaries of the administrator's action, maintenance of the suit would involve violation of the established policy that the parent may not sue his child. The court decided that this policy would not be violated, pointing out that the action is that of the deceased himself, represented by his personal representative, with the benefits passing to his next of kin, whoever they happen to be. It was considered that "the fact that the next of kin happen in this case to be the parents should not bring into play the public policy involved where the right of action lies in the right of the parent or parents themselves."

It may be that this decision results in some practical diminution of the immunity of the child from a suit by his parents, but in these days of frequent insurance, the ground asserted for the immunity in the parent-child situation—that the suit will disturb domestic tranquility or family discipline—seems to be one of diminishing significance.[70] With reference to collusion, perhaps the danger is about as great in this type of case as in one where there is a suit by the parent against the child, but there are other ways of checking fraud besides the barring of all suits by a general immunity.

B. Effect of Covenant Not To Sue—Indemnity

The effect of a covenant not to sue executed by an employee was considered for the first time in *Stewart v. Craig*.[71] There the plaintiffs were injured by the negligent driving of an employee of the defendants, who were being sued on account of the tort committed by their employee in the scope of his employment. The defense to this suit was that the employee himself had paid some money to the plaintiffs and had received in exchange a document originally asserted to be a release, but later admitted to be a covenant not to sue. The issue was whether or not this covenant not to sue the employee should operate as a bar to a suit against the employer. The supreme court held that it did so operate. It was pointed out that if a suit were successfully prosecuted against the employer, he in turn could

68. 52 AM. JUR. *Torts* § 97 (1944).
69. PROSSER, TORTS § 101, at 676 (2d ed. 1955).
70. See 1 HARPER & JAMES, TORTS § 8.11, at 649 (1956); PROSSER, TORTS § 101, at 676 (2d ed. 1955).
71. 344 S.W.2d 761 (Tenn. 1961).

sue the negligent employee for indemnity; that the negligent employee would then be losing the benefit of the covenant not to sue given him by the injured party and as a result would "be entitled to" a judgment against the covenantor, who would then wind up where he started before all the litigation. In further support of the decision the court cited a Tennessee case holding that where the negligent employee is a parent of the injured party, and therefore enjoys a personal immunity from suit, the employer likewise may not be held liable under the doctrine of respondeat superior.[72]

The holding in *Stewart v. Craig* confirms a federal court decision dealing with this same point, *Terry v. Memphis Stone and Gravel Co.*[73] On a petition to rehear the court considered the point made in an earlier survey article[74] that the result arrived at in the federal decision "appears to be somewhat inconsistent with *Mink v. Majors.*" As to this the court stated, "upon a careful reading of the Mink case, we are forced to the conclusion that insofar as the Mink case disagrees with what we have said herein we disapprove its holding."[75]

In *Memphis Street Ry. Co. v. Williams*[76] the plaintiff had executed a covenant not to sue one of two joint tortfeasors. The check which he accepted, however, in exchange for the covenant bore the usual statement, "Receipt and release. Endorsement by the payee constitutes a complete release and settlement in full satisfaction of the claim or account shown on reverse hereof." The attorney for the insurance company of the party who executed the covenant testified that the mutual intent was to give simply a covenant not to sue which would not extinguish the plaintiff's rights against the other joint tortfeasor. It was held that this oral evidence was admissible, in a suit against the other joint tortfeasor who was not a party to the covenant. In the light of this testimony it was found that there was sufficient proof that only a covenant not to sue was executed and that the language on the check should be regarded as mere surplusage.

C. Contract Against Liability for Negligence

In *Moss v. Fortune*[77] the plaintiff had rented a saddle horse from the

72. Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945); 19 TENN. L. REV. 88 (1945). See also Jenkins v. General Cab Co., 175 Tenn. 409, 135 S.W.2d 448 (1940).

73. 222 F.2d 652 (6th Cir. 1955).

74. See Wade, *Torts—1956 Tennessee Survey,* 9 VAND. L. REV. 1137, 1154 (1956).

75. While the opinion in the Tennessee Court of Appeals in the *Mink* case represents an able and accurate statement of the Tennessee law, there seem to be substantial reasons against the rule of that case. See PROSSER, TORTS § 46, at 246 (2d ed. 1955); 24 TENN. L. REV. 390 (1956).

76. 338 S.W.2d 639 (Tenn. App. W.S. 1959).

77. 340 S.W.2d 902 (Tenn. 1960).

defendant. He fell and was injured when a stirrup strap suddenly broke. It was alleged that the strap had not been inspected properly before being furnished to the plaintiff and no warning of its defective condition had been given. The defense was that the plaintiff had signed the following statement: "I am hiring your horse to ride today and all future rides at my own risk." It was held that a demurrer to the action was properly sustained. The court pointed out that it is "well settled in this State that parties may contract that one shall not be liable for his negligence to another but that such other shall assume the risk incident to such negligence." None of the established exceptions to this rule, such as the one with reference to wilful or gross negligence[78] were applicable to this situation. Perhaps there is some doubt as to whether the quoted language is broad enough to include the risks from defective equipment as well as those from unskillful riding or a skittish horse. It ordinarily is required that agreements releasing a person from liability for his own negligence be rather specific as to negligence included.[79]

D. Contributory Fault

In *Higgins v. Patrick*[80] a car driven by Patrick was having mechanical difficulty and he permitted it to stop near the middle of the highway. Both Patrick and his companion, Higgins, had been drinking. The town marshal, Reasons, hearing of the car's position, drove to it in a patrol car, stopping about two lengths west of the stalled vehicle. Reasons told Patrick and Higgins to get the car off the highway, but one of them replied that they could not move it. Patrick then got underneath the vehicle to repair it, while Higgins sat in the front seat, working the clutch. A car approaching from the east, driven by Crisp at high speed, negligently disregarded warnings from lights on both of the parked cars and from the marshal's flashlight, and continued to bear down on the parked vehicles. It hit the North door of Patrick's car just as Higgins was getting out, causing fatal injuries to Higgins, and also some injuries to Patrick who still was underneath the vehicle. The Crisp car then careened into the patrol car, causing considerable damage to it. Under these circumstances a jury allowed both Higgins' widow and the town which owned the patrol car to recover against Crisp, but the trial judge directed verdicts in favor of Patrick against both plaintiffs. The court of appeals found that the verdict was properly directed in favor of Patrick in the suit by the widow of Higgins, but not in the suit by the town.

The opinion first points out, in accordance with settled principles,

78. Memphis & C. R.R. v. Jones, 39 Tenn. 517 (1859).
79. See PROSSER, TORTS § 55, at 307 (2d ed. 1955).
80. 339 S.W.2d 39 (Tenn. App. W.S. 1959).

that a jury could find that the negligent acts of Patrick in allowing his car to be improperly parked on the highway constituted a concurrent proximate cause of the accident, since the intervening negligence of Crisp, who apparently did not actually realize the danger until too late, was foreseeable. The chief interest of the opinion lies in the handling of the defense of contributory negligence. With reference to the town, the court concluded that even though there would be no liability for negligent acts of the marshal in his handling of the patrol car, because of a governmental immunity, still any such negligence could be used defensively as a bar in a suit brought by the town for damages. Consequently, on the new trial the issue of whether or not the marshal was guilty of contributory negligence, as well as the proximate cause issue, was found to be one for the jury. On the other hand, in dealing with Higgins, the court held that he was guilty of contributory negligence as a matter of law. This conclusion was supported by the facts that Higgins had been drinking; that he was fully apprised of all the negligent acts of Patrick and that he acquiesced in them; that he failed to leave the dangerously parked car more promptly when the other vehicle was approaching; and that when he did leave he chose the side of the car nearest the approaching vehicle, when he could have escaped from the other side without injury. Under these circumstances it is indeed difficult to see how a jury could reasonably find that Higgins was free from contributory fault.

III. DAMAGES

A. Wrongful Death

Two of the cases considered earlier, *Capital Airlines, Inc. v. Barger*,[81] and *Southern Railway v. Miller*,[82] involved claims that awards made by a jury for wrongful death were excessive. In the *Capital Airlines* case the court was applying a Michigan statute under which recovery was based on what the family was entitled to receive, or had reasonable expectation of receiving, during the decedent's lifetime. The decedent was twenty-eight years old. He recently had accepted a position as a salesman for a large shoe manufacturer, after leaving a position with another shoe company where he had earned $7,240 during his last year's service. The widow testified that she was happily married to the decedent and that while at one time divorce proceedings had been instituted, they were withdrawn after two weeks and there had been a happy reconciliation. A witness for the defendant testified that the plaintiff and her husband were separated, that

81. 341 S.W.2d 579 (Tenn. App. E.S. 1960), discussed note 2 *supra*.
82. 285 F.2d 202 (6th Cir. 1960), discussed note 45 *supra*.

decedent paid a great deal of attention to her, and that they had planned to marry as soon as a divorce could be obtained. The trial court did not permit the jury to hear this testimony of the defendant's witness. The verdict was for $110,000. The court of appeals held that error was committed in rejecting the testimony of the defendant's witness, since the contribution which decedent would be likely to make to his wife and family would in all likelihood be less if the relationship was distant and unfriendly. The court then ordered a remittitur to $97,500, partly because of the improper exclusion of testimony, and partly because no previous verdicts in death cases in either Michigan or Tennessee had been for such a large amount.

In the *Southern Railway* case, the court was applying the Tennessee wrongful death act which provides recovery for the pain and suffering of the deceased and for the pecuniary value of his life. Verdicts in the amount of $22,500 had been rendered for the death of each of two young girls, aged eleven and thirteen. Since the children died immediately after the accident, pain and suffering were minor factors. The court found, however, that comparable verdicts had been reached in other jurisdictions, and declined to find these amounts excessive, referring to the declining "value of today's dollar and the law's general admonition against an appellate or trial court substituting its estimate of the value of human life for that of a jury."

B. Whiplash Injuries

There were two neck injury cases in which questions were raised as to the amount of damages. One of these, *Williams v. Daniels*,[83] involved a claim that an award of $6,000 was excessive. The X-ray secured by the doctor who first attended the plaintiff showed some narrowing between the cervical vertebrae, and localized osteoarthritic changes. The orthepedic surgeon to whom the patient was referred found some limitation of motion on rotation of the neck, and pain on all motions of the cervical spine. His additional X-rays revealed continued narrowing of the disc spaces between the vertebrae, along with continued reversal of the normal cervical curvature. Plaintiff was in the hospital for a month. The surgeon further testified that the injury "could be permanent."

The chief ground for appeal was that the jury had been allowed to speculate as to whether or not the plaintiff's injuries were permanent. This contention was based on an earlier decision in *Nashville, C. & St. L. Ry. v. Reeves*.[84] There a doctor, not stated to be a specialist, had testified simply that the plaintiff had sprained her back and that

83. 344 S.W.2d 555 (Tenn. App. W.S. 1960).
84. 25 Tenn. App. 359, 157 S.W.2d 851 (M.S. 1941).

she "may clear up and get over it." The X-ray did not disclose any objective injury, and the diagnosis was based entirely on subjective symptoms. Under these circumstances the court held that there was no substantial evidence of permanent injury; it stated that "a mere conjecture, or even a probability, does not warrant the giving of damages for future disability which may never exist." In the present case, however, the court held that in view of the objective injuries revealed by the X-rays to two physicians, one a specialist, there was sufficient evidence to support a finding of permanent injury. Furthermore, in view of the considerable stay in the hospital, with traction, and the evidences of considerable pain necessitating narcotics, the court held that the verdict, while "exceedingly sufficient" was not so large as to require a remittitur. A verdict of $2,500 for loss of consortium in favor of the husband likewise was upheld.

The other neck injury case, *Kent v. Freeman*,[85] tends to disprove the common assumption that a jury always grants too much compensation for whiplash injuries. The plaintiff in that case, a practical nurse, was in the hospital for eleven days. She was placed in traction, received heat wave treatments, and suffered considerable pain. She was disabled from work for some time. Her medical bills were $421, and she received considerable additional treatment for which she was not charged on account of being a licensed nurse. The X-rays showed, according to a consulting doctor, that she had "a tear of the ligaments which hold the bones in their normal position in her neck, that a vertebra was displaced backwards and a ligament so torn that it slides backwards instead of just arching when the neck is bent." The consultant further testified that there was acute chromatic aggravation of pre-existing arthritis of the spine. He stated that there would be permanent disability consisting "of pain in her neck, shoulders, and arms following any type of activity which places more than a moderate amount of stress and strain on the muscles and ligaments of the neck." The jury awarded damages in the amount of $1,000.

Under these circumstances the court of appeals, in sending the case back for a new trial, set the verdict aside as "so grossly inadequate in comparison with the injuries actually sustained as to evince passion, prejudice or unaccountable caprice on the part of the jury."

IV. MISCELLANEOUS TORTS

A. Vicarious Liability—Family Car Doctrine

The family car doctrine was applied to a new factual situation in *Driver v. Smith*.[86] The father in that case maintained a car for the

85. 345 S.W.2d 252 (Tenn. App. M.S. 1960), discussed note 26 *supra*.
86. 339 S.W.2d 135 (Tenn. App. W.S. 1959); 28 TENN. L. REV. 412 (1961).

use of his family, including an eighteen year old daughter. The daughter did not keep a set of keys and had to obtain permission from her father or mother each time she used the car. Ordinarily she had no permission to leave the city limits. On the night of the accident the driving was with permission, although there was some deviation from this permission by driving the car three miles outside the city. There were four couples in the vehicle. The daughter's escort was driving at the time of the accident, and while this was not expressly authorized by the girl's father, he had on some occasions permitted his daughter's escort to drive. The daughter and her escort were kissing when he lost control of the car, with resulting injuries to several of the passengers, for which they recovered from the car owner in the trial court.

One ground of appeal was that the car was being operated at the time of the accident by a third party. The court rejected this argument on the ground that the daughter was guilty of personal negligence in engaging in kissing while the car was being driven at forty miles per hour, under crowded conditions. This made it unnecessary to decide whether or not the doctrine of "constructive identity" could be applied to make the defendant liable for the negligence of the actual driver.

The more significant ground of appeal was based on a statement in an earlier case, *Redding v. Barker*,[87] quoted with approval in a later decision, *Harber v. Smith*,[88] that "the family purpose doctrine does not apply where the members of the family must obtain special permission on each occasion of the vehicle's use by them; nor does it apply where there is no evidence that the vehicle was maintained wholly or partly to serve the convenience of the family." The present decision limits the applicability of the quoted language concerning special permission to the situation where it has not already been established that the car has been devoted to general family use. That was not the situation in the earlier cases, one of which involved a truck devoted primarily to farming purposes, and the other a car used only occasionally by the owner's son, who ordinarily lived away from home. In that type of case, it may well be that the requirement of specific permission for each use still would be enough to rebut a contention that the vehicle had been devoted to general family use. In the present case the father had explicitly testified that the car was maintained for the general use and convenience of his family, and the general picture supported this testimony.

This decision is in line with authorities elsewhere in holding that

87. 33 Tenn. App. 132, 230 S.W.2d 202 (W.S. 1950).
88. 40 Tenn. App. 648, 292 S.W.2d 468 (M.S. 1956).

a requirement of special permission before each use of the car, referred to in this case as a commendable practice in the case of a teenager, does not prevent application of the family car doctrine. In general the only requirements are that the car in fact be devoted to family use, and that it be used with permission, express or implied.[89] It likewise generally is considered that some deviation as to the time and place of the driving will not remove the vehicle from the operation of the doctrine.[90]

B. Railroad Yard as Permanent Nuisance

A point of first impression in this state concerning nuisances was dealt with in *Robertson v. Cincinnati, N. O. & Tex. Pac. Ry.*[91] It was alleged that a railroad was operating its switchyard, located within 1800 feet of plaintiff's residence, in such a way as to constitute a nuisance. The particular matters complained of were the vast lighting system, the noise from the bumping of cars, the loud-speaker system, and the locomotive whistles, all of which disturbances continued through the night. It appeared that the operation of the switchyard had begun on February 28, 1955, and the plaintiff's suit was brought over three years later. Consequently the principal issue was whether the suit was barred by the statute of limitations. This in turn depended on whether the nuisance was to be regarded as a continuous one. It is a general rule in most jurisdictions that where the nuisance is continuous, in the sense that it could be abated, or corrected by the defendant himself by more careful conduct of his enterprise, the statute of limitations does not run. On the other hand, if the nuisance is regarded as permanent, in the sense of being non-correctable, the statute does run. Following the prevailing view, the court found that this nuisance was one of a permanent character, principally because it was not based on negligence. It could not be abated or corrected by the defendant himself by more careful operation of its switchyard, for it was "conceded that the lawful operation of the railroad yard was conducted in a proper manner and the acts which caused the damage to the realty of Mr. and Mrs. Robertson were necessarily incident to that proper operation." The only doubtful point about the decision seems to be whether the court should have applied the three-year statute relating to injuries to real property,[92] or the ten-year statute relating to injuries not otherwise

89. PROSSER, TORTS § 66, at 369-72 (2d ed. 1955); 1 HARPER & JAMES, TORTS § 8.13, at 661 (1956).
90. See Comment, *Family Purpose Doctrine in Tennessee*, 22 TENN. L. REV. 535, 541-42 (1952).
91. 339 S.W.2d 6 (Tenn. 1960); 28 TENN. L. REV. 433 (1960).
92. TENN. CODE ANN. § 28-305 (1956).

covered.[93] It is not clear that the real property statute is intended to apply to damage from a nuisance of this type.[94]

C. Prima Facie Tort—Picketing

In *Large v. Dick*[95] it was alleged that the plaintiff was employed to paint a restaurant in Oak Ridge, and that the defendant, and the union he represented, caused his discharge. The demand for the discharge was made on the ground that the plaintiff was a non-union man, and was accompanied by a threat to picket the restaurant. It was held that a demurrer to the complaint was erroneously sustained. The court based its decision on the prima facie tort theory, that any intentional interference with a right of the plaintiff constitutes an actionable wrong in the absence of privilege or justification.

The prima facie tort doctrine has been accepted law in Tennessee for nearly fifty years.[96] There has been doubt about the application of the doctrine to picketing to secure a union or closed shop, because of the "picketing—free speech" doctrine developed by the United States Supreme Court.[97] Since, however, a later decision of the Supreme Court[98] permits an injunction against peaceful picketing to secure a closed shop, there seems to be no reason why the prima facie tort doctrine should not be applied to this situation. While a majority of courts have regarded picketing for a union or closed shop as justified by the union's interest in eliminating non-union competition and protecting union standards, a substantial minority have rejected the existence of any such privilege.[99] In Tennessee, where the policy against a union or closed shop has been made clear by legislation,[100] it seems to follow with equal certainty that no privilege or justification is present where the defendants' interference with the plaintiff's right to work is to attain this prohibited end.[101] The decision is further supported by the holding in *Dukes v. Brotherhood of*

93. TENN. CODE ANN. § 28-310 (1956).
94. See O'Neill v. San Pedro, L.A. & S.L.R.R., 38 Utah 475, 114 Pac. 127 (1911), holding that the "not otherwise provided for" section, rather than the one relating to injuries to real property, should be applied to this type of injury.
95. 343 S.W.2d 693 (Tenn. 1960).
96. Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). This decision expressly overrules Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884).
97. See Mascari v. Int'l Bhd. of Teamsters, 187 Tenn. 345, 215 S.W.2d 779 (1948). This case upholds the constitutionality of the Tennessee Open Shop Law, but modifies an injunction to permit peaceful picketing "as held by the Supreme Court of the United States."
98. Local 10, United Ass'n of Journeyman Plumbers v. Graham, 345 U.S. 192 (1952).
99. See PROSSER, TORTS § 106, at 743 (2d ed. 1955).
100. TENN. CODE ANN. §§ 50-208 to -212 (1956).
101. See Kirby, *Tennessee Labor Decisions: 1901-1954*, 8 VAND. L. REV. 73, 82, 92 (1955).

Painters[102] that an existing employment is a property right which is protected from malicious interference.

D. Malicious Prosecution

A malicious prosecution case, *Cohen v. Ferguson*,[103] brings out well the basic matters which the plaintiff must prove in order to succeed. Cohen operated a junk yard in Nashville, bounded on three sides by a fence and on the fourth by the Cumberland River. He was informed by his employees that two boys had entered the yard near the river and had taken a tire from one of the cars without paying for it. An hour or two later the employees reported that the same two boys again had entered the yard. Cohen then called the police and asked them to investigate. Five or six officers and two detectives responded to the call, and found one of the boys, the plaintiff, trying to remove a bumper from a car. He admitted taking the tire, but said he intended to get a bumper and then pay for it, although it developed that he had no money with him. After a trial for petit larceny the plaintiff was acquitted. In the malicious prosecution suit the trial court let the case go to the jury, which found for the plaintiff. The court of appeals, however, reversed and directed a verdict for the defendant.

The issue of probable cause is one to be decided by the court, and under the circumstances of this case it is not surprising that the appellate court found that the plaintiff had completely failed to sustain his burden of establishing lack of probable cause. It was pointed out that probable cause is present as long as a prosecutor honestly and reasonably believes that the accused is guilty. It was further held that the plaintiff had failed to introduce any substantial evidence to satisfy the burden of proving malice, which was defined as any primary purpose other than that of bringing a supposed defendant to justice. Finally, since the defendant had simply reported the facts to the police, and left it to them to do what they saw fit about bringing criminal proceedings, it was held that no prosecution was actually instituted by the defendant.

E. Defamation—Statement Before Legislative Committee Absolutely Privileged

There is a defamation case which involves a point of first impression in Tennessee, *Logan's Supermarkets, Inc. v. McCalla*.[104] The plaintiff there alleged that the defendants had falsely and maliciously

102. 191 Tenn. 495, 235 S.W.2d 7 (1950); 21 TENN. L. REV. 884 (1950).
103. 336 S.W.2d 949 (Tenn. App. M.S. 1960).
104. 343 S.W.2d 892 (Tenn. 1961).

stated in a proceeding before a legislative committee engaged in investigating trading stamp practices that the use of the stamps resulted in substantially higher prices. The issue was whether these statements were absolutely or conditionally privileged. If only a conditional privilege existed, it would be defeated if the plaintiff could establish malice.[105] The court of appeals considered that only a conditional privilege existed, and that a verdict was improperly directed for the defendant. The supreme court, however, reversed, holding that the statement was absolutely privileged, with the result that even if malice as well as falsity were present, the defendant was still entitled to a directed verdict. Since there was no earlier Tennessee decision involving either proceedings before a legislative committee or even the legislature itself, the court used in support of its decision a case which established an absolute privilege in the related field of judicial proceedings, *Cooley v. Galyon*.[106] In so doing the court indicated that the words, to be privileged, would have to be pertinent to the subject of inquiry or responsive to questions, as in the case of judicial proceedings. It might be added that in the case of proceedings before the legislature itself constitutional provisions extend the absolute privilege to whatever is said in the course of the legislative proceedings, whether relevant or not.[107]

In finding an absolute privilege and extending this privilege to committee hearings, the supreme court followed the generally prevailing view.[108] While it has been argued that the legislative privilege should be confined to statements made in good faith,[109] the difficulty with this view is that the risk of being obliged to refute a charge of malice before a jury may cause legislators or witnesses before legislative committees to refrain from making frank and complete statements of the facts as they see them.

105. PROSSER, TORTS § 95, at 629 (2d ed. 1955).
106. 109 Tenn. 1, 70 S.W. 607 (1902).
107. PROSSER, TORTS § 95, at 611 (2d ed. 1955).
108. See 1 HARPER & JAMES, TORTS § 5.23 (1956); RESTATEMENT, TORTS § 590, comment *a* (1938).
109. Field, *The Constitutional Privileges of Legislators*, 9 MINN. L. REV. 442 (1925).