Torts – 1958 Tennessee Survey

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The number of torts cases was somewhat less this year than in past years, being below the forty figure rather than above it. There were no particularly significant legal developments in the field. Perhaps the cases indicate, however, a developing fashion in automobile negligence actions. At least four of the cases seem to have been brought for whiplash injuries.¹

NEGLIGENCE

Breach of Duty

The question of whether the defendant has been negligent—has breached his duty to use due care—is normally treated as a question of fact, and it is usually submitted to the jury in terms of "what a person of reasonable prudence would have done under the same or similar circumstances."² Sometimes the defendant is identified somewhat more precisely. Two statements in cases decided during the survey period are relevant in this connection. 

"[A] notary is held to the care and diligence of a reasonable prudent man to ascertain the acknowledger's identity . . . ."³ "[A] retail dealer . . . must exercise the care and competence of a reasonable dealer as to any defects which he has an opportunity to discover; the care required of such a seller at retail is only that of a reasonable man under the circumstances . . . ."⁴

In applying the test of what a reasonable man would do, it is proper for the court to admit and the jury to consider evidence of a custom in the trade or the vicinity. This was the holding in City Specialty Store v. Bonner⁵ where the question was whether the floor of a store was waxed negligently. The court explained that the "customary

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⁴ Benson v. Fowler, 306 S.W.2d 49, 57 (Tenn. App. W.S. 1957). This was part of an instruction of the trial court, approved by the court of appeals.

⁵ 252 F.2d 501 (6th Cir. 1958).
practice is not as a matter of law ordinary care . . . . The customary way of doing a thing may be a negligent way. 6

The presence of an emergency is one of the circumstances to be taken into consideration in determining whether the actor's conduct was reasonable, and he is not necessarily negligent "because by reason of the impending danger his judgment is confused and he fails to make the most judicious choice . . . ." 7 The foreseeability of danger to third parties is also an important factor in determining negligence. 8

The general standard of care is sometimes held to be reduced to a specific rule of conduct when the legislature has passed a criminal statute covering the matter. This is known as the doctrine of negligence per se. The doctrine was raised in two cases but the statutes were held to be inapplicable. 9

Proof of breach of duty is normally by specific testimony as to what the actor did. Sometimes circumstantial evidence is utilized. Thus, in City Specialty Stores v. Bonner, 10 the fact that two other customers had slipped and fallen on the same day that the plaintiff fell "was competent to show not only notice of the slippery condition of the floor, but also to show its dangerous condition." 11 Some forms of circumstantial evidence are dignified by the term res ipsa loquitur. In the two cases where this doctrine was raised, it was held to be inapplicable. 12

The survey period has produced the usual number of cases stating that the issue of whether the defendant was negligent (breached his duty of care) is for the jury to decide, 13 but there are also the usual

6. Id. at 503.
8. In Friendship Tel. Co. v. Russom, 309 S.W.2d 416 (Tenn. App. W.S. 1957) the court distinguishes foreseeability of danger to somebody in determining negligence from foreseeability of the particular injury in determining proximate cause.
10. 252 F.2d 501 (6th Cir. 1958).
11. Id. at 503.
12. City of Maryville v. Farmer, 244 F.2d 456 (6th Cir. 1957) (electric utility not in exclusive control when electrocution took place inside a plant and utility was not responsible for internal wiring); Schenk v. Gwaltney, 309 S.W.2d 424 (Tenn. App. W.S. 1957) (Indiana automobile guest statute required proof of "wanton or wilful conduct").
decisions that the court must make the determination when only one reasonable conclusion can be reached from the evidence.

Causation

A negligence case requires a cause-in-fact relationship between defendant’s negligence and plaintiff’s damage. Thus in two cases involving negligence of a notary public in taking an acknowledgment, it was held that the negligence had no factual connection with plaintiff’s loss.

In Meeks v. Yancey three persons in a car had received whiplash injuries. Each had a pre-existing condition (arthritis or degeneration of neck or cervical spine) which was aggravated by the accident. In the court below the judge had instructed that recovery should be confined “to the extent or amount that said injury aggravated or caused the pre-existing injury, disease or ailment to become worse. In other words, the law compensates for the extent an old injury or deceased condition was aggravated or rendered worse by said injury negligently aggravated.” This was held to be error. If the pre-existing condition was not causing pain or suffering or disability and after the collision it did cause pain and suffering and disability, the court indicated, the collision is the proximate cause of the injuries. To illustrate its position it put the case of a plaintiff who had a diseased condition in the bone of his leg so that it broke from a light blow which was negligently inflicted by the defendant and which would not have broken a normal leg; the diseased condition of the leg prevented its healing so that it was amputated. The court says that defendant would be liable for the loss of the leg, for pain and suffering resulting therefrom and for all medical expenses, and adds that defendant would “be entitled to no reduction in damages . . . because of the fact that the plaintiff lost a badly diseased leg as distinguished from a healthy or normal leg.” The statement is clearly correct insofar as the loss of the leg and the pain and suffering from the ampu-

15. In Lowe v. Robin, 310 S.W.2d 161, 164 (Tenn. 1958) the court said that “the proximate cause of the loss in this case must be laid to the Lowes, who after they had received the money from Parrish, took it to the bank and had it deposited in their own names, and then turned the money over to Parrish.” In Manufacturers Acceptance Corp. v. Vaughn, 305 S.W.2d 513, 522 (Tenn. ‘App. M.S. 1956) the statement was that “it is not shown that the mere failure to swear him changed or affected the results in so far as the complaining witnesses are concerned.”
17. Id. at 331.
18. The court relied strongly on the case of Elrod v. Town of Franklin, 140 Tenn. 228, 204 S.W. 298 (1917) where there is language to this effect.
19. 311 S.W.2d at 336.
tation and the medical expenses are concerned, but the last part of it (that in quotation marks above) at least carries a possible implication which may go too far. Suppose that the diseased condition of the leg had already progressed to the point where plaintiff had to use crutches. Would this not affect the measure of damages for the loss of use of the leg? After all, where defendant negligently kills a man, he may always show a diseased condition which affected the decedent's life expectancy, and this is pertinent to the measure of damages. In the end the determination should depend upon whether the damage is actually divisible and can be apportioned properly.

In Friendship Tel. Co. v. Russom, defendant maintained a telephone pole on the bank by the side of a road. A guy wire ran from the pole to an anchor in the road ditch. Plaintiff's decedent, using a road machine to clear out the ditch, struck the buried anchor rod with such force as to cause the guy wire to break the decayed telephone pole. It fell on his head and killed him. Assuming negligence in the condition of the pole and the location of the guy wire and anchor, there was clearly a cause-in-fact relationship. Defendant appealed from an adverse jury verdict, claiming that there was no proximate cause because of the unusual character of the accident, which was not foreseeable.

The court made it clear that proximate cause, or legal cause, involves more than cause in fact, and that liability may be cut off despite the presence of cause in fact; but it explained that foreseeability of the accident is not the test. Following a helpful discussion of the authorities, it summarized:

Under these authorities, it was not necessary that defendant should have been able to foresee the particular harm that befell deceased. It was enough that defendant could have reasonably foreseen that some such harm of like general character might result to him from its negligence, and that the harm which did result was within the reasonable range of the risk created by such negligence. Such being the case, the negligence was the legal or proximate cause of the injury.

Detailed treatment of the Tennessee authorities on proximate cause has been presented in previous survey issues and will not be repeated here. It is appropriate, however, to say that the opinion in the Friendship case contains one of the best recent discussions of the problem. In speaking of the "reasonable range of the risk" the

20. See Prosser, Torts § 45 (2d ed. 1955); 2 Harper & James, Torts § 20.3 (1956).
22. Id. at 421.
opinion makes it clear that this is a standard and that a court must exercise sound discretion in rendering a policy decision.

**Damages**

The question of damages is treated as one of fact and is normally for the jury to determine. Occasionally, however, the jury decision may be set aside as being inadequate or excessive. In "considering whether a verdict is excessive the court can consider the present deflated value of the dollar."[26]

**Contributory Negligence**

The determination of whether the plaintiff was guilty of contributory negligence is normally a task for the jury, though occasionally the decision is made by the court as a matter of law. In the one case involving the defense of assumption of risk it was held that the decision was for the jury.

Exceptions to the rule that contributory negligence bars recovery are discussed or raised in several cases. McCullough v. Johnson Freight Lines involved the unique Tennessee doctrine of remote contributory negligence. "It is a settled rule of law in this State that the plaintiff's contributory negligence as a remote cause of an accident, and injuries complained of, will mitigate the damages ...; and that remote contributory negligence must be considered in mitigation of damages as a matter of law; it is not within the discretion of the

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24. See, e.g., McCullough v. Johnson Freight Lines, 308 S.W.2d 387 (Tenn. 1957) (damages will be set aside as inadequate when "manifestly insufficient to compensate plaintiff ... the result of passion, prejudice or unaccountable caprice").

25. See, e.g., The Kroger Co. v. Rawlings, 251 F.2d 943 (6th Cir. 1958) (must be a "showing of bias, passion or corruption on the part of the jury").

26. Id. at 945. The question of damages when a pre-existing injury is aggravated was considered in Meech v. Yancey, 311 S.W.2d 329 (Tenn. App. W.S. 1957), treated supra under the topic of causation.


30. In Benson v. Fowler, 305 S.W.2d 49 (Tenn. App. W.S. 1957) reference is made to the rule that contributory negligence does not bar recovery where defendant's negligence was "gross, willful or wanton," but the court found it inapplicable.

31. 308 S.W.2d 387 (Tenn. 1957).
As a result the fact that the damages awarded to the plaintiff were "exceedingly small" was held not to be reversible error, since the jury must have mitigated them on a finding of plaintiff's remote contributory negligence. This doctrine is equivalent in many respects to comparative negligence. The difference is that mitigation of damages there is theoretically on the basis of the degree of negligence of the parties while here the mitigation theoretically depends upon the relative closeness of the causal relation. Is it likely that juries make a distinction? A special verdict in cases like the instant one would be most helpful to the court in understanding what the jury meant.

The doctrine of last clear chance was presented in *Louisville & Nashville R.R. v. Rochelle* where the deceased crossed railroad tracks at a grade crossing with a steep upgrade and might have been found to be "within striking distance of the train when the train was a substantial distance down the track and [when] the crew was not on the lookout to observe decedent's position." This is a broadened application of last clear chance beyond the more restricted doctrine of "discovered peril" and may be justified by the Tennessee cases.

It would appear that logically the doctrine of last clear chance should be absorbed by the broader doctrine of remote contributory negligence and have no independent significance, but there has been no judicial discussion of this issue.

### Particular Relationships

1. **Traffic and Transportation—Automobiles:** A large number of cases involved collisions. In some of them the details of the accident were not given. In several cases plaintiff was stopped, usually for a traffic light, when defendant ran into him from the rear. In one case one car "suddenly loomed in front" of the other; in another defendant turned left in front of plaintiff; another involved a rail-

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32. Id. at 392.
33. See Wade, Book Review, 8 *VAND. L. REV.* 657, 660 (1955) for a statute which would cover these matters.
34. 252 F.2d 730 (6th Cir. 1958).
35. Id. at 738.
37. The doctrine of last clear chance is mentioned in Smith v. Burks, 305 S.W.2d 748 (Tenn. App. M.S. 1957), but held to have no application.
road-crossing collision.\textsuperscript{42} Other accidents involved striking a bridge abutment,\textsuperscript{43} parked car running into a building,\textsuperscript{44} and falling off a car.\textsuperscript{45} In \textit{Young v. Franklin Interurban Co.} a bus caught fire following an explosion and a passenger was injured in escaping.

\textit{Same—Railroads:} All four cases of actions against railroads involved the Railroad Precautions Statute.\textsuperscript{47} In two of the cases, the train ran over a person on the tracks,\textsuperscript{48} and the question was whether the railroad had complied with all of the precautions prescribed by subsection (4) of the statute. The court held in both cases as a matter of law that the requirements had been met, though in one it declared that a jury question was raised regarding liability for common law negligence.\textsuperscript{49} The other two cases involved crossing accidents. In \textit{Southern Ry. v. Clevenger} the provisions of subsection (3) of the statute, requiring the sounding of a whistle or bell one-fourth mile from the crossing, were held to apply to a case where the plaintiff suffered injuries when he jumped from a moving truck just before it collided with the train.

In \textit{Louisville & Nashville R.R. v. Rochelle} the court declared that "by the great preponderance of the testimony herein the train did not give warning of its approach to the crossing." Instead of referring to subsection (3) of the statute, however, it held that the jury might properly find for the plaintiff for breach of the common law duty "to give warning of the approach of its train at its crossings."\textsuperscript{50} The court discussed subsection (4), and as to the defendant's contention that it had complied with the statute after the automobile appeared on the track as an obstruction, it held that this was a question of fact for the jury.

2. \textit{Occupiers of Land:} An owner or possessor of land owes a duty

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\item \textsuperscript{42} \textit{Louisville & Nashville R.R. v. Rochelle}, 252 F.2d 730 (6th Cir. 1958); cf. \textit{Southern Ry. v. Clevenger}, 243 F.2d 764 (6th Cir. 1957).
\item \textsuperscript{43} \textit{Schenck v. Gwaltney}, 309 S.W.2d 424 (Tenn. App. W.S. 1957).
\item \textsuperscript{44} \textit{Beene v. Cook}, 311 S.W.2d 596 (Tenn. App. M.S. 1957).
\item \textsuperscript{45} \textit{Smith v. Burks}, 305 S.W.2d 748 (Tenn. App. M.S. 1957) (failing off fender); \textit{Urmann v. City of Nashville}, 311 S.W.2d 618 (Tenn. App. M.S. 1957) (falling out of loaded truck bed). The Smith case involved a licensee and is discussed in more detail in the section on landowner's liability.
\item \textsuperscript{46} 306 S.W.2d 674 (Tenn. App. M.S. 1957).
\item \textsuperscript{47} \textit{Tenn. Code Ann.} § 65-1203 (1955).
\item \textsuperscript{48} \textit{Southern Ry. v. Elliott}, 250 F.2d 740 (6th Cir. 1958) (two-year-old boy); \textit{Page v. Tennessee Central Ry.}, 305 S.W.2d 263 (Tenn. App. M.S. 1956) (intoxicated man lying unconscious).
\item \textsuperscript{49} \textit{Southern Ry. v. Elliott}, 250 F.2d 740 (6th Cir. 1958). There was testimony regarding the speed of the train and failure to blow the whistle before reaching an unincorporated town.
\item \textsuperscript{50} 245 F.2d 764 (6th Cir. 1957).
\item \textsuperscript{51} 255 F.2d 730 (6th Cir. 1958).
\item \textsuperscript{52} Id. at 736. Why there was no reference to subsection (3) is not clear. Perhaps the crossing was not marked as required by the statute.
\end{itemize}
of due care to an invitee, or business guest, and is liable for damages caused by breach of the duty. Thus recovery was allowed when a customer slipped and fell on a slick floor, and it was held to be a jury issue whether a hotel was negligent when a guest fell down certain steps leading from a banquet room and just outside a swinging door. A similar duty is owed to the public on the highway—that is, to use care to keep the premises in condition so that they will not endanger a person traveling on a public road. This principle extends to users of the highway ‘who stay a few feet from it inadvertently or in an emergency’; and any obstruction over, under, or so near the highway as to endanger such users comes within this principle.

A lesser duty is owed to a person characterized as a licensee. The nature of this duty and the basis for classifying persons as invitees or licensees are treated in Smith v. Burks. Defendant's truck, delivering ready-mixed concrete to the plaintiff, turned off the highway on to a field and immediately mired down. Plaintiff came up, put some rocks in the soft ground and jumped on the running board of the truck to assist the driver in driving through the field. The truck went a little way up a slight rise, but the motor stalled and it rolled back a few feet to the edge of the highway, where the front end reared up. Plaintiff fell off, breaking his leg. The lower court directed a verdict for defendants and the court of appeals affirmed, holding that the plaintiff was a “mere licensee.” He was not an “invitee” because: (1) the “driver did not ask or suggest to the plaintiff that he ride on his truck,” and (2) there was no “implied invitation” since the plaintiff's purpose of directing the driver where to drive would have been better served "by staying on the ground rather than riding on the running board."
As a licensee, the court held, he was owed "no duty except to refrain from willfully injuring him or from committing negligence so gross as to amount to willfulness." The Tennessee cases are in some confusion regarding the duty of care owed a licensee. The rule stated above is stated in several cases. It was at one time the majority rule in this country, but "an increasing regard for human safety has led to a retreat from this position, and the greater number of courts now expressly reject it." In Tennessee there are a number of cases which follow the majority rule regarding an automobile guest (who is classified as a licensee), and hold that ordinary care is required in driving. The instant case can probably be reconciled with these decisions by assuming that the court was holding as a matter of law that there was no negligence to the plaintiff in the activity of driving when the engine stalled and the truck rolled back. There was no need to warn the plaintiff about the condition of the truck as this was perfectly apparent to him.

Normally the duty to use care is not owed to an unknown trespasser. Southern Ry. Co. v. Elliott reiterates again the Tennessee rule that as a result of the Railroad Precautions Act a duty is owed by the railroad to a person on the tracks.

The special Tennessee rule that a landlord is under a duty to use care to discover and repair or warn of a defective condition of leased premises was raised in Cart v. Coal Creek Mining & Mfg. Co. which involved land leased for strip mining. The court held that the

59. Id. at 750.
60. See, e.g., Chattanooga Whse. & Cold Storage Co. v. Anderson, 141 Tenn. 288, 210 S.W. 153 (1919); Westboro Coal Co. v. Willoughby, 133 Tenn. 267, 180 S.W. 322 (1915). But cf. Heaton v. Kagley, 198 Tenn. 530, 536, 281 S.W. 2d 385, 388 (1955) ("He was a licensee under the law, and the only duty devolving upon the defendant was 'to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land'").
61. PROSSER, TORTS 448 (2d ed. 1955). The duty owed is to use reasonable care in conducting activities on the premises and to warn the licensee of latent dangerous conditions which are known to the occupier; there is no duty to use care to discover defective conditions. See generally, PROSSER, TORTS § 77 (2d ed. 1955). 2 HARPER & JAMES, TORTS §§ 27.8-27.11 (1956).
63. Harrison v. Graham, 21 Tenn. App. 189, 107 S.W.2d 517 (M.S. 1937) was another case involving falling off a fender and breaking a foot. A jury verdict for plaintiff was affirmed. There are two possible distinguishing features: (1) defendant was clearly negligent in starting the car while plaintiff was still mounting the fender and (2) defendant "directed [plaintiff] to get on the running board."
64. 250 F.2d 740 (6th Cir. 1958).
existing underground entries could not be eliminated and that ade-
quate notice was given.

3. Suppliers: In Hill v. Harrill, an automobile dealer let a pros-
ppective customer have a second-hand automobile to try it out and
show it to his mother. The customer negligently ran into the plain-
tiff. It was held that the transaction was a bailment and that the
bailee's negligence is not imputed to the bailor. There being no
evidence of negligence on the part of the bailor in delivering the car
to the bailee, the court held that there should be a directed verdict
in his favor.

Benson v. Fowler treats the responsibility of a retail dealer (pro-
pane gas and equipment). It approved an instruction that the care
required "does not extend beyond the reasonable examination which
experience would indicate to the retail dealer is necessary, along with
the investigation of any unusual condition that might be apparent."
A jury verdict for defendant was affirmed.

4. Professional Negligence: Two cases involved the negligence of a
notary public in taking an acknowledgment. In one he failed properly
to identify the person before him, and in the other he failed to
require the person to take an oath and swear though he did observe
the signing of the papers. In both cases the court appeared ready to
allow a finding of negligence but found that the negligence could
not be regarded as the proximate cause of the plaintiff's losses.

Garrison v. Graybeel involves a malpractice action against a
physician for negligence in administering antitoxin serum, but the
court merely held that a plea in abatement had been improperly sus-
tained. The question was whether an employee could recover from
a physician employed by the employer after accepting workmen's
compensation from the employer.

5. Master and Servant: The case of Urmann v. City of Nashville involves an application of the fellow-servant rule. Plaintiff, a member
of a street crew, was injured when he fell off the rear of a truck on its
making a sudden turn without slowing down. The truck was given by

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66. 310 S.W.2d 169 (Tenn. 1957).
68. Lowe v. Robin, 310 S.W.2d 161 (Tenn. 1956). For an earlier decision in
this case, see Lowe v. Wright, 292 S.W.2d 413 (Tenn. App. M.S. 1956).
69. Manufacturers Acceptance Corp. v. Vaughn, 305 S.W.2d 513 (Tenn.
70. 308 S.W.2d 375 (Tenn. 1957), 25 TENN. L. REV. 528 (1958).
71. See also, McMahon v. Baroness Erlanger Hospital, 306 S.W.2d 41 (Tenn.
App. E.S. 1957) where a student nurse negligently gave an obstetrical patient
ergotrate under the mistaken assumption that she had already been delivered.
The case turned on the issue of governmental immunity.
72. 311 S.W.2d 618 (Tenn. App. M.S. 1957).
one Gilbert, the crew foreman, and the city defended on the ground
that Gilbert was a fellow servant. The court found that Gilbert was
"boss or foreman of the crew," in charge of it and not simply carry-
ing out orders of his supervisors without discretion. As a result, he
was held to be a vice principal rather than a fellow servant, and a
judgment for defendant was reversed. A somewhat similar holding
seems to be implied in Garrison v. Graybeal.73

The opinion in the Urmann case also contains an extensive dis-
cussion of the defense of assumption of risk. The conclusion was that
"even if the plaintiff assumed the ordinary risk of riding in the posi-
tion in which he was found on the day of the accident; nevertheless,
it does not necessarily follow that he assumed the risk of negligent
driving such as the jury might have found from the evidence."74

6. Governmental Agencies: A governmental agency is not liable for
negligence when it is performing a governmental function, as dis-
tinguished from a proprietary function. Thus the operation of a
hospital is regarded as a governmental function, and plaintiff was un-
able to recover in McMahon v. Baroness Erlanger Hospital75 where
the hospital was owned and operated by Hamilton County, even
though she was a paying patient and about 87 per cent of the hospital
income was received from paying patients. The court adverted to the
growing criticism of the rule of governmental immunity and the
growing trend away from it, but regarded the rule as solidly estab-
lished in Tennessee. Under the Tennessee rule the immunity may be
waived by the procurement of liability insurance, but the insurance
held by the hospital in the McMahon case was held not to cover
malpractice and thus was ineffectual for the plaintiff.

On the other hand, in Wilson v. Maury County Board of Education,76
involving a school bus, when the defendant admitted that it had liabil-
ity insurance, the court held that it was proper for the trial judge to
exclude all reference to the insurance from the jury. The judge's
instruction that the defendant would be liable despite the fact that
it was engaged in a governmental function was held to be sufficient
for the jury.

73. 308 S.W.2d 375 (Tenn. 1957), 25 TENN. L. REV. 528 (1958). Plaintiff had
been injured and was given an antitoxin serum injection by defendant, a
physician employed by plaintiff's employer. The court held that acceptance
of workmen's compensation from the employer did not prevent an action
against the physician and that a plea in abatement was improperly sustained.
In distinguishing an earlier case, it indicated that the physician was not to be
regarded as a fellow servant of the plaintiff, since "his services had no rela-
tion to the employer's business."

74. 311 S.W.2d at 626.
75. 306 S.W.2d 41 (Tenn. App. E.S. 1957).
76. 302 S.W.2d 502 (Tenn. App. M.S. 1957).
Thornton v. Carrier\textsuperscript{77} held that the legislature can by a private act declare a proprietary act governmental and thus impose immunity. The case involved construction of a harbor project.

Tennessee has held for some time that a municipality is liable for the negligent maintenance of its streets and alleyways.\textsuperscript{78} But the statute requires that a written notice regarding the injury be given the mayor within ninety days from the time it is received.\textsuperscript{79} This action has been strictly construed, and the court held in Waite v. Orgill\textsuperscript{80} that physical disability of the injured party did not excuse her from giving proper notice.

**OTHER TORTS**

**Battery:** In Gross v. Abston,\textsuperscript{81} the court held that a private person is not privileged to shoot and kill a fleeing misdemeanant. The decedent had been peering in a bedroom window (a violation of the “Peeping Tom Act”\textsuperscript{82}) and was running away after being accosted by defendant when defendant shot him. The case was reversed and sent back for a new trial because the trial judge had failed to direct a verdict for plaintiff.

**Malicious Prosecution:** In Rice v. Logan's Super Market\textsuperscript{83} defendants had a check for $25, purportedly signed by plaintiff; but plaintiff disclaimed it, stating that it was not his signature and that he did not know anything about it. Defendants swore out a warrant for arrest against plaintiff, and it was apparently executed. When the matter came before the grand jury, defendants advised it that the check had been paid off and that they did not want to prosecute. Plaintiff himself had never paid the check. The supreme court reversed the action of the trial judge in sustaining a demurrer to the declaration, stating that the declaration contained the necessary elements of a cause of action in malicious prosecution, including lack of probable cause, malice and termination of the criminal prosecution favorably to plaintiff.

77. 311 S.W.2d 208 (Tenn. App. W.S. 1957).
78. For discussion of the basis of the rule, see Knoxville v. Fielding, 153 Tenn. 586, 285 S.W. 47 (1925).
80. 310 S.W.2d 179 (Tenn. 1958).
81. 311 S.W.2d 817 (Tenn. App. M.S. 1957).
83. 310 S.W.2d 431 (Tenn. 1958).