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Torts -- 1957 Tennessee Survey

John W. Wade

TORTS—1957 TENNESSEE SURVEY

JOHN W. WADE*

NEGLIGENCE

Duty

One who performs an act is ordinarily under a duty to act carefully. When the defendant has acted there is seldom a problem regarding the duty to use care. But when the defendant has failed to act the question of duty raises a substantial problem.[1] The rule is stated that there is no duty to act, but the exceptions are many. One arises when there is a particular relationship between the parties; another, when the defendant had commenced to act. Both exceptions are involved in *Union Carbide & Carbon Corp. v. Stapleton.*[2] Plaintiff had been subject to a mustard gas attack in the war, incurring a spot on his lungs. While working as an employee for defendant he had several X-rays made. They showed the spot and also indicated an arrested case of tuberculosis. The doctor in defendant's employ informed plaintiff of the spot but there was a conflict in testimony as to whether he mentioned the arrested tuberculosis. After plaintiff left defendant's employ, he was ill. Apparently his doctor then would have had an X-ray made except that plaintiff told the doctor that he had been X-rayed by defendant and found all right. The tuberculosis had become active and he was seriously disabled. A jury verdict for plaintiff was regarded as indicating that defendant failed to inform plaintiff of the tubercular condition and as covering the issues of proximate cause and contributory negligence and the court felt that its task was to determine whether there was a duty to disclose. It held that there was. The relationship of employer and employee has been held to be sufficient basis for the duty to act under certain circumstances but not to this extent. The act of taking the X-rays might be regarded as an undertaking, imposing liability for acting negligently or for leaving plaintiff in a worse condition than before the undertaking, but the cases are few where the undertaking imposes liability for failure to carry it out without more. Here the combination of the two was held sufficient, with the greater emphasis on the concept of the undertaking; and the verdict for the plaintiff was affirmed.

* Dean, Vanderbilt University School of Law; member, Tennessee Bar.

1. See generally PROSSER, TORTS § 38 (2d ed. 1955).
2. 237 F.2d 229 (6th Cir. 1956), 10 VAND. L. REV. 622 (1957).

Breach of Duty

The issue of breach of duty is normally for the jury to decide.[3] It is submitted to the jury in terms of a standard of what a reasonable, prudent man would do under the same or similar circumstances. Sometimes the phrase "same or similar circumstances" is felt not to be adequate, and particular circumstances are specifically set out in the instruction. This is true, for example, of the situation where the defendant is acting in an emergency situation, and the so-called "sudden emergency doctrine" has developed.[4] It was held proper in another case to instruct that a driver must take into consideration that the road was wet and not necessary to add that he must take into account that he could not stop his car as readily as on a dry road.[5] The fact that one is dealing with children is another circumstance which may be specifically mentioned. Thus, in *Bradshaw v. Holt*[6] the court held that the driver of a car must take into consideration the irresponsibility of children and explained that it was a "jury question as to whether Bradshaw was guilty of negligence (1) in not placing his car under such control as was necessary to avoid any collision that the known childish impulses of this child of such tender years might render probable, or (2) in assuming that such child would stand on the side of the highway without attempting to cross until Bradshaw's very swiftly moving automobile should pass."[7]

Negligence per se: A criminal statute may sometimes lay down a specific rule of conduct. This rule of conduct may then be taken by the courts in a negligence case as supplanting the general standard of care, in which case the jury are instructed that the violation of the rule constitutes negligence per se. Thus, in *Hammonds v. Mansfield*[8]

3. Thus, in a number of cases the issue was held to have been properly left to the jury. See, *e.g.*, Crane Co. v. Simpson, 242 F.2d 734 (6th Cir. 1957); City of Winchester v. Finchum, 301 S.W.2d 341 (Tenn. 1957); Dixon Stave Heading Co. v. Archer, 291 S.W.2d 603 (Tenn. App. E.S. 1956); McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956); Moore v. Watkins, 293 S.W.2d 185 (Tenn. App. E.S. 1956); Kendall Oil Co. v. Payne, 293 S.W.2d 40 (Tenn. App. E.S. 1955). In others it was held that the issue should have been left to the jury and a directed verdict was improper. See, *e.g.*, Coatney v. Southwest Tenn. Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956); Thurman v. Southern Ry., 293 S.W.2d 600 (Tenn. App. E.S. 1956); Boyce v. Shankman, 292 S.W.2d 229 (Tenn. App. W.S. 1953).

However, the facts may be so clear that the jury could reasonably reach only one result, in which case a directed verdict should be given. See, *e.g.*, Johnson v. Johnson City, 292 S.W.2d 794 (Tenn. App. E.S. 1956); Hooper v. Starkey, 297 S.W.2d 948 (Tenn. App. M.S. 1956); Chattanooga v. Shackleford, 298 S.W.2d 743 (Tenn. App. E.S. 1956).

4. An instruction regarding the "doctrine" was sustained in Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. W.S. 1955); see also Womac v. Casteel, 292 S.W.2d 782 (Tenn. 1956).

5. Kunk v. Howell, 289 S.W.2d 874 (Tenn. App. E.S. 1956).

6. 292 S.W.2d 30 (Tenn. 1956).

7. *Id.* at 33.

8. 296 S.W.2d 652 (Tenn. App. W.S. 1955).

violation of the statute requiring good brakes was held to constitute negligence per se, and the statute was construed to render it unnecessary that the defendant know that the brakes were defective. "The statute is both penal and peremptory in its requirement and one who violates it and causes injury to another should affirmatively remove any imputation of negligence in failing to discover the defect."[9] The doctrine was raised in several other cases. In one case the statute was held not to have been violated.[10] In two cases the issue was whether the injury sustained was within the purpose for which the ordinance was passed.[11]

The contention was made in three cases that the National Electric Safety Code should be treated in a similar fashion, as laying down a specific rule of conduct replacing the general standard.[12] All three cases agreed, however, that the "Code" was not to be treated as the equivalent of a statute or ordinance, and that while its provisions were appropriate for evidence they should not be controlling on the jury.

Proof of Negligence: Since breach of duty, or negligence, is treated as an issue of fact, it can be proved by direct or circumstantial evidence, like other fact issues. In malpractice cases, however, it is usually held that ordinary evidence is not sufficient and that professional or expert testimony is required to permit the jury to find negligence. This rule was urged by the defendant in *Rural Educ. Ass'n v. Bush.*[13] The alleged negligence, in this case, however, was sewing up a sponge in plaintiff's abdomen, and the court held that expert evidence was not necessary to establish negligence under these circumstances. "Any layman would know that fact." The court was of course relying on circumstantial evidence, and this is one of the classic instances of the doctrine of *res ipsa loquitur.*

Res ipsa loquitur was the subject of extended discussion in *Coca Cola*

9. *Id.* at 659.

10. Merck & Co. v. Kidd, 242 F.2d 592 (6th Cir. 1957). Defendant manufactured blood plasma which had hepatitis virus. This was held not to be in violation of the Tennessee Food, Drug and Cosmetic Act prohibiting the manufacture or sale of drugs containing "any filthy, putrid or decomposed substance." TENN. CODE ANN. § 52-115 (1956).

11. City of Winchester v. Finchum, 301 S.W.2d 341 (Tenn. 1957) (ordinance prohibiting bicycles on sidewalks); Murray v. Nashville, 299 S.W.2d 859 (Tenn. App. M.S. 1956) (marked crosswalk ordinance). Both cases involved contributory negligence. See also McKamey v. Andrews, 289 S.W.2d 704 (Tenn. App. E.S. 1955) (yielding right of way to vehicle in "favored thoroughfare"); Spence v. Carne, 292 S.W.2d 438 (Tenn. App. W.S. 1954) (municipal ordinances).

12. Kingsport Util. v. Brown, 299 S.W.2d 656 (Tenn. 1957); Chattanooga v. Rogers, 299 S.W.2d 660 (Tenn. 1956); Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956). In all three cases defendants claimed compliance with the terms of the "Code" as conclusive indication of due care. This would not necessarily be true even if the "Code" were treated as a statute; under certain circumstances one may be negligent in driving 29 miles per hour in a statutory 30-mile zone.

13. 298 S.W.2d 761 (Tenn. App. M.S. 1957).

Bottling Works, Inc. v. Crow.[14] Plaintiff's eye was injured when a Coca Cola bottle exploded. He had purchased a case of the bottles from a retail merchant, Havener, to whom the bottles had been delivered by defendant company. While in Havener's possession they had been under a counter, where they were under the observation of the owner and his son. Plaintiff took them to his truck and carried them a half mile away, where he placed them in a tub of crushed ice with other soft drinks. When plaintiff reached for a bottle 30 minutes later, a bottle of Coca Cola exploded, causing the injury. The trial court submitted the case to the jury, and while the court of appeals reversed a verdict for the plaintiff, the Supreme Court reinstated the verdict, holding that the doctrine of *res ipsa loquitur* was applicable. There was little difficulty in taking the position that the bottle would not normally have exploded in the absence of negligence, and the problem came in identifying that negligence with the defendant. In the earlier case of *Coca Cola Bottling Works v. Sullivan,*[15] involving a foreign body in the bottle, the Supreme Court had held that it must be shown by a clear preponderance of the evidence that there was no reasonable opportunity for the bottle to have been tampered with, in order for the case to go to the jury on the basis of *res ipsa loquitur.* While the court in the instant case holds that this requirement of a higher measure of proof is met, its general treatment indicates a relaxation of the requirement.[16] This special type of proof is not required in the great majority of jurisdictions and even in Tennessee it has been peculiar to the bottled drink cases.[17] Perhaps in the future it will be sufficient for the plaintiff simply to introduce sufficient evidence to allow the jury reasonably to find that the bottle had not been tampered with by a third person, so that the inferred negligence can be regarded as that of the defendant.[18]

Two other cases should be considered on the subject of circumstantial evidence. In *Moore v. Watkins*[19] and *Ross v. Griggs*[20] the facts were remarkably similar. Two young men were in each car,

14. 291 S.W.2d 589 (Tenn. 1956), 24 TENN. L. REV. 1219 (1957).
15. 178 Tenn. 405, 158 S.W.2d 721, 171 A.L.R. 1200 (1942).
16. The court speaks of the evidence eliminating "the probability of any tampering with" the bottle; the *Sullivan* test would apparently have required the "clear" elimination of any "possibility."
17. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 2.10 (1951); Wade, Book Review, 22 TENN. L. REV. 444, 446 (1952).
18. It is possible to distinguish the *Sullivan* case on the element of damages. That case involved a foreign substance in the bottle, and the physical illness as a result could easily be faked, a matter which clearly bothered the court. In the instant case, the explosion was unquestioned, and both it and the physical damage to the eye were seen by several witnesses. While the court in the instant case declines to accept the distinction, it is a practical one which may well be important in future cases. When plaintiff's "injury" is doubtful the requirement in the *Sullivan* case may still be imposed.
19. 293 S.W.2d 185 (Tenn. App. E.S. 1956).
20. 296 S.W.2d 641 (Tenn. App. W.S. 1955), 24 TENN. L. REV. 1217 (1957).

which was apparently going at an extreme speed and failed to make a sharp turn and crashed against a tree, "jackknifing" against it and coming down at a different angle. Both young men were killed in each instance. Although there were no witnesses, the circumstances clearly indicated negligent driving at an unreasonable speed. The big question in each case therefore was not one of whether the driver was negligent but one of who was the driver. In each case the court held that it would be possible for the jury to infer that the owner was driving. He had been originally driving in both cases and the position of the bodies in the car and on the ground was held to permit the inference—a somewhat tenuous one in each case.[21]

Causation

The element of "proximate cause" in a negligence case usually includes both cause in fact and legal cause. Cause in fact—whether defendant's negligence actually caused, or was a substantial factor in causing, the plaintiff's injury—is an issue for the jury to determine. Thus, in *Illinois Central R.R. v. Exum*[22] the issue was whether the fire which burned the plaintiff's buildings was started by defendant railroad. There was conflicting evidence, and the jury verdict for the plaintiff was allowed to stand. Again, in *Coatney v. Southwest Tennessee Elec. Membership Corp.*,[23] the issue was whether the purported negligence of defendant in allowing an electric wire to sag was a cause in fact of its coming in contact with a portable antenna. The court held that this was a question for the jury, rather than for the trial judge.[24]

Legal cause involves the decision of whether the liability should be cut off despite the presence of a cause-in-fact relationship for reasons of policy or because the relationship between the negligence and the injury is not reasonably close. This is sometimes left to the jury, sometimes decided by the court as a matter of law. In *Chattanooga v. Rogers*,[25] where both cause in fact and legal cause were involved, the determination was left to the jury. Electricity was transmitted (by contact or by arc) from defendant's high tension wires to a building crane operated by a third person. It went through the crane, killing the deceased, a workman. Defendant contended that the action of the

21. Both cases relied on the holding in the recent case of Burkett v. Johnson, 282 S.W.2d 647 (Tenn. App. W.S. 1955), which involved similar facts. See discussion in Wade, *Torts—1956 Tennessee Survey*, 9 VAND. L. REV. 1137, 1138-39 (1956).

22. 296 S.W.2d 372 (Tenn. App. W.S. 1955).

23. 292 S.W.2d 420 (Tenn. App. W.S. 1956).

24. See also McKamey v. Andrews, 289 S.W.2d 704 (Tenn. App. E.S. 1955), where there was some discussion of the question of whether an automobile accident could be regarded as the cause, some time later, of a stroke in a woman who had high blood pressure and arteriosclerosis.

25. 299 S.W.2d 660 (Tenn. 1956).

crane operator constituted an intervening cause. Said the court, through Justice Burnett:

> The question of the proximate cause of the accident, the crane coming into too close proximity to the wires or the lowness of the uninsulated wires, generally presents a question of fact. The mere fact that active intervening cause is so vehemently and forcefully argued and can be argued as the cause of an accident seems to us one of the strongest reasons of why this question should be submitted to a jury if there is any evidence of negligence on the part of two or more parties which might cause the injuries. In this case clearly there was a dispute on material facts as to whether or not the erection and leaving these uninsulated wires at the height that they were was negligence on the part of the City or whether or not the crane operator who was handling his crane or whether they came in contact with the wires or whether the current jumped from the wires onto the crane, was all disputed and under such a situation if the minds of reasonable men might differ as to the conclusion to be drawn from these facts (clearly they might do so here) then there is presented a jury question.[26]

Where negligence per se is involved because of violation of a statute or ordinance, causation questions are often handled most aptly by determining whether the injury came within the group of hazards which the statute was intended to protect against. This approach was used in two cases where the plaintiff violated a municipal ordinance.[27]

Damages

> Under our decisions no mathematical rules of computation have ever been formulated making verdicts and judgments uniform in negligence cases. It is the duty of the courts to take into consideration the nature and extent of the injuries, the suffering, expenses, diminution of earning capacity, inflation and high cost of living, age, expectancy of life and amount awarded in other similar cases.

This apt and concise listing of the elements to be taken into consideration in assessing damages is from *Management Services, Inc. v. Hellman*.[28] The case involved death of an eight-year-old boy and contains further consideration of the elements of damage in a wrongful death case. A $35,000 jury verdict for which the trial judge ordered a remittitur of $5,000 was affirmed.[29]

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26. *Id.* at 664. See also Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955); Bradshaw v. Holt, 292 S.W.2d 30 (Tenn. 1956).
27. City of Winchester v. Finchum, 301 S.W.2d 341 (Tenn. 1957) (ordinance prohibiting use of bicycles on sidewalk not intended to protect against dangerous condition of sidewalk); Murray v. Nashville, 299 S.W.2d 859 (Tenn. App. M.S. 1956) (cross-walk ordinance intended to protect against vehicular traffic hazards but other hazards as well).
28. 289 S.W.2d 711, 722 (Tenn. App. E.S. 1955).
29. On remittiturs, see Comment, 24 TENN. L. REV. 1155 (1957).

Bradshaw v. Holt[30] is another wrongful death case involving a five-year-old boy. It was held erroneous for the trial court, "after correctly charging the formula applicable in ascertaining damages," to add, "that the loss of services during the child's minority is another element to consider." But the court held that since the jury verdict was for only $5000, the error was not prejudicial, since "the value of the life of the child was not less than" this. In another case $21,900 for death of a nineteen-year-old boy was held not excessive.[31]

In *Harber v. Smith*,[32] the trial judge's order of remittitur of $3000 on a jury verdict of $6000 for personal injuries was set aside by the court of appeals. Five hundred dollars for a dog killed by a truck was held not excessive[33] and $15,000 was held not excessive in a case in which a sponge was sewed up in the abdomen of the plaintiff causing serious damage.[34]

Contributory Negligence

Contributory negligence, like defendant's negligence, is normally a question for the jury to determine.[35] Sometimes, however, a plaintiff's conduct is so obviously negligent that the court rules to this effect as a matter of law.[36] Whether the contributory negligence was a proximate cause of the injury was submitted to the jury in *Kendall Oil Co. v. Payne*.[37] If it is not a proximate cause, under the Tennessee doctrine of remote contributory negligence, it does not bar recovery but merely mitigates damages.[38] Plaintiff's violation of an ordinance was held not to bar recovery in one case because the injury was not one of the hazards within the scope of purpose of the ordinance.[39]

The doctrine of last clear chance was discussed in *Kunk v. Howell*.[40] Normally this doctrine is used as a method for avoiding the harshness of the contributory negligence rule. When the plaintiff, even though negligent, no longer had an opportunity to avoid the accident, and the defendant still had a "last clear chance" to do so, the plaintiff

30. 292 S.W.2d 30, 35 (Tenn. 1956).
31. Kunk v. Howell, 289 S.W.2d 874 (Tenn. App. E.S. 1956).
32. 292 S.W.2d 468 (Tenn. App. M.S. 1956).
33. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956).
34. Rural Educ. Ass'n v. Bush, 298 S.W.2d 761 (Tenn. App. M.S. 1956).
35. See, *e.g.*, Bradshaw v. Holt, 292 S.W.2d 30 (Tenn. 1956); Howell v. Wallace E. Johnson, Inc., 298 S.W.2d 753 (Tenn. App. W.S. 1956); Tschumi v. Bradley, 296 S.W.2d 885 (Tenn. App. W.S. 1956); Kendall Oil Co. v. Payne, 293 S.W.2d 40 (Tenn. App. E.S. 1955); *cf.* McLellan Stores Co. v. Weaver, 238 F.2d 232 (6th Cir. 1956) (trial before judge without jury).
36. See Chattanooga v. Shackleford, 298 S.W.2d 743 (Tenn. App. E.S. 1956).
37. 293 S.W.2d 40 (Tenn. App. E.S. 1955).
38. See De Rossett v. Malone, 34 Tenn. App. 451, 239 S.W.2d 366 (W.S. 1950); Wade, *Torts—1953 Tennessee Survey*, 6 VAND. L. REV. 990, 1003-04 (1953).
39. City of Winchester v. Finchum, 301 S.W.2d 341 (Tenn. 1957); *cf.* Murray v. Nashville, 299 S.W.2d 859 (Tenn. App. M.S. 1956).
40. 289 S.W.2d 874 (Tenn. App. E.S. 1956).

has been allowed to recover.[41] In the *Kunk* case, however, it was held suitable for the trial judge to instruct that the doctrine may apply in favor of the defendant as "a defensive weapon," since "the doctrine is but a phase of proximate cause." If the plaintiff had the last clear chance then the defendant did not and plaintiff's contributory negligence bars recovery under the general rule. Under ordinary circumstances it would seem less confusing to avoid use of the language of last clear chance for the benefit of the defendant when the statement of the contributory negligence rule will be clear enough to the jury.[42]

Two cases held that an automobile driver's negligence is not imputed to his guest but that the guest may himself be contributorily negligent and may thus be barred from recovery for this reason.[43]

In two cases involving landowner's liability to an invitee, the court explained that "he is not liable for injuries sustained from dangers that are obvious, reasonably apparent or as well known to the invitee as the owner."[44] They add the corollary that the invitee assumes the risk of all obvious and known dangers.[45]

Particular Relationships

1. *Traffic and Transportation*

Automobiles: There were more cases in the field of automobile accidents than in any other. Most of these concerned collisions—between two cars,[46] between a car and a truck[47] or between three cars.[48] There was a crossing collision with a train in one case.[49] In other cases a

41. See PROSSER, TORTS § 52 (2d ed. 1955); Wade, *Torts—1954 Tennessee Survey,* 7 VAND. L. REV. 951, 960-61 (1954).

42. Perhaps in the *Kunk* case the fact that there were two defendants involved in a three-car collision provided more reason for speaking about last clear chance in connection with one of them, but even here the jury could probably understand the issues better in terms of negligence and contributory negligence. In general, see Annot., 32 A.L.R.2d 543 (1953), cited by the court.

43. Santi v. Duffey, 290 S.W.2d 884 (Tenn. App. M.S. 1956); Howell v. Wallace E. Johnson, Inc., 298 S.W.2d 753 (Tenn. App. W.S. 1956).

44. Kendall Oil Co. v. Payne, 293 S.W.2d 40, 42 (Tenn. App. E.S. 1955) (service station); Evans v. Nashville Union Stockyards, 292 S.W.2d 521 (Tenn. App. M.S. 1956) (stockyards).

45. Assumption of risk is mentioned also in Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955).

46. McKamey v. Andrews, 289 S.W.2d 704 (Tenn. App. E.S. 1955) (one car pulled out of driveway onto main thoroughfare); Spence v. Carne, 292 S.W.2d 438 (Tenn. App. W.S. 1954) (intersection collision).

47. Santi v. Duffey, 290 S.W.2d 884 (Tenn. App. M.S. 1956) (intersection); Dixon Stave & Heading Co. v. Archer, 291 S.W.2d 603 (Tenn. App. E.S. 1956); Long v. Kirby-Smith, 292 S.W.2d 216 (Tenn. App. M.S. 1956) (truck parked over crest of hill); Harber v. Smith, 292 S.W.2d 468 (Tenn. App. M.S. 1956).

48. Kunk v. Howell, 289 S.W.2d 874 (Tenn. App. E.S. 1956) (one defendant, losing control, crossed over and hit plaintiff; then, other defendant, behind plaintiff, hit him); Womac v. Casteel, 292 S.W.2d 782 (Tenn. 1956) (one car driver tried to pass another car, which would not let him back in lane when he could not make it).

49. Southern Ry. v. Maples, 296 S.W.2d 870 (Tenn. 1956).

car hit a pedestrian,[50] a bicycle[51] or a dog.[52] In two cases the car failed to make a curve, crashed into a tree and killed both occupants.[53] There were other cases involving upsets.[54] Significant holdings of these cases were discussed in the general treatment of negligence.

Railroads: In *Southern Ry. v. Cradic*,[55] plaintiff, walking along a railroad track, was half way across a trestle when a train came along. He swung over the side of the trestle, but his hold was knocked loose by the vibrations and he fell some 35 feet, suffering serious injuries. He testified that it was a clear day and no bell or whistle was sounded. Defendant's evidence was to the effect that there was a heavy fog and that a warning was sounded. A jury verdict for plaintiff was affirmed. The court explained that under the Railroad Precautions Statute,[56] the railroad was required to keep a lookout, and when a person appeared on the tracks, to sound the alarm and use every possible means to stop the train; and the jury might have found that if this had been done, plaintiff could have gotten over the trestle in time. The fact that he was a trespasser on the track was immaterial to liability under the Precautions Statute.

In a highway-crossing collision a jury verdict for the plaintiff was sustained on the ground that the defendant railroad breached its duty to keep the crossings in safe repair.[57] Two other cases involving railroads do not raise traffic matters. One involved a fire, found by the jury to have been started by the defendant,[58] and the other was an action under the Federal Employers' Liability Act.[59]

Aircraft: A new statute makes the owner and pilot of an aircraft "liable for injuries or damage to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any objects therefrom in accordance with the rules of law applicable to torts in this State."[60]

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50. Bradshaw v. Holt, 292 S.W.2d 30 (Tenn. 1956) (little boy ran across highway); Hooper v. Starkey, 297 S.W.2d 948 (Tenn. App. M.S. 1956) (pedestrian on highway). In Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. W.S. 1955), three plaintiffs were hit as they walked up the steps of a school house.

51. Parrish v. Yeiser, 298 S.W.2d 556 (Tenn. App. W.S. 1955).

52. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956).

53. Moore v. Watkins, 293 S.W.2d 185 (Tenn. App. E.S. 1956); Ross v. Griggs, 296 S.W.2d 641 (Tenn. App. W.S. 1955), 24 TENN. L. REV. 1217 (1957).

54. Christofiel v. Johnson, 290 S.W.2d 215 (Tenn. App. E.S. 1956); Wyatt v. Lassiter, 299 S.W.2d 229 (Tenn. App. W.S. 1956).

55. 301 S.W.2d 374 (Tenn. App. E.S. 1956).

56. TENN. CODE ANN. § 65-1208(4) (1956).

57. Southern Ry. v. Maples, 296 S.W.2d 870 (Tenn. 1956).

58. Illinois Central R.R. v. Exum, 296 S.W.2d 372 (Tenn. App. W.S. 1955).

59. Thurmer v. Southern Ry., 293 S.W.2d 600 (Tenn. App. E.S. 1956).

60. Tenn. Pub. Acts 1957, c. 325, amending TENN. CODE ANN. § 42-105 (1956), which formerly imposed absolute liability on the owner. The act also provides that the person in whose name the aircraft is registered with the United States Department of Commerce or Aeronautics Commission shall be prima facie the owner of the aircraft.

Streets and Highways: The city's duty to use care to keep its streets and sidewalks in safe condition was involved in two cases. In *City of Winchester v. Finchum*[61] the city was held liable to a girl on a bicycle for a defect in the sidewalk despite an ordinance prohibiting riding of bicycles on the sidewalk. "The City was not bound to keep its sidewalks safe for bicyclists, but was bound to keep them reasonably safe for pedestrians—bound to maintain such walks against defects which were so dangerous that they might reasonably be expected to cause injury to pedestrians; and it was liable for a breach of this duty causing injury to a user of the sidewalk, whether such user was a pedestrian or a bicyclist."[62]

In *Murray v. Nashville,*[63] plaintiff, an eighty-eight-year-old man, fell while crossing the street. There was in the vicinity a slight ditch, not more than one and one-half inches deep. Even assuming that this played a part in causing the fall, the court held that the jury verdict for the defendant should be sustained because the existence of such trivial depressions would not constitute actionable negligence. In addition the plaintiff was contributorily negligent in crossing at a place other than the marked crosswalk.

In *Howell v. Wallace E. Johnson, Inc.,*[64] the developer of a subdivision who had not turned the roads over to the city was held responsible for their condition if they were not barricaded from the public. *Southern Ry. v. Maples*[65] indicates that both the municipality and the railroad may be responsible for the defective condition of a crossing.

Blocking or rendering unsafe a passageway or highway may cause liability to a person injured as a result.[66]

Carriers: In *Frye v. Railway Express Agency, Inc.,*[67] plaintiff shipped a valuable dog by defendant express company, and the dog escaped before delivery to the consignee. The court reversed a directed verdict for defendant, holding that the jury might find negligence in allowing it to escape.

2. *Electric Utilities*

There were six cases during the period involving death or injury from high-tension electric lines.[68] Half produced death,[69] and half pro-

61. 301 S.W.2d 341 (Tenn. 1957).
62. *Id.* at 344.
63. 299 S.W.2d 859 (Tenn. App. M.S. 1956).
64. 298 S.W.2d 753 (Tenn. App. W.S. 1956).
65. 296 S.W.2d 870 (Tenn. 1956).
66. Tschumi v. Bradley, 296 S.W.2d 885 (Tenn. App. W.S. 1956) (garbage cans and garbage in public passageway); *cf.* Wyatt v. Lassiter, 299 S.W.2d 229 (Tenn. App. W.S. 1956) (clay on highway).
67. 296 S.W.2d 362 (Tenn. App. W.S. 1955).
68. Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955); Chattanooga v. Rogers, 299 S.W.2d 660 (Tenn. 1956); Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956); Johnson v. Johnson City, 292 S.W.2d 794 (Tenn. App. E.S. 1956); Chattanooga v. Shackleford,

duced serious injuries.[70] Contact with the wires (or sufficiently close proximity to produce an electric arc) came about by means of a crane,[71] a portable television antenna,[72] a long gutter,[73] and by direct contact.[74] The plaintiff recovered in three cases,[75] one case was reversed to go back for a jury trial,[76] and a directed verdict for defendant was held proper in two cases.[77] In the last two cases, the plaintiff was also held contributorily negligent as a matter of law.

There is agreement that compliance by the utility with the provisions of the National Electric Safety Code does not constitute conclusive evidence of due care, though it is appropriate evidence for consideration by the jury.[78]

The possible negligence on the part of the defendant in one case involved inadequate checking to see whether the electricity was cut off.[79] In two cases it involved the height and location of the wires.[80] The most significant decision was the latest one decided by the Supreme Court—*Kingsport Util., Inc. v. Brown.*[81] The court there held that it was a question of fact for the jury whether "a utility is negligent in having such high-powered voltage in lines uninsulated, running through the business section of towns. Of course the law does not require that all lines be insulated at any particular place but only where persons are likely to be and have a right to be, for business,

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298 S.W.2d 743 (Tenn. App. E.S. 1956); Kingsport Util., Inc. v. Brown, 299 S.W.2d 656 (Tenn. 1955). The *Coatney* and *Johnson* cases are discussed together in 24 TENN. L. REV. 1059 (1957); *cf.* 9 VAND. L. REV. 890 (1956).

69. Coatney v. Southwest Tennessee Elec. Membership Corp., *supra* note 68; Chattanooga v. Rogers, *supra* note 68; Chattanooga v. Shackleford, *supra* note 68.

70. Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955); Johnson v. Johnson City, 292 S.W.2d 794 (Tenn. App. E.S. 1956); Kingsport Util., Inc. v. Brown, 299 S.W.2d 656 (Tenn. 1955).

71. Kingsport Util., Inc. v. Brown, *supra* note 70; Chattanooga v. Rogers, 299 S.W.2d 660 (Tenn. 1956).

72. Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956); Johnson v. Johnson City, 292 S.W.2d 794 (Tenn. App. E.S. 1956).

73. Chattanooga v. Shackleford, 298 S.W.2d 743 (Tenn. App. E.S. 1956).

74. Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955).

75. Pierce v. United States, *supra* note 74; Chattanooga v. Rogers, 299 S.W.2d 660 (Tenn. 1956); Kingsport Util., Inc. v. Brown, *supra* note 70.

76. Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956).

77. Johnson v. Johnson City, 292 S.W.2d 794 (Tenn. App. E.S. 1956); (given in court below), Chattanooga v. Shackleford, 298 S.W.2d 743 (Tenn. App. E.S. 1956) (reversing a jury verdict for plaintiff).

78. Chattanooga v. Rogers, 299 S.W.2d 660 (Tenn. 1956); Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956); Kingsport Util., Inc. v. Brown, 299 S.W.2d 656 (Tenn. 1955).

79. Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955).

80. In Chattanooga v. Rogers, 299 S.W.2d 66 (Tenn. 1956) there was involved height and proximity to a building; in Coatney v. Southwest Tennessee Elec. Membership Corp., 292 S.W.2d 420 (Tenn. App. W.S. 1956) there was involved height, sagging and location over private property.

81. 299 S.W.2d 656 (Tenn. 1955).

pleasure or otherwise."[82] To the defendant's argument (and that of Knoxville, Nashville and Memphis, as amici curiae) that this would add greatly to the cost of supplying electricity, the court replied curtly: "When the likelihood of danger to human life is to be balanced against the cost of insulation, we do not think the latter is a very good argument."[83]

This holding is likely to constitute a new point of departure in the electricity cases. Previously, the cases had based findings of negligence on the height of the uninsulated wires or their proximity to buildings or other objects. Now, apparently, it may be found negligent merely to have uninsulated high-tension wires in certain areas. Will the rule in this case be extended to well populated residential areas as well as business sections?

3. *Suppliers*

Schaeffer v. Lindsey[84] involves the liability of a bailor to a third person for negligently entrusting a car to an incompetent person. Hinkle, a salesman for Schaeffer, a used car dealer, was trying to sell a car to Mrs. Morris. While the battery was being charged, Hinkle left her with the car and went into the office to obtain a drive-out slip. She apparently stepped on the starter, and the car, being in gear, rolled backwards, hitting the plaintiff's small boy and crushing him against a wall. Mrs. Morris did not know how to drive and there was evidence that she was intoxicated. Hinkle made no attempt to find out whether she was a competent driver. A jury verdict against all three parties was affirmed on the ground that the jury could find that it was negligence to leave the car in Mrs. Morris's control.

This case is to be contrasted with *Parrish v. Yeiser*.[85] Hugh Thompson, eighteen, had had an automobile accident a month and a half earlier and still had his face bandaged so that the vision in one eye was obscured. He came with his father to defendant to buy a new automobile. By the time the car was selected it was too late to complete the required paper work, but defendant let Hugh have the car anyway. Within fifteen minutes he had run over two boys on a bicycle, killing them both. A directed verdict for defendant was affirmed. While "the general rule is that one who furnishes or lends his automobile to a known incompetent driver is liable for damages to persons injured by the negligence of such incompetent driver,"[86] defendant was held not to come within the rule. He knew only that Hugh had been in a wreck before and had his eye bandaged, and the

82. *Id.* at 659.
83. *Id.* at 660. See, generally, Comment, *High Tension Lines—Tort Liability*, 24 TENN. L. REV. 362 (1956).
84. 297 S.W.2d 801 (Tenn. App. W.S. 1956).
85. 298 S.W.2d 556 (Tenn. App. W.S. 1955).
86. *Id.* at 560.

court explained that the mere fact that a person has been in a wreck is not proof of negligence or incompetence and that one-eyed persons are allowed to drive.

In *Harber v. Smith*[87] the family purpose doctrine was held not to apply when a father allowed his son, on leave from the service, to take the car one night. The doctrine was held to be inapplicable when the members of the family must obtain special permission on each occasion when they use the vehicle or when the vehicle is not maintained wholly or partly to serve the convenience of the family.

McIntosh v. Goodwin[88] repeats the rule, now well established in Tennessee, that the vendor of a house is under no duty to the purchaser to use care to see that it is in safe condition.[89]

Merck & Co. v. Kidd[90] involves the liability of a manufacturer. The product manufactured here was blood plasma. This plasma had hepatitis virus in it and plaintiff contracted the disease. There is no way of telling whether the germ is in the plasma or of sterilizing the plasma to eliminate the germ. Plaintiff's original action had been on the basis of common law negligence and breach of warranty, but he dropped these two grounds and relied on the provision of the Tennessee Food, Drug and Cosmetic Act providing that a drug is adulterated if it contains "any filthy, putrid, or decomposed substance"[91]—contending that this made the defendant negligent per se. A divided court held that the virus did not come within the language of the statute.

4. *Landowners*

Several cases involve the question of the duty of care owed by a landowner (or possessor) to a business guest or invitee. In *Management Services, Inc. v. Hellman,*[92] a swimming pool operator was held not to be an insurer but required to exercise due care to see that the premises were safe. When a small rope blocking off a part of the concrete apron was easily overlooked and apparently not marked, the jury were permitted to find negligence in failing to warn of a latent danger. Similarly, in *McLellan Stores Co. v. Weaver,*[93] recovery was permitted when a part of weighing scales protruded into the aisle of a store in a fashion so as to create a hazard for customers. On the other hand, if the danger is obvious, there may be no duty to take

87. 292 S.W.2d 468 (Tenn. App. M.S. 1956).
88. 292 S.W.2d 242 (Tenn. App. W.S. 1954).
89. See Trautman and Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 941, 930-34 (1954); Wade, *Torts—1954 Tennessee Survey*, 7 VAND. L. REV. 951, 968-69 (1954); Note, *Tort Liability of Vendor of Real Property*, 24 TENN. L. REV. 1170 (1957).
90. 242 F.2d 592 (6th Cir. 1957).
91. TENN. CODE ANN. § 52-118(b) (1956).
92. 289 S.W.2d 711 (Tenn. App. E.S. 1955).
93. 238 F.2d 232 (6th Cir. 1956).

action. Thus, in *Kendall Oil Co. v. Payne*,[94] defendant was washing down the pavement at a service station. Plaintiff drove in and stopped. When he got out, he slipped on the soapsuds and fell. Defendant's negligence was held to be a matter for the jury. Said the court:

> Liability is sustained on the ground of the owner's superior knowledge of a perilous condition on his premises and he is not liable for injuries sustained from dangers that are obvious, reasonably apparent or as well known to the invitee as to the owner. . . . If the danger is so obvious that a reasonable careful and prudent person would assume that an invitee would become aware of it in time to avoid injury to himself there is no duty to give warning of the danger.[95]

Evans v. Nashville Union Stockyards[96] illustrates the situation where the danger was known to the invitee. Plaintiff was walking down a stockyard passageway in which, as he knew from experience, cattle were regularly driven. As one herd was going by, a steer broke away and ran toward plaintiff; people shouted to him but he did not hear and the steer ran into him and knocked him down. A directed verdict for defendant was affirmed, on the ground that there was no duty to protect him further.

In both of the last two cases, some courts would have explained the result by talking in terms of assumption of risk by the invitee in remaining there despite the known or obvious danger. This approach was mentioned in the two cases, but the approach actually used is more meaningful and helpful in reaching decisions.

The question of whether the plaintiff was an invitee or licensee was presented in *Crane Co. v. Simpson*.[97] Plaintiff's husband was an employee of an independent contractor engaged in installing an elevator in a penthouse structure located on the roof of defendant's building. He stepped outside the penthouse onto the roof for fresh air and fell through a skylight so covered with dust that the glass could not be observed. A jury verdict for plaintiff was affirmed, the court indicating that it was for the jury to tell whether the husband had become a mere licensee outside the penthouse.

To an unknown trespasser there is no duty owed to use care. But under the Railroad Precautions Act,[98] requiring a lookout, the court held again in *Southern Ry. v. Cradic*[99] that a duty is owed to persons on the track or a trestle.

The landlord-tenant relationship was involved in two cases. In *Boyce v. Shankman*,[100] the tenant fell through a hole in the attic floor.

94. 293 S.W.2d 40 (Tenn. App. E.S. 1955).
95. *Id.* at 42, 43.
96. 292 S.W.2d 521 (Tenn. App. M.S. 1956).
97. 242 F.2d 734 (6th Cir. 1957).
98. TENN. CODE ANN. § 65-1208 (1956).
99. 301 S.W.2d 374 (Tenn. App. E.S. 1956).
100. 292 S.W.2d 229 (Tenn. App. W.S. 1953).

The landlord had covered it with black paper board when he enlarged the attic floor for storage purposes and informed plaintiff that the attic was safe. A directed verdict for defendant was reversed, the question of negligence and contributory negligence being held for the jury. This was in accord with the special Tennessee rule,[101] but the court would apparently find a jury question even under the majority rule imposing liability only for known latent defects. *Harris v. Dobson-Tankard Co.*[102] involves the tort liability of the landlord for wrongful eviction of the tenant.

5. *Professional Negligence*

Doctors: Three cases involve the negligence of a doctor—though somewhat indirectly. In *Rural Educ. Ass'n v. Bush,*[103] a surgeon sewed up a sponge in a patient after an abdominal operation. The action was against the hospital, and the court affirmed a jury verdict for plaintiff on the ground that the surgeon was an agent of the hospital. No professional expert evidence was held to be necessary to find the doctor negligent since the doctrine of *res ipsa loquitur* applied.

In *Hall v. De Saussure,*[104] the defendant, performing a rhizotomy, involving the clipping of certain nerves, also removed parts of some vertebrae. The case turned on the issue of limitation of actions and was sent back for a trial on the question of whether there had been a concealment of the cause of action. *Union Carbide & Carbon Corp. v. Stapleton*[105] involved the doctor's failure to notify plaintiff of arrested tuberculosis as indicated in an X-ray negative. The employer was held liable.

Public Officials: In *Lowe v. Wright,*[106] one Parrish forged a deed from Lowe and his wife. He apparently took another man whom he identified as Lowe to defendant Robin, a notary public, and had the deed acknowledged. Robin knew that Mrs. Lowe was not present, and he apparently knew her. His failure to investigate and to determine that the deed was executed by both parties was held to amount to negligence, rendering him liable.

Harris v. Dobson-Tankard Co.[107] involves the liability of the sheriff (and his surety) for executing a writ of restitution in an unlawful detainer action. The writ was invalid as to the plaintiff since she was not a party to the action, but since it was valid on its face there was

101. See Wade, *Torts—1955 Tennessee Survey,* 8 VAND. L. REV. 1131, 1142-43 (1955); Comment, *Landlord and Tenant; Tort Liability in Tennessee,* 23 TENN. L. REV. 219 (1954).
102. 298 S.W.2d 28 (Tenn. App. M.S. 1956).
103. 298 S.W.2d 761 (Tenn. App. M.S. 1956).
104. 297 S.W.2d 81 (Tenn. App. W.S. 1956).
105. 237 F.2d 229 (6th Cir. 1956).
106. 292 S.W.2d 413 (Tenn. App. M.S. 1956).
107. 298 S.W.2d 28 (Tenn. App. M.S. 1956).

no liability in merely executing it. The eviction took place, however, while the plaintiff was away, and the sheriff and his agents moved plaintiff's furniture out on the street just prior to a thunder shower. The court held that they were under a duty to use care to protect plaintiff's goods and the jury could find them guilty of negligence.

6. *Other Relationships*

Animals: A dog owner's liability for its attack on an invitee is involved in *Henry v. Roach.*[108] The court repeated the general rule that the owner is not liable unless he has knowledge of the animal's vicious tendency. It reversed a directed verdict for defendant, however, on the ground that there was evidence to permit the jury to find both a vicious tendency and scienter. In this connection it called attention to what it called the anomaly that a different rule applies to livestock, where knowledge of vicious habits is not required.[109]

Shooting: In *Goodrich v. Morgan,*[110] defendant caught a "peeping tom" looking in her basement window. As he ran away she shot at him. A bullet struck plaintiff's husband in the chest, wounding him mortally. Defendant could not see the deceased on the sidewalk because of shrubbery. A directed verdict for defendant was reversed. "The fact that the defendant was shooting at a fleeing criminal who was guilty of a misdemeanor, does not exonerate her from the duty of exercising ordinary care in shooting at [him]."[111] The jury might find her guilty of negligence toward the deceased.

Fire: In *Illinois Central R.R. v. Exum*[112] a railroad was liable for starting fire. It was held proper to instruct the jury that if there was a drouth and a wind on the day involved the railroad company should exercise unusual care.

OTHER TORTS

False Arrest

A new statute provides that a merchant who has probable cause to believe that a person has unlawfully taken goods and that he can recover them, "may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time," without being "criminally or civilly liable for false arrest, false imprisonment, or unlawful detention."[113]

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108. 293 S.W.2d 480 (Tenn. App. E.S. 1956).
109. TENN. CODE ANN. § 44-101 (1956).
110. 291 S.W.2d 610 (Tenn. App. M.S. 1956).
111. *Id.* at 614.
112. 296 S.W.2d 372 (Tenn. App. W.S. 1955).
113. Tenn. Pub. Acts 1957, c. 164, TENN. CODE ANN. § 40-824 (Supp. 1957); see Comment, *Shoplifting in Tennessee,* 24 TENN. L. REV. 1177 (1957).

Defamation

Another new statute provides that commercial printers shall not be liable for printing libellous matter which they have not "written, edited or otherwise authored," unless the copy is libelous per se or the printer "knew or in the exercise of ordinary care should have known, of the falsity of the matter." To qualify for this immunity the printer must require "the person furnishing such copy to place his true name, address and organization represented, if any, on such copy or in a permanent record book kept for such purpose, such information to be available to the person allegedly libeled upon his written request."[114]

Malicious Prosecution

In *Dunn v. Alabama Oil & Gas Co.*,[115] defendant had brought a bad-check charge against the plaintiff's wife, who had given a check on her savings account. The check was turned down for failure to present the savings book, and the wife did not make it good because it had been given in accordance with a contract between plaintiff and defendant which had subsequently fallen through. Apparently suit was to force her to pay the amount. The court held that a directed verdict for defendant was improper since the jury might have found both lack of probable cause and malice. "Malice may be inferred from a motive to enforce payment of a debt or the doing of any other act the prosecutor wants done."[116]

In *Devine v. Patteson*,[117] a jury verdict for plaintiff was affirmed on the merits but reversed and sent back for a new trial on the damages, which were held to be inadequate. Advice of the district attorney was held not to be conclusive on the issue of probable cause if the advice was not honestly sought under reasonable belief of guilt. Evidence that defendant sought to compel plaintiff to transfer an interest to him under threat of prosecution was pertinent; and the fact that the defendant failed to testify was held to warrant an inference of bad faith and want of probable cause.

Inducing Breach of Contract

Defendant was held not guilty of the tort of inducing breach of contract in *Decca Records, Inc. v. Republic Recording Co.*[118] because the contract was found to be no longer binding and there was no evidence that the defendant enticed the third party away.

Trover

Two trover cases are both concerned with the issue of damages.

114. Tenn. Pub. Acts 1957, c. 240, TENN. CODE ANN. § 23-2608 (Supp. 1957).
115. 299 S.W.2d 25 (Tenn. App. M.S. 1956).
116. *Id.* at 28.
117. 242 F.2d 828 (6th Cir. 1957).
118. 235 F.2d 360 (6th Cir. 1956).

Cline v. Roundtree[119] involved a shipment of steel which defendants took without complying with the bill of lading. The court affirmed the decision below, saying that damages are not rendered uncertain because they cannot be calculated with absolute exactness. In *Chapman & Dewey Lbr. Co. v. Tri-State Veneer & Plywood Co.*,[120] involving the conversion of timber, the court applied the so-called harsh rule of damages, the measure being the value of the logs at the time of the sale rather than the stumpage value. This was because the defendant in buying the logs had not made diligent inquiry or obtained a certificate from the seller as required by the Tennessee Code.[121]

Damage to Property

A new statute provides that any governmental agency or religious organization can recover damages not to exceed $300 from the parents of minor children who "maliciously or willfully destroy property" of the plaintiff, but adds that there will be no recovery if the parent "shows due care and diligence in his care and supervision of such minor child."[122]

Another statute provides that the owner or pilot of an aircraft will be liable for damages "caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any objects therefrom in accordance with the rules of law applicable to torts in this State."[123]

Unclassified

In *Stratton v. Conway*,[124] plaintiff brought an action against defendant for lowering the value of his property by selling adjoining property to a Negro. The Supreme Court affirmed the action of the lower court in sustaining a demurrer to the declaration, saying the injury, if any, was *damnum absque injuria.* It explained that every person is entitled to make a reasonable use of his own property, and added that "The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or whether the injury was the natural consequence, or whether the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also, public policy."[125]

119. 236 F.2d 412 (6th Cir. 1956).
120. 301 S.W.2d 363 (Tenn. 1957).
121. TENN. CODE ANN. § 39-4528 (1956).
122. Tenn. Pub. Acts 1957, c. 76, TENN. CODE ANN. §§ 37-1001 to -1003 (Supp. 1957).
123. *Id.* c. 325, amending TENN. CODE ANN. § 42-105 (1956), which previously had imposed absolute liability on the owner.
124. 301 S.W.2d 332 (Tenn. 1957).
125. *Id.* at 334, quoting 3 AM. JUR., *Adjoining Landowners* § 3 (1936).

The court found that there was no nuisance, citing *Latchis v. John*,[126] holding that the erection of a fruit stand near plaintiff's property did not create a nuisance. Would an allegation in the declaration that the sale was solely for the purpose of injuring and annoying the plaintiff have changed the situation and brought it within the principle of spite fences?[127]

MISCELLANEOUS

Joinder of Parties

Griffith v. Hurt[128] involves the question of joinder of parties-plaintiff. It was held that three downstream landowners could join together in an equity suit to obtain an injunction against polluting a stream. They could not join together in a single action at law to obtain damages, since their damages were separate. The Supreme Court held that the suit for the injunction might be maintained but that since the monetary damages were allowed only as an incident to the equitable relief of injunction, there was a misjoinder of parties as to this part of the action and a demurrer as to it should be sustained.

Day v. North Am. Rayon Corp.[129] construes the Tennessee third-party statute[130] so as not to allow the original defendant to bring in another party defendant if this would eliminate diversity of citizenship and thus cause the federal district court to dismiss for lack of jurisdiction and therefore "delay the right of the original plaintiff." The statute has now been repealed,[131] however, and there is no longer a third-party practice in Tennessee.

Releases

A release of one joint tortfeasor has the effect of releasing the other. But this result does not follow when the plaintiff gives a covenant not to sue. Two cases illustrated this last rule and applied it though trial courts had entered orders dismissing the covenants "with prejudice."[132]

Limitation of Action

Hall v. De Saussure,[133] a malpractice action, holds that the one-year statute of limitations applies to all actions for personal injuries,

126. 117 Vt. 110, 85 A.2d 575, 32 A.L.R.2d 1203 (1952).

127. On spite fences, see PROSSER, TORTS §§ 412-13 (2d ed. 1955); *cf.* Holbrook v. Morrison, 214 Mass. 209, 100 N.E. 1111 (1913) (defendant put up sign, "For Sale. Best Offer from Colored Family"; dictum that plaintiff might recover if sole purpose was to injure him). On the effect of malice, see Hatton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

128. 291 S.W.2d 271 (Tenn. 1956).

129. 140 F. Supp. 490 (E.D. Tenn. 1956).

130. TENN. CODE ANN. § 20-120 (1956). See Sturdivant, *Joint Tortfeasors in Tennessee and the New Third-Party Statute*, 8 VAND. L. REV. 69 (1955).

131. Tenn. Pub. Acts 1957, c. 33.

132. Long v. Kirby-Smith, 292 S.W.2d 216 (Tenn. App. M.S. 1956); Wyatt v. Lassiter, 299 S.W.2d 229 (Tenn. App. W.S. 1956).

133. 297 S.W.2d 81 (Tenn. App. W.S. 1956).

whether the action sounds in tort or contract. Mere ignorance and failure of the plaintiff to discover the cause of action will not prevent the running of the statute, but it does not run when the defendant fraudulently concealed the existence of the action. The case was sent back for submission to the jury on the issue of concealment.

In *Union Carbide & Carbon Corp. v. Stapleton*,[134] involving failure of the defendant employer to disclose that X ray negatives indicated arrested tuberculosis, the court held that there was no concealment tolling the statute of limitations. It also held, however, that the duty to disclose was a continuing duty, lasting as long as the employment relation existed, and that the statute did not begin to run until the employment relation was severed.

Declaratory Judgment

In *Tennessee Farmers Mut. Co. v. Hammond*[135] an insurance company brought an action under the Declaratory Judgment Act to determine its liability, when recovery had been obtained against the insured for more than the amount of the liability policy. The Supreme Court approved the lower court's dismissal of the action, saying: "The complainant by this suit anticipates that a tort action will be instituted against it based upon its alleged lack of good faith in negotiating a settlement, to Hammond's damage. In seeking a declaratory judgment, the complainant would force the defendant into a forum, and at a time of complainant's own choosing and compel him to litigate his tort action in the Chancery Court. For this reason the Chancellor was right in dismissing the complainant's bill."[136]

134. 237 F.2d 229 (6th Cir. 1956).
135. 290 S.W.2d 860 (Tenn. 1956).
136. *Id.* at 863.