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## Torts

George Savage King

*University of South Carolina School of Law*

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## TORTS

GEORGE SAVAGE KING\*

For convenience the cases covered in this review will be grouped under five headings. None of this year's cases can be said to have introduced any novel principles, though the Supreme Court did take advantage of the opportunity presented in the case of *Howle v. McDaniel*<sup>1</sup> to declare that this state recognizes the well established general rule<sup>2</sup> that the negligence of a bailee is not imputed to the bailor.

Perhaps particular attention should be paid to *A.C.L. Railroad Co. v. Truett*<sup>3</sup> decided by the Court of Appeals, Fourth Circuit. Its significance lies not in the decision but in the following inadvertent misstatement of the South Carolina law on imputed negligence: "As to the question of the parents' contributory negligence, *which under South Carolina law would be imputed to the child*, this too was a jury question."<sup>4</sup> [Emphasis added.]

Ever since the case of *Watson v. Southern Ry.*,<sup>5</sup> decided in 1903, it has been the law in South Carolina that the negligence of a parent is *not* imputed to the child, and Mr. Justice Jones speaking for the Court expressed condemnation of the contrary rule in the following language:

The view opposed violates all our conceptions of justice and of those principles of the common law which protect the innocent from the guilty, which has tender regard for the rights and safety of the helpless, which will not excuse negligence merely because it cooperates with other actionable negligence in working injury to one without fault.<sup>6</sup>

This rule has been frequently reiterated by our Supreme Court, with two cases as recent as 1950.<sup>7</sup>

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\*Professor of Law, University of South Carolina.

1. 232 S. C. 125, 101 S. E. 2d 255 (1957). See also 10 S. C. L. Q. 515 for a more extended discussion of this case.

2. PROSSER, TORTS, 302 (2d ed. 1955). RESTATEMENT, TORTS § 489 (1934).

3. 249 F. 2d 215 (4th Cir. 1957).

4. *Id.* p. 218.

5. 66 S. C. 47, 44 S. E. 375 (1903).

6. *Id.* p. 51.

7. *Limehouse v. Southern Railway Co.*, 216 S. C. 424, 58 S. E. 2d 685 (1950); *Daniels v. Timmons*, 216 S. C. 539, 59 S. E. 2d 149 (1950).

In the Truett case, *supra*, the 18 months old son of the plaintiff was killed by defendant's train when he wandered onto the tracks and the father brought this action under Lord Campbell's Act to recover for the death. Among the defenses raised by the railroad was the contributory negligence of the parents in not keeping the child in custody, and the Court was entirely correct in saying "... the parents' contributory negligence . . . was a jury question," implying that a finding of negligence would have barred a recovery. But there is no need for the negligence to be *imputed to the decedent* to bar recovery by negligent beneficiaries.

The adoption of the rule imputing the negligence of the parent to the child would bar all actions arising out of the negligent injury or death of the child, including those of the child himself when he survived. The distinction between the situations was discussed by Mr. Justice Cothran in the case of *Cirsofsky v. Smathers*,<sup>8</sup> and illustrated by the case of *Horne v. A.C.L. Railroad Co.*<sup>9</sup> in which the father's negligence barred him from recovering for the death of his child, but did not bar the non-negligent mother, both of which were cited by the Court of Appeals following the quotation under discussion. Because of the citations given by the Court there can be no doubt but what the misstated parenthetical clause was inadvertent. Nevertheless, the error cannot be allowed to go unnoticed because such remarks of the courts have a way of finding themselves into the digests and turning up as authority for general statements of the law. In fact the syllabus on the point reads: "Under South Carolina law, parents' contributory negligence would be imputed to 18 month-old child which was struck by train at crossing."<sup>10</sup>

## 1. NEGLIGENCE

### (a) *Sudden Emergency*

Three cases this year fall within the "sudden emergency" doctrine.

In one of these, *Critzer v. Kerlin*,<sup>11</sup> there was no mention of a sudden emergency in those words, but the defendant was suddenly confronted with a small child running in front of him from between parked cars and stopped "in less than the

8. 128 S. C. 358, 122 S. E. 864 (1924).

9. 177 S. C. 461, 181 S. E. 642 (1935).

10. 249 F. 2d 215, 216 (4th Cir. 1957).

11. 231 S. C. 315, 98 S. E. 2d 761 (1957).

hood length of the car". Clearly the sudden emergency doctrine would apply, and the Supreme Court held that the evidence was not susceptible of any inference of negligence and the defendant was entitled to a judgment as a matter of law.

In *Melton v. Ritch*<sup>12</sup> the Supreme Court reversed a directed verdict for the defendant, holding that it was for the jury to decide whether the defendant acted reasonably in remaining as long as he did in his traffic lane while plaintiff's truck was approaching from the opposite direction followed by two autos racing more or less abreast, or in finally turning into plaintiff's oncoming truck as the lesser of the evils confronting him. No doubt one confronted with oncoming vehicles in both traffic lanes is faced with a dilemma. But where there was evidence, as here, that defendant's passenger had twice warned him of the impending peril, and he had a wide shoulder on the right of the highway onto which he could have turned, it could hardly be said as a matter of law that he was justified in turning into the left lane and colliding with plaintiff. To claim the benefits of the sudden emergency doctrine one must not have brought on the emergency.

In *Green v. Sparks*<sup>13</sup> the Court affirmed the submission of the case to the jury when plaintiff ran off the highway on a curve to avoid colliding with defendant who backed out into the highway from a driveway on the curve, saying plaintiff was confronted with a sudden emergency. The case was reversed for a new trial, however, to determine whether plaintiff had ratified a release he had given to defendant while he was in the hospital.

### (b) Contributory Negligence

Of the four cases under this heading only one was reversed on appeal, and that was the one in which the trial judge had directed a verdict for defendant, *Chesser v. Taylor*.<sup>14</sup> In that case plaintiff was working between defendant's truck and another which were parked back to back at the State Farmers' Market, when defendant's truck suddenly backed up crushing him against the back of the other truck. Defendant knew plaintiff was there but gave no warning that he was going to back up. It was held that there was sufficient evidence to

12. 231 S. C. 146, 97 S. E. 2d 509 (1957).

13. 232 S. C. 414, 102 S. E. 2d 435 (1958).

14. 232 S. C. 46, 100 S. E. 2d 540 (1957).

go to the jury on the question of negligence and contributory negligence.

In *Jeffers v. Hardeman*,<sup>15</sup> a verdict for the plaintiff driver of a truck and his passenger who were injured as a result of a collision with the rear end of defendant's auto which had stopped in the traffic lane ahead of plaintiff without any impelling reason and when it could have pulled off on the shoulder, was affirmed.

In *A.C.L. Railroad Co. v. Truett*,<sup>16</sup> discussed above, the Court of Appeals affirmed the jury's finding for the plaintiff when plaintiff's 18 month-old son was killed by defendant's train after the engineer had seen something on the track which he thought to be a dog, but, too late, discovered was a child.

Judgment for the defendant given by the district judge sitting without a jury was affirmed in *Westley v. Southern Railway Co.*,<sup>17</sup> in which plaintiff's leg had been amputated as a result of a collision with defendant's train at a crossing when it was raining and still dark in the early morning.

In affirming, the Court of Appeals observed:

Whether or not one shares the District Judge's view that the circumstances *compel* a finding of gross contributory negligence, it is not to be doubted that they *permit* such a finding by the tribunal chosen by the parties.<sup>18</sup>

### (c) Duty Owed to Persons on Defendant's Premises

In *Bailes v. Southern Railway Co.*,<sup>19</sup> plaintiff's intestate was killed by defendant's train when passing through a populated area within the limits of a town and with a footpath along the right of way. In answer to defendant's contention that it had breached no duty owed to the decedent because he was a trespasser, although the engineer had testified that he had not slowed down when he saw an object on the track ahead because he thought it was a fertilizer sack, the Court quoted the following language from *Sentell v. Southern Ry.*:<sup>20</sup>

It makes no difference if the trend of the testimony was that Sentell was a naked trespasser, the defendant

15. 231 S. C. 578, 99 S. E. 2d 402 (1957).

16. 249 F. 2d 215 (4th Cir. 1957).

17. 250 F. 2d 188 (4th Cir. 1957).

18. *Id.* p. 191.

19. 231 S. C. 474, 99 S. E. 2d 195 (1957).

20. 70 S. C. 183, 49 S. E. 215, 217 (1904).

owed him a duty, *viz.*, that he should not be treated by defendant without some regard to the dictates of humanity. There was positive testimony that the engineer could have seen Mr. Sentell in plenty of time to have stopped the train before reaching him, thus have saved his life. All in all there was testimony tending to show negligence.<sup>21</sup>

That an owner of a racetrack who invites the public to watch performances upon payment of an admission fee owes a duty comparable to that of a merchant to his customer was declared by the Supreme Court in the case of *Taylor v. Hardee*:<sup>22</sup>

He is not an insurer of safety but does owe the duty to keep his premises free of defects of which he knows, or, in the exercise of reasonable care and providence, should have known or foreseen.<sup>22a</sup>

The Chief Justice took the occasion to offer a word of warning to those who operate riding devices such as ferris wheels, merry-go-rounds, or the like, although none was involved in this case:

... a different and more stringent rule of liability, akin to that of carrier to passenger, appears to exist in the case of [such] operators....<sup>23</sup>

In *Hunter v. Dixie Home Stores*,<sup>24</sup> the Court reversed a judgment for plaintiff who had fallen after slipping on a green bean on the floor in defendant's self service food store and remanded the case for entry of judgment in favor of defendant. The Court found the evidence of negligence by defendant insufficient to support a verdict. There was no evidence to show that defendant had actual knowledge of the bean's presence on the floor, nor to show that it had been there long enough to charge defendant with constructive knowledge. The rule stated in *Anderson v. Belk-Robinson*<sup>25</sup> was reiterated with the following quotation:

In *Bradford v. F. W. Woolworth Co.*, 141 S. C. 453, 140 S. E. 105, we laid down the rule, deduced from the weight of authority, that a merchant who invites the pub-

21. 231 S. C. 474, 481, 99 S. E. 2d 195 (1957).

22. 232 S. C. 338, 102 S. E. 2d 218 (1958).

22a. *Id.* p. 344.

23. *Id.* p. 345.

24. 232 S. C. 139, 101 S. E. 2d 262 (1957).

25. 192 S. C. 132, 5 S. E. 2d 732 (1939).

lic to his premises is not an insurer of the safety of his patrons, and is therefore not liable for injuries caused by some defect in the premises, in the absence of any evidence tending to show that he or his agents knew or should have known, by the exercise of reasonable diligence, of the defect. This principle was re-affirmed in *Pope v. Carolina Theater*, 172 S. C. 161, 173 S. E. 305; *Perry v. Carolina Theater*, 180 S. C. 130, 185 S. E. 184.<sup>26</sup>

Although the above rule is followed in numerous other states, as was pointed out by the Court, it may be asked: Is the view expressed by the following excerpt from a special concurring opinion by Justice Terrell of the Florida Supreme Court<sup>27</sup> a forecast of things to come?

It is admitted that appellee slipped on a green bean and fell while she was a customer in defendant's store. The evidence shows that the accident occurred about 11:30 A.M., that the floor had been swept about fifteen minutes before, that appellant had no knowledge of the bean on the floor or how long it had been there before the plaintiff's fall. Appellant contends that under such circumstances, it is not the insurer of the safety of its customers but is required to exercise reasonable care only to see that the premises are kept in safe condition. It is further contended that the trial court recognized this to be the rule and instructed the jury accordingly.

Reasonable care was without question the rule governing stores and many other business places in the old day when the proprietor had his breakfast by candle light and tailored his place of business, and had it ready for customers before sun up. Such was the store that generated the reasonable care rule, it was a general merchandising establishment, the food section occupied space in the rear and the invoice consisted of a cracker barrel, a box of white bacon, a few barrels of flour and sacks of water ground meal, a hogshead of sugar, several cases of can goods, a few caddies of plug tobacco, a barrel of kerosene, several boxes of barber pole candy, some cartons of snuff, spices, salt, soda, fresh meats on Saturday and green groceries according to the season. Trace chains, horse collars, back bands and plow handles often got mixed up with the groceries. Nothing was screened, the

26. *Id.* p. 733.

27. *Carl's Markets, Inc. v. De Feo*, 55 So. 2d 182, 183 (Fla. 1951).

house fly was everywhere in evidence and the germ theory was in the future. There was an accommodating yokel dressed in jean trousers and a hickory shirt to serve the customer. The floors were of rough boards, Pop purchased the family groceries and wore shoes that did not turn easily. The customers came in singles, took their turn with the clerk and the store was kept open till bed time and longer if those who came wanted to discuss the fate of the nation around the cracker barrel.

The modern food store of the self serving super market variety is a very different institution. It is said to have had its origin about 90 years ago when George H. Hartford organized the first unit in Manhattan, out of which came the Great Atlantic and Pacific Tea Company. In 1936 it commenced self service supermarketing in foods and other household articles and now has more than 4500 stores doing more than three billion dollars of business per year. Some of the other large self serving chains are Safeway, Kroger and First National. Piggly Wiggly, Hinke and Pillot, Big Bear, Food Fair, American Stores and dozens of others are among the independent and smaller chains. Some of them have developed into onestop trading centers where the housewife not only buys the groceries for the week but she may purchase many other articles used in the home. She can get her hair marcelled and her husband can go along and get a shave and a hair cut.

The indicia of the modern self serving food store is the basket cart, self service, volume sales, minimum prices, showmanship, large and frequent turnover, small net profit, unique arrangement, color scheme attraction, Friday and Saturday specials, circus stunts in some places, and many other attractions. Some one has defined it as a combination of brilliant showmanship and the world's most modern distribution techniques. It makes the best use of color therapy to arrest the attention. Some of them provide rest facilities and nurseries, put on family nights and have reduced the wrapping problem to a minimum. They are open from eight A.M. to six P.M., they sell more than fifty per cent of the foods consumed in the country, they are replacing the old style retail store and new ones are springing up daily. They are frequented by hundreds



and thousands of customers every day, the mural attractions and food displays are often spectacular and so consuming that it is said that they break down purchase resistance and encourage impulse buying. The floors are of synthetics or some species of composition tile, they are smooth and much easier to trip on than the board floors of the old store.

Nothing said here is in criticism of the self serving food store as an institution. It is a typical product of American ingenuity. It has revolutionized food merchandising, made it cleaner and more sanitary, it has installed screens, refrigeration and other devices to preserve perishables and the people are committed to it. It dispenses thousands of items that were unknown to the old grocery store. It merits the place it has made in the economy of the country but I think it has brought with it potential hazards to the customer that it cannot dodge responsibility for. I think these hazards lurk in the complete environmental differences between the two classes of food stores, the difference in service, the difference in customers, the difference in volume, the difference in floors, the difference in glamour and in addition to these and others but by no means the least of them, the self service store has dispensed with Pop and enthroned Mom as the family purchasing agent. She came in straps, pumps and high heels that turn readily on composition floors if a bean or other inducement is dropped in the way. Mom is not the athlete that Pop is, and hasn't the capacity to retrieve herself in a fall that Pop has. In fact, a tumble on the floor is one extremity in which Pop is more resourceful than Mom.

In view of these factors I think something more specific than the reasonable care rule must be imposed on the proprietor of the self serving grocery store. In fact, I think that in the light of the disparity between the modern food market and the old time grocery, it is out of the question to contend that they are governed by the same rule of care. They are so different in every essential aspect that I think it would be as reasonable to contend that the proprietor of a horse drawn vehicle would be governed by the same rule of care as the proprietor of a motor driven vehicle. The reasonable care rule may

still be appropriate to some factual situations but since the judgments of men as to values now vary as the size of their shirts and shoes, it is antiquated and has no application to a case like this. If reasonable care can be construed to relieve one, the phrase is so flexible that negligence would rarely be fastened on the defendant. Rules of conduct governing a business are not rules of statute that the legislature is expected to promulgate, they are rules of reason that emanate from the court and which the court is expected to keep current. At one time they would have been designated rules of the common law which were also court made. They are essential to promote human progress and should square with changing social and economic conditions. To "burn incense" to an antiquated rule in a case like this, in my judgment, amounts to inexcusable lag in judicial administration.

The basket cart of the self serving store provides a seat to carry the baby. At the time Mrs. DeFeo was injured she was carrying her baby and collecting the family groceries. She had traded at Carl's Markets many times, she was perfectly familiar with the layout, she had a right to assume that the floors were clean. The dominant atmosphere of the self serving store reflects cleanliness. Dirt is an abomination to it. There was no reason for her to suspect a green bean or other object on the floor. In fact, I do not think that under the circumstances she was charged with looking for such impediments. This court is committed to the doctrine that the degree of care required of the operator of any business must be commensurate with the kind and danger of the business he is engaged in. I think this rule should govern the case at bar.

In *Wells v. Palm Beach Kennel Club*, 160 Fla. 502, 35 So. 2d 720, we rejected the reasonable care rule which appellant seeks to invoke in this case for reason not materially different. True the patron in that case slipped on a bottle in the aisle of the grand stand at a race course. It was not shown how long the bottle had been there, but we held that the diligence required of the proprietor must be comparable to that necessary under the circumstances to prevent accidents. In this case the evidence shows a complete lack of that degree of care, not alone in looking

after the floors, but in the construction of the vegetable bins. It is shown that the vegetable bins were overfilled and it is admitted that the bean might have been on the floor at least fifteen minutes at a busy time of the day. *Moone v. Kroger Grocery & Baking Co.*, Mo. App., 148 S. W. 2d 628; *Pabst v. Hillman's*, 293 Ill. App. 547, 13 N. E. 2d 77; *Wells v. Palm Beach Kennel Club*, *supra*. In these and many other cases the court rejected the contention that liability turns on proof that the bean or other substance had been on the floor long enough to put the defendant on notice. Given any other interpretation the rule becomes shop worn and the law "goes to seed."

Deserving of only passing notice is the case of *Mullen v. Winn-Dixie Stores*,<sup>28</sup> decided by the United States Court of Appeals, Fourth Circuit, in which judgment for the defendant *non obstante veredicto*, was affirmed. Plaintiff had fallen in defendant's self service store after slipping on a grape or something similar on the floor. The Court followed the South Carolina law as stated in *Hunter v. Dixie Home Stores*, *supra*.

## 2. GUEST STATUTE

Three cases involving the guest statute were decided during the period under consideration: two by our Supreme Court and one by the Court of Appeals. In all three, judgments for the plaintiffs on verdicts were affirmed. In *Benton v. Pellum*<sup>29</sup> the Court found there was evidence to support the recklessness necessary to impose liability under the statute. There was conflicting testimony estimating defendant's speed from 40 to 100 m.p.h. just before he collided with another car which had stalled in the highway at 11 o'clock at night.

Defendant's conduct in driving at high speed on a very hot day in his heavily loaded truck on a tire known to be very weak and resulting in its blowing out and overturning the truck with consequent injuries to the plaintiff guest was held to be sufficient evidence of recklessness or heedlessness to overcome the burden of the guest statute in *Saxon v. Saxon*.<sup>30</sup>

28. 252 F. 2d 232 (4th Cir. 1958). Although the Court refers to the plaintiff customer (at p. 233) as a "licensee", it would seem clear that under the South Carolina cases he is regarded as an "invitee". *E.g.*, *Blease, J.* concurring at p. 459 in *Bradford v. F. W. Woolworth*, 141 S. C. 453 (1957): "...Where the relationship was that of owner of a public store and his invitee." [Emphasis added.]

29. 232 S. C. 26, 100 S. E. 2d 534 (1957).

30. 231 S. C. 378, 98 S. E. 2d 803 (1957).

The Court acknowledged that the mere fact of a tire's blowing out is not sufficient, but when coupled with defendant's knowledge of its weakness, his driving at high speed and with a heavy load that shifted from time to time, the evidence was sufficient to support the verdict. Defendant also contended that the jury's failure to find punitive damages "absolved defendant from wilfulness, wantonness or recklessness, without proof of which there can be no recovery under the guest statute." To this the Court answered,

... We do not think that the verdict should be so interpreted.

.... When the jury awarded \$5,000 for actual damages, they exhausted the demand of the complaint and there was no room for additional, punitive damages.<sup>31</sup>

The Court of Appeals held in *Hardigg v. Inglett*<sup>32</sup> that a single escapade of "outrageous recklessness" earlier in the evening which was shown to be completely out of character for the twenty-year-old defendant, was not sufficient to charge the guest with the same degree of heedlessness or recklessness as defendant, as a matter of law, when the guest voluntarily rode again with defendant resulting in the guest's death. It was pointed out that decedent was a close friend and frequent companion of the defendant and knew of his proven habit of driving with care and the inference could be drawn that decedent had expected his host to drive in his accustomed manner on the fatal trip, rather than heedlessly and recklessly as he did.

### 3. MALICIOUS PROSECUTION

*Elletson v. Dixie Home Stores*<sup>33</sup> again illustrates how dangerous it may be for merchants to undertake to stop suspected shoplifters. The risk of liability for false imprisonment, slander, or malicious prosecution is very great indeed. Even though the new shoplifting statute enacted by the Legislature in 1956<sup>34</sup> was not applicable in this case, there is no reason to believe that the results would have been any different with the aid of the statute.

Plaintiff's judgment for \$10,000, on a verdict for \$7,000 actual and \$3,000 punitive damages, was affirmed in an

31. *Id.* p. 809.

32. 232 S. C. 94, 101 S. E. 2d 269 (1957).

33. 231 S. C. 565, 99 S. E. 2d 384 (1957).

34. CODE OF LAWS OF SOUTH CAROLINA, 1952, Suppl. 1957, § 16-359.1 *et seq.*

opinion reiterating that the question of probable cause is one for the jury.

Plaintiff was an elderly man of good reputation who had been a regular customer of defendant's self service store and failed to pay for a jar of coffee which he put into his pocket while carrying some other items in a box. When accosted by defendant's manager after going through the check out counter, his offer to pay for the coffee was refused, and plaintiff was escorted to the store room of the store by the manager who called the police and told them to "take him in". Plaintiff was subsequently acquitted on trial in the Municipal Court.

#### 4. FRAUD

When the real estate agents handling the sale of a home undertook to represent to the plaintiff purchaser the balances of the outstanding mortgages which he assumed in the transaction, they were under a duty not to mislead him. Judgment for plaintiff for the difference between the balances outstanding and the amounts represented was affirmed in *Lawlor v. Scheper*.<sup>35</sup> The fact that defendants had mistakenly believed the representation to be true did not relieve them of liability when they professed to have knowledge of the facts stated. The misrepresentation in this type of case exists in the representation that one has knowledge of a fact, which is readily ascertainable, when actually he does not have such knowledge.

#### 5. DEFAMATION

The only point involved in the case of *McClain v. Altman*<sup>36</sup> on this appeal was whether the complaint included an allegation of publication of the alleged libel by the defendants. Defendants were job printers who had allegedly printed posters used against plaintiff in a political race for his re-election as Sheriff of Anderson County. On appeal the Supreme Court affirmed the overruling of defendant's demurrer stating,

It is axiomatic for the purpose of demurrer that all allegations of the complaint must be taken as true; and when so considered, it clearly alleges that each of the Appellants "combined and conspired" in printing or allowing to be printed the alleged libelous placards or posters which by their very nature could have been intended for no purpose other than publication, thereby contrib-

35. 232 S. C. 94, 101 S. E. 2d 269 (1957).

36. 231 S. C. 251, 98 S. E. 2d 263 (1957).

uting to the chain of circumstances culminating in the alleged libel, *Nunnamaker v. Smith's*, 96 S. C. 294, 80 S. E. 465.<sup>37</sup>

Without challenging the validity of the conclusion of the Court under the facts alleged in this case, it appears that the cited case of *Nunnamaker v. Smith's*, *supra*, is no authority for the conclusion. The latter did not involve libel, there was no doubt as to publication, nor was a conspiracy alleged. It was a slander case in which defendant's demurrer on the following four grounds was overruled:

1. That the complaint alleged a joint liability against two persons.
2. That the language is not actionable *per se* and there is no allegation of special damage.
3. That there is no allegation that the charge is false.
4. That there is no allegation of any fact that the defendant by the words alleged to have been used by them meant to impute to the plaintiff the commission of some criminal offense involving moral turpitude, for which the plaintiff, if charged, if the charge were true, might have been indicted.<sup>38</sup>

The appeal was on exceptions to the overruling of the demurrer. The "joint liability" complained of in the first ground was that of the corporation and its agent. The Court stated:

Where a wrong complained of is done by a corporation which can act only through an agent, then the wrongful act is the joint act of the corporation and the agent, and both may be sued in one action.<sup>39</sup>

Though neither Appellant nor Respondent cited the *Nunnamaker* case in their briefs, it was cited by the Circuit Court in the Order Passing Upon Demurrer as follows:

As a general rule of law an action for libel may not be brought against more than one defendant but where conspiracy is alleged it may be brought against more than one person in the same complaint. *Nunnamaker v. Smith's*, 96 S. C. 294, 80 S. E. 465.<sup>40</sup>

It should be noted that the first clause in this statement is not in accord with the case of *Connelly v. State Co.*;<sup>41</sup> and,

37. *Id.* p. 266.

38. 96 S. C. 294, 297, 80 S. E. 465 (1913).

39. *Id.*

40. Transcript of Record, p. 10.

41. 152 S. C. 1, 149 S. E. 266 (1929).

as stated earlier, the *Nunnamaker* case involved neither libel nor conspiracy.

Perhaps this case will serve to prove to the writer's students the value of his repeated admonitions to go back to the cases cited and read them and refuse to accept someone else's citation of it. *E.g.*, West's S. C. Digest includes the following:

An action for slander cannot be maintained against two or more persons jointly unless the slander is the result of a conspiracy—*Nunnamaker v. Smith's*, 80 S. E. 465, 96 S. C. 294.<sup>42</sup>

Yet again, there is no reference in the *Nunnamaker* case to any conspiracy. Undoubtedly, the citation of *Connelly v. State Co.*<sup>43</sup> by respondent's counsel would have given the Court the assistance which it has a right to expect of its attorneys.

The United States Court of Appeals, Fourth Circuit, in the case of *Tedder v. Merchants and Manufacturers Ins. Co.*<sup>44</sup> reversed a judgment *non obstante veredicto* for defendant and sent it back with instructions to enter judgment for the plaintiff on the jury's verdict. Plaintiff brought suit for slander allegedly committed by defendant's adjuster in the settlement of a fire insurance claim. The trial court had found that the adjuster was not acting within the scope of his authority when he made the defamatory remarks. After reviewing the evidence in detail the Court of Appeals held that the evidence was sufficient to go to the jury, stating: "It is clear that the business entrusted to the adjuster brought about the occasion for the slanderous remarks."<sup>45</sup> The defamation had taken place in the adjuster's office during a conversation between the adjuster and plaintiff's co-owner of the tobacco which had been destroyed, while discussing the settlement of the loss.

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42. Vol. 13, Libel and Slander, Key 74.

43. *Supra*, note 41.

44. 251 F. 2d 250 (4th Cir. 1958).

45. *Id.* p. 253.