Vanderbilt Law Review

Volume 9
Issue 5 *Issue 5 - August 1956*

Article 20

8-1956

# Torts -- 1956 Tennessee Survey

John W. Wade

# TORTS—1956 TENNESSEE SURVEY

JOHN W. WADE*

This year, as in the past several years, there were approximately forty Torts cases. A much smaller number of the cases, however, involved automobile accidents. This is hardly competent evidence that there were fewer accidents, but may perhaps indicate that negligence law is becoming somewhat clearer so that fewer appeals to the higher courts are considered warranted.

## NEGLIGENCE

### *Breach of Duty*

"Generally speaking, everyone owes to everyone else the duty of exercising ordinary care not to injure him—the duty to refrain from conduct which may reasonably be expected to injure other persons."[1] This statement from the Tennessee Court of Appeals accurately describes the duty to use care in all but a few relationships.[2] Litigation normally turns on the question of whether the duty has been breached —in other words, whether defendant has been negligent.

The determination of this issue is within the province of the jury. Several cases during the Survey period reiterate and illustrate this.[3] Sometimes, however, the case is taken from the jury because there is not enough evidence for it to find negligence, or breach of duty.[4] As the Supreme Court expressed the matter in *Memphis v. Dush:*

> And so, where the evidence is conflicting, or the facts such as to authorize different inferences as to whether the defect is a dangerous obstruction calculated to cause injury, the case must be submitted to the jury, but, where the defect or obstruction is such that reasonable men would not

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

1. De Ark v. Nashville Stone Setting Corp., 38 Tenn. App. 678, 683, 279 S.W.2d 518, 521 (M.S. 1955).

2. Compare, however, Brown v. Harkleroad, 287 S.W.2d 92 (Tenn. App. E.S. 1955), holding that a father is not liable to a third party whom a son injured while driving recklessly in an intoxicated condition, even though he gave the son the car knowing of his propensity for drunken driving. The case is discussed *infra.*

3. *E.g.,* Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955) (court interference with a jury verdict "is a strong-arm function to be exercised sparingly and only upon the plainest showing of compulsion in the interest of substantial justice"); Ford v. Vanderbilt University, 289 S.W.2d 210 (Tenn. App. M.S. 1955); Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954) ("[T]he verdict of the jury, being in favor of the defendant and approved by the trial judge, the matter is foreclosed so far as this Court is concerned").

4. *E.g.,* Nashville, C. & St. L. Ry. v. Crawford, 281 S.W.2d 69 (Tenn. App. W.S. 1954) (plaintiff injured in opening the door to a freight car); cf. Tennessee Valley Electric Cooperative v. Harmon, 286 S.W.2d 593 (Tenn. App. W.S. 1955) (spraying along right of way).

> differ in the conclusion that the obstruction or defect was not dangerous to travel in the ordinary modes by persons exercising due care, a verdict should be directed.[5]

The issue is normally submitted to the jury in terms of a general standard of care—what a reasonable prudent man would do under the same or similar circumstances. In some instances, however, the court lays down a more specific rule of conduct, and the jury's function is simply to determine the facts and apply this rule to them, rather than to exercise the discretion involved in applying the standard. Thus, in *Burkett v. Johnston*[6] the court repeats the previous holding that it is negligence to ride in an automobile driven by an intoxicated person. More frequently the reduction of the standard to a rule of conduct is produced by a criminal statute, when violation is called negligence per se. This was the case in *McParland v. Pruitt*,[7] where the defendant was exceeding a 35-mile-per-hour speed limit and failed to stop after striking the plaintiff.[8]

Proof of negligence is normally provided by testimony as to what the defendant did. But as the court repeated in *Burkett v. Johnston*, "A case may be made out by direct evidence, circumstantial evidence, or by a combination of direct and circumstantial evidence."[9] In this case, the defendant and plaintiff's husband were found dead in defendant's automobile, defendant behind the steering wheel and Johnston on the right front seat. The car was perpendicular to the road, its front end against a concrete culvert, and its back end on the pavement. The road was straight and level and there was a tire mark along the shoulder of the road for sixty feet, up to the culvert. The front end of the car had been smashed, and there was blood inside the car and other damage indicating a collision of the automobile with some object. The court held that this evidence was sufficient to allow the jury to:

> infer and find as a fact the Burkett's Dodge automobile was the one which ran off the east side of the blacktop pavement and made the 60-foot track and ran into the north end of the culvert, and that said automobile was being driven at such a speed and hit the culvert with such force as to kill both occupants of the automobile, and then the rear end of the automobile skidded across the highway with the right end nosed up against the culvert.[10]

---

5. 288 S.W.2d 713, 715 (Tenn. 1956). The case involved an obstruction in the sidewalk, caused when tree roots pushed one block of the sidewalk 3½ to 4 inches higher than the other. A directed verdict for defendants was held correct. Judge Burnett dissented, on the ground that the case was for the jury.
6. 282 S.W.2d 647 (Tenn. App. W.S. 1955), 24 TENN. L. REV. 398 (1956).
7. 284 S.W.2d 299 (Tenn. App. M.S. 1955).
8. See also Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954) (railroad crossing statute).
9. 282 S.W.2d 647, 650 (Tenn. App. W.S. 1955), quoting from Everett v. Evans, 30 Tenn. App. 450, 456, 207 S.W.2d 350, 352 (M.S. 1947).
10. 282 S.W.2d at 650-51.

Here, therefore, was circumstantial evidence to permit the jury to find the facts, what had happened. The same circumstantial evidence was utilized to permit the jury to find that the defendant was negligent. This was on the basis of the doctrine of *res ipsa loquitur*, now recognized as a form of circumstantial evidence. In the earlier case of *Sullivan v. Crabtree*,[11] the doctrine had been held to apply when a truck left the road and overturned down a steep embankment, killing plaintiff's intestate (a passenger). The basis was that the car was in the control of the driver and that it would not ordinarily leave the road without some negligence on the part of the driver.[12] By extending the holding of the *Sullivan* case in several respects, the holding is reached in *Burkett* that the jury may find a verdict for plaintiff.

While the *Burkett* case involves an expansion of the doctrine of *res ipsa loquitur*, the case of *Heaton v. Kagley*[13] seems to suggest its restriction. There a seven-year-old boy was injured in defendant's hay field, where defendant, his helper and his five-year-old son were engaged in hauling hay to the barn. The son was driving a tractor which was pulling a flat trailer while defendant and the helper loaded hay on the trailer. Plaintiff, who had been walking behind the trailer, came up and was riding on the fender of the tractor when a bale of hay fell from the trailer, hit the plaintiff and knocked him off, and the front wheel ran over his head. The court declared that the plaintiff was a mere licensee and held that the doctrine of *res ipsa loquitur* did not apply. Since it indicates that there was no evidence that defendant knew (or should have known?) that plaintiff was riding on the tractor fender or was that close to the trailer, the case may well be explained on the ground that the bale of hay might easily have tumbled from the trailer without any negligence on the part of the defendant or his helper. The court concluded that the doctrine "should not be available to fix liability for an injury resulting from an unforseeable accident such as we have here."[14] There is, however, certain language in the opinion which suggests a much more restricted application of the doctrine than the authorities indicate—at least in non-agricultural activities.[15]

11. 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953).

12. The *Sullivan* case has previously been discussed in some detail, treating its application to the doctrine of *res ipsa loquitur*. See Wade, *Torts—1954 Tennessee Survey*, 7 VAND. L. REV. 951, 954-56 (1954).

13. 281 S.W.2d 385 (Tenn. 1955), 24 TENN. L. REV. 265 (1956).

14. *Id.* at 390.

15. Thus application of the doctrine is not ordinarily restricted to "inherently dangerous" instrumentalities or to "cases of an absolute duty, or an application practically amounting to that of an insurer." Tennessee cases are collected in Comment, *Res Ipsa Loquitur in Tennessee*, 22 TENN. L. REV. 925 (1953); see generally PROSSER, TORTS § 42 (2d ed. 1955). And there are cases in which the doctrine has been applied in favor of a licensee. Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953); and Burkett v. Johnston, 282 S.W.2d 647 (Tenn. App. W.S. 1955) are both cases of a gratuitous guest in

*Causation*

Causation is the relationship between negligent conduct by the defendant and the injury or damage which the plaintiff incurs. If there is no such relationship—if the injury would have occurred even without the defendant's negligence—that negligence is not a *causa sine qua non*, and there is no liability.[16] The presence of the relationship is a question of fact, and the existence of cause in fact is normally for the jury. Evidence of its presence may be direct or circumstantial; often expert testimony is utilized. Sometimes the case is not submitted to the jury because there is not sufficient evidence to allow a jury verdict to stand. Thus, in *Tennessee Valley Electric Cooperative v. Harmon*,[17] where the question was whether defendant's spraying its right-of-way with 2,4-D caused the plaintiff's cattle to become ill and die, it was held that the evidence of the relationship was so unsubstantial that a jury verdict was reversed and the case dismissed.[18]

The causal relationship between defendant's negligence and plaintiff's injury must not only exist; it must also be reasonably close. This latter issue is often called proximate cause, or sometimes legal cause, as distinguished from cause in fact. The courts have laid down contradictory rules for determining the issue of proximate cause. No matter how the test is expressed, however, essentially what is involved is the reaching of a value judgment—the exercise of discretion in applying the standard of whether the relationship is reasonably close.[19]

The decision is frequently given to the jury, as in three cases involving the intervening negligent act of a third party. In *Rogers v. Chattanooga*[20] and *Turner v. Tennessee Valley Electric Cooperative*,[21] the defendants negligently maintained electric lines near construction

---

an automobile, who is generally characterized as a licensee.

The doctrine has, however, been rarely applied in normal farm activities, such as those involved here. *Cf.* Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 91 S.W. 199 (1906), holding that it does not apply to a moving wagon.

16. Heaton v. Kagley, 281 S.W.2d 385 (Tenn. 1955). Defendant allowed his five-year-old son to drive a tractor pulling a trailer on which bales of hay were being loaded. A bale fell from the trailer and plaintiff was injured. Even if it was negligence to allow the boy to drive, no liability was incurred. "The accident would have occurred no matter who was driving the tractor." *Id.* at 389.

By a peculiar Tennessee rule casual relationship is not required in case of violation of the Railroad Safety Precaution Statute, TENN. CODE ANN. § 65-1208 (1956). See Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284, 290 (Tenn. App. W.S. 1954).

17. 286 S.W.2d 593 (Tenn. App. W.S. 1955).

18. See also Nashville, C. & St. L. Ry. v. Crawford, 281 S.W.2d 69 (Tenn. App. W.S. 1954).

19. This has been elaborated on and the Tennessee cases discussed in previous Survey issues. See Wade, *Torts—1955 Tennessee Survey*, 8 VAND. L. REV. 1131, 1134-37 (1955) and earlier issues cited at 1137 n.39.

20. 281 S.W.2d 504 (Tenn. App. En Banc 1954).

21. 288 S.W.2d 747 (Tenn. App. W.S. 1955).

work and a crane was negligently brought by a third person into contact with the wires, electrocuting the plaintiffs' decedents. In *Southern Ry. v. Jones*,[22] defendant's freight cars had defective brakes and negligent handling of them by a person who might not have been defendant's agent produced the death of plaintiff's decedent. In each case the court declared that the intervening negligent act of the third party might have been anticipated and that the determination of proximate cause was for the jury.[23]

Sometimes, however, the determination is made by the court, as a matter of "law," that the relationship between negligence and injury is not sufficiently close to allow recovery. Thus, in *Teague v. Pritchard*,[24] defendant's agent had left his car on the streets with the key in it. An unknown youth stole the car and negligently hit the plaintiff's car. A directed verdict for defendant was affirmed. The great majority of courts would agree with this as a common law decision though some courts have held otherwise when there is a statute forbidding the leaving of a key in a car.

In *Brown v. Harkleroad*[25] defendant bought a car and gave it to his adult son just back from the Army. Four months later the son, driving recklessly while drunk, had a collision with plaintiff. It was held error to submit the case to the jury, even though there was evidence that the father knew of the son's propensity for such driving. Cases are divided on this holding.[26]

### *Contributory Negligence*

Cases decided during the Survey period illustrate most of the established Tennessee rules regarding contributory negligence. Plaintiff's contributory negligence bars his recovery.[27] But this is only if the contributory negligence is proximate;[28] in Tennessee "remote contributory negligence" has the effect only of mitigating plaintiff's recovery.[29] Plaintiff's negligence if the defendant is a railroad violating the Railroad Safety Precaution Statute, has the effect merely of

22. 228 F.2d 203 (6th Cir. 1955).
23. Jury verdicts for the plaintiff were affirmed in the *Rogers* and *Jones* cases, and a directed verdict for the defendant was reversed in the *Turner* case.
24. 38 Tenn. App. 686, 279 S.W.2d 706 (W.S. 1954), 24 TENN. L. REV. 395 (1956); see also 8 VAND. L. REV. 151 (1954).
25. 287 S.W.2d 92 (Tenn. App. E.S. 1955).
26. The Kentucky case of Estes v. Gibson, 257 S.W.2d 604 (Ky. 1953), relied on in the *Brown* case, is severely criticized in law reviews and by Dean Prosser. A contrary holding was reached in Golembe v. Blumberg, 262 App. Div. 759, 27 N.Y.S.2d 692 (2d Dep't 1941). For discussion and citations, see PROSSER, TORTS 513 (2d ed. 1955). See also Harbison, *Family Responsibility in Tort*, 9 VAND. L. REV. 809 (1956).
27. Nashville, C. & St. L. Ry. v. Crawford, 281 S.W.2d 69 (Tenn. App. W.S. 1954).
28. Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955).
29. Burkett v. Johnston, 282 S.W.2d 647 (Tenn. App. W.S. 1955).

mitigating damages, whether the contributory negligence is proximate or remote.[30] If the defendant is guilty of "gross and wanton negligence" contributory negligence does not bar recovery.[31]

*Particular Relationships*

1. *Traffic and Transportation*

*Automobiles:* From the comparatively few case involving automobile accidents there are cases involving collisions between two cars,[32] a car striking a pedestrian[33] and a car striking a culvert.[34] The owners' responsibility and the statutory presumption of agency were involved in two cases.[35] The significant aspects of these cases have been discussed in the general treatment of negligence.

*Railroads:* Two cases involve a collision between an automobile and a train. *Little v. Nashville, C & St. L. Ry.*[36] deals with the Railroad Safety Precaution Statute[37] in some detail. The statute is held to create an independent cause of action, separate and distinct from common law negligence, and must therefore be presented in a separate count; contributory negligence does not bar recovery but merely mitigates damages, and a causal relationship between the violation of the statute and the injury is not required. But section (1) of the statute requires that the crossing be properly marked and provides that there shall be no requirement to ring the bell or blow the whistle unless the crossing is so designated. In accordance with earlier authority,[38] the *Little* case holds that section (2) of the statute (bell-ringing and whistle-blowing provision) is inapplicable when the crossing is not marked. It also appears to hold that section (4) (requiring a lookout, giving of a warning and attempt to stop) is inapplicable under the same circumstances. This seems somewhat questionable since the requirement for a lookout is not confined to crossings

30. Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954).

31. McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955).

32. Terry v. Memphis Stone and Gravel Co., 222 F.2d 652 (6th Cir. 1955) (covenant not to sue); Berry v. Foster, 287 S.W.2d 16 (Tenn. 1955) (procedural problem); Brown v. Harkleroad, 287 S.W.2d 92 (Tenn. App. E.S. 1955) (father's liability for giving car to son having propensity for drunken driving); Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (W.S. 1954) (owner's liability for leaving key in car). Each of the cases turned on other matters.

33. McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955).

34. Burkett v. Johnston, 282 S.W.2d 647 (Tenn. App. W.S. 1955).

35. McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955) (owner riding on front seat—statutory presumption applicable); Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (W.S. 1954) (owner left key in car which was stolen by third party—no liability and statutory presumption rebutted).

36. 281 S.W.2d 284 (Tenn. App. W.S. 1954).

37. TENN. CODE ANN. § 65-1208 (1956).

38. *E.g.*, Graves v. Illinois Cent. R.R., 126 Tenn. 148, 148 S.W. 239 (1912).

and subsection (1), in treating the crossing sign, refers only to the whistle and bell.[39]

In the *Little* case the plaintiff also relied on section 65-1101 of the Tennessee code, requiring railroads to "furnish good and sufficient crossings . . . and keep same in lawful repair. . . ." The court holds that this section does not create an independent cause of action but is simply a form of negligence per se involving a specific legislative standard of care so that a separate count is not required for it. A jury verdict for defendant on the common law count for negligence was therefore held to be applicable here.[40]

The case of *Louisville & N.R.R. v. Farmer*[41] was treated fully in last year's Survey.[42] A supplementary opinion on petition for rehearing reiterates that at a railroad crossing collision, plaintiff's proximate contributory negligence bars his recovery, so long as section 65-1208 was not violated.[43]

*Carriers:* The Tennessee rule that a "carrier of passengers . . . is held to the exercise of the highest degree of care and foresight for the passenger's safety"[44] was held in *Knoxville v. Bailey*[45] to be inapplicable when the passenger was in the station awaiting the arrival of a plane. Ordinary care is then required.[46] Plaintiff's injury occurred when she fell at a deceptive step landing at the Knoxville Municipal Airport, and the federal court held that the Delta Air Lines might be found liable. Admitting that there was no Tennessee authority, it declared: "The best considered rule is that a common carrier should not be relieved from liability for injury to its passengers, resulting from the unsafe condition of the station premises which they must use in order to board its trains or airplanes, by reason of the mere fact that such premises are under control of another company or municipality with which the carrier has contracted for terminal facilities."[47]

Two cases involved injuries sustained in unloading from a freight car. A jury verdict for plaintiff was affirmed in *Southern Ry. v. Jones*,[48] where there were defective brakes. A similar verdict was reversed in

39. *Cf.* Southern Ry. v. Campbell, 8 Tenn. Civ. App. 190 (1917).
40. The court added that even though the count involving section 65-1101 should not be treated as concluded by the jury verdict, the trial judge might have granted a peremptory instruction for defendant on the ground that any violation of the statute was not the cause of plaintiffs' injuries.
41. 220 F.2d 90 (6th Cir. 1955).
42. Wade, *Torts—1955 Tennessee Survey,* 8 VAND. L. REV. 1131, 1144-45 (1955).
43. 224 F.2d 599 (6th Cir. 1955).
44. Knoxville Cab Co. v. Miller, 176 Tenn. 88, 91, 138 S.W.2d 428, 429 (1940).
45. 222 F.2d 520 (6th Cir. 1955), 24 TENN. L. REV. 272 (1956).
46. Cases in other jurisdictions are divided. See Annot., 10 A.L.R. 259 (1921). The court relied on Neville v. Southern Ry., 126 Tenn. 96, 146 S.W. 846 (1912); *cf.* Clinton v. Tennessee Electric Power Co., 10 Tenn. App. 311 (E.S. 1929).
47. 222 F.2d at 527, citing 10 AM. JUR., *Carriers* § 1288 (1937).
48. 228 F.2d 203 (6th Cir. 1955).

*Nashville, C. & St. L. Ry. v. Crawford*,[49] where plaintiff attempted to open a freight door by attaching a tractor to it and pulling it open.

### 2. *Public Service Companies*

Three cases involved death by electrocution when a crane used in construction work came into contact with a high tension wire and killed a workman on the ground below—*Rogers v. Chattanooga*,[50] *Turner v. Tennessee Valley Electric Cooperative*,[51] and *Kingsport Utilities, Inc. v. Brown*.[52] In each of them the liability of the utility was held to be for the jury. The *Rogers* and *Brown* cases involved activities in an urban area; the alleged negligence occurred in allowing the uninsulated wires to be too close to buildings and activities. The *Turner* case involved a road where a bridge was being constructed; the negligence was in replacing the wires after they had been removed for the construction work.

In the *Turner* case the court declares that "There is a definite tendency in the reported cases to hold that in case of one dealing with, or handling electricity, the duty towards the public requires a somewhat greater degree of care than is generally required."[53] In the *Rogers* case the court explains that the duty to use care applies to maintenance as well as installation and this involves the responsibility for periodic inspections not just to see that the wires were in proper shape but also whether conditions around them had changed making it necessary to alter the installation.[54]

All three of the cases discussed the effect of intervening negligent acts of a third person (*i.e.*, the crane operator) and held that this causation issue was for the jury.

*Ross v. Sequatchie Valley Electric Cooperative*,[55] involved injury to a boy climbing a pole guy-wire too close to a high tension wire. A demurrer to the declaration was held properly sustained. In *Tennessee Valley Electric Cooperative v. Harmon*,[56] the utility was held not negligent in spraying its right-of-way with 2,4-D.

---

49. 281 S.W.2d 69 (Tenn. App. W.S. 1954).
50. 281 S.W.2d 504 (Tenn. App. En Banc 1954).
51. 288 S.W.2d 747 (Tenn. App. W.S. 1955).
52. (Tenn. App. E.S. 1954), unreported but described and quoted in the opinion of the *Turner* case, 288 S.W.2d at 755, 760. See, in general, Comment, *High Tension Lines—Tort Liability*, 24 TENN. L. REV. 362 (1956).
53. 288 S.W.2d at 752. Since there had been a directed verdict, this does not indicate what language should be used to the jury. In Lawrenceburg v. Dyer, 11 Tenn. App. 493, 505 (M.S. 1929), it was held proper to tell the jury that "ordinary care and prudence" were required and to call attention to the excessively dangerous characteristics of electricity. In Lebanon v. Jackson, 14 Tenn. App. 15, 21 (M.S. 1931), it was held correct to charge that "the highest degree of care" was required.
54. Justice Hale dissented to this part of the opinion, 281 S.W.2d at 509.
55. 281 S.W.2d 646 (Tenn. 1955).
56. 286 S.W.2d 593 (Tenn. App. W.S. 1955).

### 3. *Land Owners and Possessors*

"The public right of passage in a road, street, or sidewalk, carries with it the obligation upon occupiers of abutting land to use reasonable care not to endanger such passage, by excavations or other hazards so close to the public way as to make it unsafe to persons using it with ordinary care." The quotation is from *De Ark. v. Nashville Stone Setting Corp.*,[57] in which it was held that a recovery might be permitted by a woman who fell in an unlighted, unguarded excavation adjoining a sidewalk; the defendant was a subcontractor who had removed the barricade and failed to replace it.

In *Heaton v. Kagley*,[58] a small boy coming on to a neighboring farm to play with the son of the owner, was held to be not an invitee but a licensee, to whom the only duty owed was to "use reasonable care to discover him and avoid injury to him in carrying on activities upon the land."[59] This duty was held not to be violated under the facts of the case.

The *Heaton* case also holds that the attractive nuisance doctrine does not apply to farm activities like loading hay in a hayfield. The plaintiff would therefore have been classified as a trespasser if he had not been treated as a social guest and therefore a licensee. Had the doctrine applied, the duty owed would have been one to exercise reasonable care.[60]

*Ross v. Sequatchie Valley Electric Cooperative*[61] is another case in which the court declined to apply the attractive nuisance doctrine.[62] Here a school boy, taking a short cut home, passed by defendant's right of way; he went over to a pole supporting the electric lines and climbed up a guy wire with the intention of sliding down another guy wire. Coming too close to the high tension line he was hit by a bolt of electricity and knocked to the ground. The court held that a demurrer was properly sustained, saying: "We are of the opinion that the attractive nuisance doctrine had no application in the present case. This wire was far above the ground and it required unusual effort to reach the place of danger. Furthermore, this instrumentality was on the right-of-way of the defendant and was far removed from any populous community."[63]

---

57. 38 Tenn. App. 678, 683-84. 279 S.W.2d 518, 521 (M.S. 1955).
58. 281 S.W.2d 385 (Tenn. 1955), 24 TENN. L. REV. 265 (1956).
59. *Id.* at 388.
60. PROSSER, TORTS § 76 (2d ed. 1955).
61. 281 S.W.2d 646 (Tenn. 1955).
62. See also Russell v. Chattanooga, 38 Tenn. App. 670, 279 S.W.2d 270 (W.S. 1954).
63. 281 S.W.2d at 648. The decision is supported by the earlier holding in Gouger v. Tennessee Valley Authority, 188 Tenn. 96, 216 S.W.2d 739 (1949), and the reasons given in the instant case are more supportable than the explanation in the *Gouger* case that the plaintiff was enticed to climb the pole by an unusual hum, which was not the thing which injured him. For comments on

*Pulaski Housing Authority v. Smith*[64] involves the landlord-tenant relationship. Defendant had just accepted certain units of a housing project in which a subcontractor had left open a gas pipe in a pantry. When a match was lighted to show plaintiffs (new tenants) how to use the appliances, an explosion occurred injuring them. The majority rule is that a landlord owes a duty only to disclose concealed dangerous conditions of which he has knowledge.[65] But the Tennessee rule is that he is under a "duty to use reasonable care and diligence to inspect the premises to see that they are turned over to the tenant in reasonably safe condition."[66] On the basis of this rule a jury verdict for plaintiff was affirmed.

### 4. *Contractors and Suppliers*

In *De Ark v. Nashville Stone Setting Corp.*,[67] a subcontractor who had negligently failed to replace a barricade around an excavation adjoining a sidewalk was not relieved of liability by the fact that the general contractor was bound by his contract with the owner to maintain safeguards to prevent accidents. On the other hand, in *Pulaski Housing Authority v. Smith*,[68] a builder was not relieved of liability for the negligence of a subcontractor in failing to cap a gas pipe when the builder had accepted the structure and was renting it to a third person.

In *Tennessee Valley Electric Cooperative v. Harmon*,[69] where defendant sprayed its right-of-way with 2,4-D, it was held not to be liable to a farmer who claimed that his cows died from grazing on the area and consuming the poison. The court felt that there was not sufficient proof of a causal relationship, but it added: "The defendant had a right to rely upon the label as to the contents of the container when he purchased same from a reliable manufacturer in interstate commerce; and it certainly would not be negligence on the part of the defendant to use this chemical when there was no warning of any character on the label that it was injurious to humans or livestock."[70]

*Brown v. Harkleroad*[71] declares that a defendant might be liable in case of a bailment of an automobile to a known reckless driver addicted

---

the *Gouger* case, see Noel, *The Attractive Nuisance Doctrine in Tennessee*, 21 TENN. L. REV. 658 (1951); 2 VAND L. REV. 716 (1949); 20 TENN. L. REV. 765 (1949).

64. 282 S.W.2d 213 (Tenn. App. M.S. 1955).

65. PROSSER, TORTS § 80 (2d ed. 1955).

66. 282 S.W.2d at 217. See Comment, *Landlord and Tenant: Tort Liability in Tennessee*, 23 TENN. L. REV. 219 (1954).

67. 38 Tenn. App. 678, 279 S.W.2d 518 (M.S. 1955).

68. 282 S.W.2d 213 (Tenn. App. M.S. 1955).

69. 286 S.W.2d 593 (Tenn. App. W.S. 1955).

70. *Id.* at 596-97.

71. 287 S.W.2d 92 (Tenn. App. E.S. 1955).

to drink, but holds that there is no liability in case of a gift. Plaintiff's injury had occurred some time after the gift.

### 5. *Hospitals*

In *Ford v. Vanderbilt University*,[72] an asthma patient in Nashville General Hospital who was given drugs at night fell from his bed and broke his hip. The court of appeals held that a directed verdict for the defendant should be reversed. It discusses in detail the care owned by a hospital and the question of how far the medical testimony as to proper medical practice must prevail and when the members of the jury are entitled to use their own judgment.

## OTHER TORTS

### *Assault and Battery*

In an action for assault and battery, the Tennessee rule is that insulting and provocative language by the plaintiff may be shown in mitigation of damages, both punitive and actual. Accordingly, the court in *Arnold v. Wiley*[73] affirmed a jury verdict of $25 for a broken nose, when the medical expenses alone were greater than this amount.

*Day v. Walton*[74] and *State ex rel. Harbin v. Dunn*[75] both involve the question of the amount of force which a police officer may use to catch a fleeing misdemeanant. They agree that while "an officer may shoot or even kill a felon, if that is the only means of taking him or preventing his escape. . . . [he] has no right to shoot at one guilty of only a misdemeanor to stop his flight or prevent his escape."[76] The major part of the opinion in both cases is devoted to the question of the liability on the officers' bonds.

### *Defamation*

In *Jones v. Fleming*,[77] defendant Fleming was quoted over defendant radio as charging plaintiff with perjury. This was held to be defamatory per se, and a demurrer to the declaration was held to be properly overruled. The court gave no indication as to whether statements over the radio are to be regarded as libel or slander.

In *Insurance Research Service, Inc. v. Associates Finance Corp.*,[78] the Tennessee rules were reiterated that dictation of a libelous letter to a secretary is not a publication,[79] and that no publication is involved

72. 289 S.W.2d 210 (Tenn. App. M.S. 1955).
73. 284 S.W.2d 296 (Tenn. App. E.S. 1955).
74. 281 S.W.2d 685 (Tenn. 1955).
75. 282 S.W.2d 203 (Tenn. App. M.S. 1943). Although this case had been decided some twelve years earlier the opinion was just published, at the direction of the supreme court in the *Day* case.
76. *Id.* at 206.
77. 280 S.W.2d 927 (Tenn. 1955).
78. 134 F. Supp. 54 (M.D. Tenn. 1955).
79. Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S.W.2d 255 (1929).

when the letter is received and read by the party libeled.[80]

*Langford v. Vanderbilt University*[81] involved extensive holdings in the field of defamation. Certain material had appeared in a student humor magazine ("The Chase") which the plaintiffs regarded as libelous and an invasion of their right of privacy. They, therefore, brought actions against the student editor, Vanderbilt University and the printer for both libel and invasion of the right of privacy. After the declarations were filed, "The Hustler," the campus newspaper, quoted from them at length and reproduced the material from "The Chase," which had been made a part of the declarations. Actions for libel and invasion of the right of privacy were then brought against the student editor of The Hustler, Vanderbilt University and the printers of the newspaper. In this action the trial court sustained demurrers to the declarations, and the plaintiffs appealed to the Supreme Court. Three holdings on the law of libel resulted:

(1) Where the allegedly defamatory material "is susceptible of two constructions, the one innocent and the other libelous. . . . it would be a question for the jury as to which of the two constructions is proper."[82]

(2) The 1955 statute, involving libel actions against newspapers and requiring five days written notice for retraction before bringing suit,[83] applies retroactively to conduct before the act was passed if the suit was brought later, and punitive damages were therefore barred in this case because of failure to comply with the statute.

(3) Fair and accurate reporting in a newspaper of the contents of a pleading is privileged even though no action has yet been taken by a court.

This last holding is the most important of the three. It involved overruling a dictum in *American Publishing Co. v. Gamble*,[84] and aligned the state with the rule which is still in the minority but which has been growing rapidly since a New York decision in 1927.[85] There is much to be said for the new rule; and its application to the facts of the instant case, where the action was brought by the person who had originally filed the pleading rather than by the person against whom the charges had been made in the pleading, is entirely consistent with the reasons urged in behalf of the majority rule.[86]

80. Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895).
81. 287 S.W.2d 32 (Tenn. 1956).
82. *Id.* at 37. The court relied on American Publishing Co. v. Gamble, 115 Tenn. 663, 678, 90 S.W. 1005, 1008 (1906).
83. TENN. CODE ANN. § 23-2605 (Supp. 1956).
84. 115 Tenn. 663, 90 S.W. 1005 (1906).
85. Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153, 52 A.L.R. 1432 (1927).
86. The majority rule has been justified because of "the opportunity afforded for malicious public defamation and even extortion through suits begun and promptly discontinued. . . ." PROSSER, TORTS 624 (2d ed. 1955). The inapplicability of this reason to the case where the person filing the pleading is

*Right of Privacy*

There has been no decision in Tennessee either establishing or repudiating a legally protected right of privacy. The *Langford* case,[87] just discussed in connection with defamation, presented the problem for the first time. The Supreme Court discussed the authorities at some length; by implication it seems to have recognized the right. But it held that the demurrers to the plaintiffs' declarations on this issue should be sustained because "it is . . . unrealistic and illogical to hold that there has been an invasion of this common law right of privacy of an individual by publishing a matter which that individual had already made a matter of public record available to the eyes, ears and curiosity of all who care to look, listen or read."[88]

*Inducing Breach of Contract*

There have been comparatively few cases in Tennessee on tortious interference with contract rights, the three cases decided during the Survey period constituting about half the number that had been previously decided.

A statute passed in 1907 provides for treble damages "for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto."[89] *Howard v. Haven*[90] seems to be the first reported case allowing recovery under this statute. Defendant labor union was found by the jury to have induced an owner to breach his contract with a contractor by threatening him with blacklisting if he did not drop the plaintiff and take another company which used union labor. The verdict was affirmed, and it was held that there was no authority under the statute to consider any mitigation of the penalty. The constitutionality of the statute was also upheld.

In *Evans v. Mayberry*,[91] plaintiff's brother had made an oral contract to sell land to him. He sold instead to a third party, and plaintiff brought this action against defendants, contending "that they induced his brother to so sell this land." The original contract was oral and therefore unenforceable under the statute of frauds, and the court affirmed the action of the trial court in sustaining a demurrer to the declaration, quoting a statement from a Texas court that "if the party to such oral agreement would not be liable for noncompliance there-

bringing the defamation action, is immediately apparent. For criticism of the majority rule, see 44 MICH. L. REV. 675 (1946).

87. See note 81 *supra*.

88. 287 S.W.2d at 39. For general treatment of the right of privacy, see PROSSER, TORTS § 97 (2d ed. 1955).

89. TENN. CODE ANN. § 47-1706 (1956).

90. 281 S.W.2d 480 (Tenn. 1955), 24 TENN. L. REV. 387 (1956).

91. 278 S.W.2d 691 (Tenn. 1955).

with, it is legally incomprehensible that another person would be liable for procuring him not to perform."[92] The reasoning sounds persuasive, and the court correctly cites the earlier Tennessee case of *Watts v. Warner*[93] as being in accord. The rule is followed, however, by only a small minority of the cases,[94] and the persuasiveness of the reasoning disappears when it is recalled that a tort action may lie for wrongfully interfering with mere prospective contractual relations.[95] It would seem that rights established under a contract actually entered into, though unenforceable, should be protected for what they are worth if the right to acquire such rights is to be protected.

But the actual holdings in both *Evans v. Mayberry* and *Watts v. Warner* may be completely justified and explained. In both cases the action was being brought under the Tennessee statute allowing treble damages.[96] With its penal aspects, it has been held that this statute should be strictly construed and that it does not apply to interference with prospective rights.[97] The term "lawful contract" used in it may appropriately be construed to include only legally enforceable contracts. The common law tort of wrongful interference with contractual relations, allowing only actual damages, would then not be affected by the holdings in the *Evans* and *Watts* cases if a few broad statements by way of dictum are limited.

*Swift v. Beaty*[98] involved action both at common law for tortiously inducing breach of contract and under the treble-damage statute. Defendant had sold his automobile business to plaintiff by transferring the stock of the company to plaintiff and taking the stock back as a pledge for the indebtedness. Plaintiff later transferred all assets of the company to himself individually and allowed the charter of the company to expire for nonpayment of taxes. Later he contracted to sell all his business, including assets obtained from the defendant to one Moore, who put up a deposit as earnest money. Defendant's attorney, his son, told Moore's attorney that defendant was entitled to a lien on the property for the amount of the unpaid balance and would bring suit to enforce it. Moore declined to continue with the contract unless some protection were given him for the defendant's claim, and the contract fell through. Plaintiff decided not to sue Moore for breach of contract and arranged for his earnest money to be returned. Sub-

92. *Id.* at 692, relying on Davidson v. Oakes, 60 Tex. Civ. App. 269, 128 S.W. 944 (1910).
93. 151 Tenn. 421, 269 S.W. 913 (1925).
94. See PROSSER, TORTS 726 (2d ed. 1955); Annots., 84 A.L.R. 43, 48-49 (1933), 26 A.L.R. 2d 1227, 1242-43 (1952).
95. See, *e.g.*, Hutton v. Walters, 132 Tenn. 527, 179 S.W. 134, 1916B L.R.A. 1238, 1916C Am. Ann. Cas. 433 (1915); and see in general PROSSER, TORTS §§ 106-07 (2d ed. 1955).
96. See note 89 *supra.*
97. Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (E.S. 1938).
98. 282 S.W.2d 655 (Tenn. App. W.S. 1954), 24 TENN. L. REV. 625 (1956).

sequently an instrument was drawn up and signed by plaintiff and later by Moore by which the contract was cancelled "by mutual consent."

The court of appeals affirmed the action of the trial court in giving a directed verdict for defendant, basing its holding on two grounds.

One ground was that defendant's attorney was privileged to tell Moore's attorney about defendant's claim against the property. Whether the lien was enforceable or not, there was reasonable ground to believe that it might be. Defendant was therefore justified in asserting an honest claim. This holding is clearly sustained by the authorities at common law,[99] and, though the statute makes no reference to privileged conduct, common law defenses should be applicable.

The other ground is that "the act of Swift in rescinding or cancelling the contract with Moore without reserving his right of action for the alleged prior breach operated to discharge any claim he might have had against Beaty, Sr., for inducing the alleged breach."[100] The court acknowledged the "general rule . . . that a person's liability in tort for wrongfully inducing the breach of contract is in no way affected by the fact that the injured party also has a right of action in contract against the defaulting party to the contract."[101] This would seem to provide some indication that the tort action is not dependent on the contract action, and the conclusion is emphasized by the general rule, described earlier, that a defendant may be liable in tort for wrongful interference with prospective contractual advantages, in spite of the absence of any contract right or cause of action against the party with whom negotiations were conducted. The closest case to the specific problem involved is *Simon v. Norma Electric Corp.*,[102] holding that a judgment obtained and collected against the contract breaker will bar recovery against the tortfeasor if the plaintiff received no further damage, but that plaintiff can recover in the tort action any additional damages he can prove. In the instant case Swift had received nothing from Moore, and there was nothing to credit against a tort judgment. Unless the Tennessee case of *Watts v. Warner*[103] is given the broad construction indicated in the instant case, the holding on this issue is somewhat questionable.[104] But this is simply an alternative ground

99. See PROSSER, TORTS 737 (2d ed. 1955); *cf.* McKee v. Hughes, 133 Tenn. 455, 181 S.W. 930 (1915).

100. 282 S.W.2d at 660.

101. *Id.* at 659.

102. 293 N.Y. 171, 56 N.E.2d 537 (1944).

103. 151 Tenn. 421, 269 S.W. 913 (1925). This is the case holding that no tort action lies for wrongfully inducing a breach of an unenforceable contract, discussed earlier in this section.

104. It is to be remembered here that Moore is treated as having already breached the contract before the "rescission" (elsewhere called by the court a release) was executed. If this had been a true rescission, based on negotiations by the parties, the situation might have been different.

for the holding for the defendant which is entirely sustained on the privilege basis indicated in the previous paragraph.

*Nuisance*

In *Columbia v. Lentz*,[105] a jury verdict was affirmed holding it to be a nuisance for a municipality to dump sewerage in a creek. The city had an easement, but had recently put an outlet to a higher place in the creek and the amount had increased so that as a result of the two changes it frequently overflowed plaintiff's land within a horseshoe bend of the creek.

On the other hand, in *Russell v. Chattanooga*,[106] sanitary fills (deep, narrow ditches used for the purpose of dumping garbage) dug on land belonging to the city, were held not to constitute a nuisance even though they contained four to six feet of water and two children were drowned in them. A directed verdict for the defendant was affirmed.

*Seduction*

The facts of a seduction case are set out at some length in *Caccamisi v. Thurmond*.[107] The court held that punitive damages are always allowable in a seduction case, but granted a remittitur on the ground that they were too high.

MISCELLANEOUS

*Governmental Immunity*

A state cannot be sued in tort unless it gives consent. The State of Tennessee has set up a State Board of Claims to hear tort claims against the state.[108] In *Hill v. Beeler*,[109] plaintiff, whose husband had been killed by a drunken convict driving a prison truck, had filed a claim which the State Board of Claims turned down on the ground that it had no jurisdiction to make an award. She then brought suit in chancery court for a declaratory judgment that the Board of Claims had jurisdiction. The supreme court held that no such judgment could be granted since the remedy, if any, rests exclusively with the Board of Claims. It added that the Board of Claims was correct in indicating that it had no jurisdiction, since the doctrine of respondeat superior

---

The rule that release of one joint tortfeasor necessarily releases the other is unrealistic, and has been changed in many states by judicial decision or statute; it seems unwise to extend it to new situations, where the parties are not truly joint tortfeasors but are liable on entirely different bases. The decision in the *Swift* case is criticized in 24 TENN. L. REV. 625 (1956).

105. 282 S.W.2d 787 (Tenn. App. M.S. 1955).

106. 38 Tenn. App. 670, 279 S.W.2d 270 (W.S. 1954).

107. 282 S.W.2d 633 (Tenn. App. W.S. 1955).

108. See TENN. CODE ANN. §§ 9-801 to -815 (1956); Anderson, *Claims Against States*, 7 VAND. L. REV. 234 (1954); Note, *Claims against the State in Tennessee—The Board of Claims*, 4 VAND. L. REV. 875 (1951).

109. 286 S.W.2d 868 (Tenn. 1956).

does not apply where officials of a prison fail to perform their duty.

In the performance of a governmental function a municipality is not liable for negligence. It may, however, as two cases indicate, be held liable for creation of a nuisance.[110] A city may also be held liable in negligence in the exercise of a proprietary function.[111]

*Joint Tortfeasors*

When several persons act together for the accomplishment of an unlawful purpose, each of them is held liable for any injury caused by one of them. This rule was recognized in *Day v. Walton*,[112] but was held to be inapplicable where the parties are engaged in lawful conduct and one of them commits a tort. Three special policemen were trying to catch a fleeing misdemeanant and one of the policemen wrongfully fired at him, injuring the plaintiff. The other policemen were held not liable.

The rule that release of one joint tortfeasor releases the others as a matter of law whether or not complete satisfaction was obtained, is subject to severe criticism from the standpoint of logic, history and general policy, and has been modified in many states.[113] In Tennessee, as in a number of other states, the injured party who desires to release one tortfeasor and hold the others liable may execute a covenant not to sue rather than a release. The covenant not to sue is defined in *Mink v. Majors*[114] as "a fictional device to enable a joint tort-feasor to buy his peace and for that reason, when he has done so and another joint tort-feasor has not, the latter under our law is not entitled to peace."

In the *Mink* case, plaintiff sued three defendants for wrongfully enlarging a ditch on his boundary line. He subsequently gave two of them a covenant not to sue on a consideration of payment of $1500. The court held that the third defendant was not released. The jury

110. In Columbia v. Lentz, 282 S.W.2d 787 (Tenn. App. M.S. 1955), dumping sewerage in a creek was held to be a nuisance. In Russell v. Chattanooga, 38 Tenn. App. 670, 279 S.W.2d 270 (W.S. 1954), maintenance of deep, narrow ditches on property of the city for sanitary fills was held not to constitute a nuisance.

111. In Memphis v. Dush, 288 S.W.2d 713 (Tenn. 1956), the city was held not negligent in the maintenance of a sidewalk. In Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955), 24 TENN. L. REV. 272 (1956), the maintenance of a municipal airport would have been treated as a proprietary function except for the code provision designating it as governmental and barring suits. TENN. CODE ANN. § 42-310 (1956). The city was held liable, however, to the extent that it had liability insurance.

112. 281 S.W.2d 685 (Tenn. 1955).

113. See *e.g.*, PROSSER, TORTS 243-46 (2d ed. 1955). Despite this it was said in Swift v. Beaty, 282 S.W.2d 655 (Tenn. App. W.S. 1954), to be applicable to a case of tortiously inducing breach of contract, so that a release of the contract breaker also released the tortfeasor. For further discussion, see textual material supported by notes 98-104 *supra*.

114. 279 S.W.2d 714, 717 (Tenn. App. W.S. 1953), 24 TENN. L. REV. 390 (1956).

found damages of $2000 and the trial court gave defendant credit for the $1500 payment; but the court of appeals held that this was wrong and that the defendant was liable for the full $2000. This holding, while sustained by the Tennessee authorities,[115] is apparently unique to the state of Tennessee. Courts elsewhere all disagree with it.[116] It means that the injured party may receive more than 100% satisfaction, and in any case where contribution or indemnity is permitted the tortfeasor paying for a covenant not to sue may have to pay a second time to the other tortfeasor.[117] Perhaps this last objection would be eliminated if the statement of the federal court in *Terry v. Memphis Stone and Gravel Co.*[118] is followed. The court there indicated that where the injured party gives a covenant not to sue to an employee, an employer who is liable only on the principle of respondeat superior is "necessarily released." Though this position purports to be in accord with Tennessee decisions it appears to be somewhat inconsistent with *Mink v. Majors.*[119]

In any event the present law in Tennessee on releases and covenants not to sue is in such a confused and illogical state that a carefully drafted statute is sorely needed.[120]

*Damages*

There was little of significance on the subject of tort damages during the Survey period. Three cases are worthy of comment.

*Scott v. St. Louis—S.F. Ry.*[121] holds that in an action for loss of

115. Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S.W. 1053 (1917).

116. See PROSSER, TORTS 246 (2d ed. 1955): "All courts are agreed, however, that it [a partial satisfaction] must be credited pro tanto to diminish the amount of damages recoverable against him, irrespective of an agreement that it shall not, and regardless of whether it is received under a release or a covenant not to sue."

117. For a thorough and complete treatment, see Sturdivant, *Joint Tortfeasors in Tennessee and the New Third-Party Statute*, 9 VAND. L. REV. 69 (1955).

118. 222 F.2d 652 (6th Cir. 1955).

119. In *Mink v. Majors*, the covenant not to sue was given to general contractors and the action was continued against Chandler Construction Co., a subcontractor. Chandler contended that in enlarging the ditch it was simply following the orders of the general contractors and was guilty of no negligence, so that it would be entitled to indemnification from them. The court of appeals did not regard this as significant and said: "If Chandler desires to claim either contribution or indemnity, it would have to file a suit against the other joint tort-feasors for that purpose . . . ." 279 S.W.2d at 717.

It may be significant that the court in the *Terry* case relied primarily on the Massachusetts case of Karcher v. Burbank, 303 Mass. 303, 21 N.E.2d 542, 124 A.L.R. 1292 (1939), which based its holding in part on the position that "where a plaintiff has received money on account of his injuries from one tortfeasor, but not in such circumstances that the transaction amounts to a release, the amount so received is admissible in evidence in reduction of damages in an action against a joint or concurrent tortfeasor." 21 N.E.2d at 544.

120. Lawyers are afraid to take a covenant not to sue. The covenantee may ultimately be held liable for an additional amount in contribution or indemnity. Can he then sue the covenantor?

121. 286 S.W.2d 347 (Tenn. App. W.S. 1954).

consortium and loss of services of a wife, mental anguish is not an element of damages. The court failed to reverse, however, stating that the jury may have loosely labeled its award for loss of consortium as mental anguish.

*Caccamisi v. Thurmond*[122] holds that punitive damages are always allowable in an action for seduction. However, the court granted a remittitur because they were excessive.

*Mink v. Majors* holds that the measure of damages for injury to real property is "the difference between the value of the premises immediately prior to the injury and the value immediately after the injury," but adds that "if the reasonable cost of repairing the injury was less than the depreciation in value, then the costs of repair would be the lawful measure of damages."[123]

*Limitation of Actions*

In case of damage to real property by a public utility, the problem may arise whether the one-year eminent-domain statute for intentional taking[124] or the three-year statute on "actions for injuries to personal or real property"[125] applies. This is discussed in *Donohue v. East Tennessee Natural Gas Co.*,[126] in which the three-year statute was held applicable to the facts there involved.

The statute of limitations in a seduction action is one year.[127] It was originally held to start running from the time of the first act of intercourse, but later cases held that the statute does not begin to run with the first act where there are subsequent acts, all induced by the same promise of marriage. In *Caccamisi v. Thurmond*,[128] the court states that when there is a "break in the relations between the parties . . . interrupted by their complete severance of relations, but followed by subsequent renewals" the statute is not tolled after the break.

Two cases involve the statute providing for an additional period of one year to bring an action when an original suit, brought within the limitation period, is determined against the plaintiff "upon any ground not concluding his right of action."[129] *Denny v. Webb*[130] applies the statute, and holds that if the defendant seeks to show that the first action was not brought within the statutory period he must clearly plead this when required to plead specially. *Turner v. Nashville*,

122. 282 S.W.2d 633 (Tenn. App. W.S. 1955).
123. 279 S.W.2d at 716.
124. TENN. CODE ANN. § 23-1424 (1956).
125. *Id.* § 28-305.
126. 284 S.W.2d 692 (Tenn. App. M.S. 1955).
127. TENN. CODE ANN. § 28-304 (1956).
128. 282 S.W.2d 633 (Tenn. App. W.S. 1955). The earlier cases are described in the opinion.
129. TENN. CODE ANN. § 28-106 (1956).
130. 281 S.W.2d 698 (Tenn. 1955).

*C. & St. L. Ry.*[131] holds that the statute permits only one additional period of a year from the time of the original suit and does not authorize a series of nonsuits. The rule is not affected by the fact that plaintiff had been unable to find witnesses and that the defendant refused to disclose to the plaintiff what it knew.

131. 285 S.W.2d 122 (Tenn. 1955).