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Torts

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As is often the case, the Torts cases covered by this Survey probably have the most interesting facts of any cases but establish the fewest novel principles of law. However, during the period covered by this Survey, a case of major importance in the field of labor relations involving the Right-to-Work Law was decided; several cases which established general principles were specifically applied for the first time to particular factual situations, such as in the cases of kicking domestic animals, maintaining a junked car yard, and failing to maintain a shopping center's sidewalks properly; and the standard crop of negligence, fraud and other torts cases were decided.

Malicious Prosecution

This year's case with the most interesting facts, *Margolis v. Telech*,[1] illustrates the dangers inherent in using criminal process to enforce a supposed civil liability. In the events giving rise to this action for malicious prosecution, the plaintiff, who was the defendant's sister-in-law, had come from Elmira, New York, to Beaufort, South Carolina, to nurse her sister who was dying with cancer, living in the house trailer with her sister and brother-in-law. Shortly after his wife's death, the defendant missed and could not find her diamond ring. The plaintiff having moved from the trailer in the meantime, the defendant accused the plaintiff of stealing the ring and swore out a warrant for her arrest on the ground of grand larceny. The plaintiff's version, which the defendant knew at the time he took out the warrant, was that before she died her sister had given her the ring and a black coat and had loaned her a fur coat and blue suit. The plaintiff was arrested as she left the cemetery after the funeral. The grand jury later returned a no bill on the indictment, and the plaintiff instituted this action for malicious prosecution.

The question before the Supreme Court was whether the evidence was sufficient to sustain the verdict for actual and punitive damages. The Court, viewing the evidence most

*Henderson, Salley & Cushman, Aiken, South Carolina.

1. 239 S. C. 232, 122 S. E. 2d 417 (1961).

favorably to the plaintiff, upheld the verdict, stating the general rule as follows:

> It is well settled that, in order to maintain an action for malicious prosecution, it is incumbent upon the plaintiff to show that the prosecution was instituted maliciously, without probable cause, and that it terminated favorably to plaintiff.[2]

The opinion contains a definition of probable cause and of malice in the sense with which it is used in the law of torts. The Court very aptly quoted the following from an old case[3] on the subject of a lack of caution indicating malice:

> The term "malice," as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 2 Bouv. Dic. 98. And, in the same case, it is said: Malice "is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another", and "in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another".[4]

Defamation

The one case in the very technical area of defamation illustrates the tendency of the courts to restrict liability for torts against reputation while expanding liability for torts causing personal injury.

In *Brown v. National Home Inc. Co.*,[5] in the lower court an insurance agent had recovered a verdict for actual and punitive damages against an insurance company for its libel in writing a letter to the State Insurance Commissioner stating that the agent owed the company $2,312.48 and that no payment on account had been received for nearly two years. Four grounds of appeal were presented to the Supreme Court, but the Court based its reversal of the judgment on the one ground that there was no proof of damages legally sufficient to support the verdict.

2. 239 S. C. 232 at 237, 122 S. E. 2d 417 at 419 (1961).
3. Hogg v. Pickney, 16 S. C. 387 (1882).
4. 232 S. C. 232 at 238, 122 S. E. 2d 417 at 420 (1961).
5. 239 S. C. 488, 123 S. E. 2d 850 (1962).

The opinion necessitated a discussion of the distinctions between a libel *per se*, which is actionable on its face and a libel *per quod* which is actionable only by reason of the peculiar situation or occasion upon which the words were written. The Court handled this discussion and definition with precision and clarity. The Court then concluded that the publication was not libelous *per se*, and that proof of damages was therefore required to support the action.

The Court found no evidence of any legally sufficient damage resulting from the publication since neither impairment of the plaintiff's credit nor impairment of his relationship with the Insurance Commissioner's office had been proven. There was evidence, however, that he had been embarrassed and humiliated. In line with the general authorities,[6] the Court held that such mental suffering by itself, absent a showing of other legally sufficient special damages, does not constitute an element of damage and will not by itself support a recovery based on a libel which is not actionable *per se*. Two prior cases holding that humiliation is an element of damage in an action for defamation[7] were distinguished on the grounds that the language there used was defamatory *per se*.

On first blush the Court's conclusion that the letter was not libelous *per se* seems arguable, on the grounds that to charge a business man, an insurance agent, falsely with failing to pay his debt overdue for nearly two years would necessarily affect his business reputation and thus amount to a defamation *per se* and thus be actionable without proof of special damage, within the exception for words tending to injure one in his trade, business or profession. However, the Court's conclusion is entirely in accord with the South Carolina cases involving an imputation of bad credit on the part of businesmen which apply a very restrictive rule. Apparently, under the South Carolina rule it is not defamatory *per se* to charge a businessman falsely with failure to pay a debt unless the words are specifically spoken against him in his business capacity, as distinguished from his individual

6. 33 AM. JUR., *Libel and Slander* § 205 (1941); PROSSER, TORTS p. 594 (2d ed. 1955); HARPER & JAMES, TORTS § 5.30 n. 14 p. 470 (1956); 90 A.L.R. 1200.

7. McClain v. Reliance Life Ins. Co., 150 S. C. 459, 148 S. E. 478 (1929); Smith v. Smith, 194 S. C. 247, 9 S. E. 2d 584 (1940).

capacity.[8] The cases can be rationalized on the basis that it does not injure a businessman as such to accuse him falsely of owing one debt,[9] but it does so injure him to say falsely that he is "broke" and cannot pay more than 50¢ on the dollar[10] or that he has sold out and left the state without making any provision for paying his debts.[11] The distinction seems to be a very reasonable one: there is a considerable difference in charging that a businessman has not paid one particular debt and in charging that he is bankrupt.

In covering this new territory in the area of defamation, the Court has followed the direction pointed to by our own reliable and authoritative guides.

Fraud and Deceit

Three cases for fraud and deceit were decided by the Court this year, two insurance cases and one arising from the sale of a used car.

In the automobile case[12] the defendant's salesman had represented a 1958 Plymouth, then one year old, as having about 16,000 miles on it. After the plaintiff had bought it and driven it 3,000 miles it began to give trouble, the engine being worn out and requiring new connecting rods and a new crank shaft. The plaintiff, then more than curious, traced the vehicle through the Highway Department's records, and discovered that a traveling salesman had formerly owned the car and driven it over 55,000 miles. In the ensuing tort suit for fraud and deceit the defendant urged as a defense the express 30 days or 1,000 miles written warranty and the printed form which expressly negated any representation as to the correctness of speedometer mileage. The Court dismissed this contention summarily: since the action was grounded on fraud and deceit and not upon breach

8. See cases in 13 WEST'S SOUTH CAROLINA DIGEST, *Libel & Slander*, key number 9 (7), and particularly Galloway v. Cox, 172 S. C. 101, 172 S. E. 761 (1934) wherein the defendant landlord said that his tenant, the plaintiff who operated a woodyard and owed rent, was dishonest. The Court here held that to be actionable *per se*, the words must relate to the plaintiff's business as the keeper of a woodyard, and that here the words applied to the plaintiff only in his individual capacity and not in his business capacity.

9. Brown v. National Home Ins. Co., 239 S. C. 488, 123 S. E. 2d 850 (1962); Galloway v. Cox, 172 S. C. 101, 172 S. E. 761 (1934).

10. Davis v. Ruff, Cheves 17 (S. C. 1839).

11. Bentley ads, Reynolds, 1 McMullan 16 (S. C. 1840).

12. Aaron v. Hampton Motors, Inc., 240 S. C. 26, 124 S. E. 2d 585 (1962).

of warranty, the parol evidence as to the representations was clearly admissible though contrary to the writing. The defendant's stronger point was his objection that the plaintiff had failed to prove that the defendant knew of the falsity of the representation. On this point, the real heart of the case, the Court applied the doctrine that knowledge of the falsity of a representation is legally inferable from the making of the representation as of the speaker's personal knowledge with reckless disregard of his lack of information as to its truth. The Court rejected the contention that the buyer was negligent in failing to inform himself, for at the time of the sale he had no reason to doubt the salesman's statements or to know otherwise.

In an insurance case the plaintiff's failure to inform himself of the contents of his insurance policy was held to negate his cause of action for fraud and deceit in *Gordon v. Fidelity & Casualty Ins. Co. of New York.*[13] The complaint alleged that at the time the medical coverage portion of his policy was issued to the plaintiff, the defendant's agent assured him that it made no difference that he was a career soldier and if injured would be confined to an Army Hospital. On the insurance point the Court held that the policy did not cover such treatment furnished at Government expense, since the plaintiff had not incurred any expenses. After an extensive review and summary of the cases, the Court held the plaintiff barred form recovering on a theory of fraud and deceit since he had had the policy for more than eight months, with the opportunity to learn its contents and coverage. The Court stated the rule thusly:

> We have consistently followed the rule that ordinarily one cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning.

One point in the case raises a question: The plaintiff contended that the silence of the defendant's agent, with respect to the medical benefits under the policy, constituted a fraud upon him, thereby invoking the theory of a fraudulent nondisclosure. To place such a construction upon the facts

13. 238 S. C. 438, 120 S. E. 2d 509 (1961).

does not seem warranted, for this was not a case where the agent stood silent, but one in which the agent's assertion amounted to an affirmative statement that the plaintiff would be covered in a situation which the policy did not cover. In effect, the agent undertook to construe the policy. Nevertheless, the Court went into the law of fraudulent nondisclosure, stating the three occasions when a duty to disclose arises.[14] In doing so, the Court relied upon the rule stated by the old standard authority, Pomeroy.[15] The Court found no relation of trust and confidence between the plaintiff and the defendant's soliciting agent.[16] However, following Pomeroy, our Court had previously referred to an insurance contract as being intrinsically fiduciary in its essential nature, thus illustrating the third class of cases in which the duty to disclose arises.[17] If this is so, why is there no duty of disclosure in the Gordon case under consideration? Probably the best answer is that once the insurance contract is entered into, it is intrinsically fiduciary as to matters thereafter arising so as to impose the duty to disclose upon the insurer, but in the application or solicitation stage, before the policy comes into existence, the applicant and the would-be insurer deal at arm's length, so that there is no duty of disclosure on the part of the soliciting agent.

Except that the cause of action is misnamed one for fraud and deceit, *Outlaw v. Calhoun Life Ins. Co.*[18] is a sound decision. The defendant had issued to the plaintiff an insurance policy on the life of her son with face value of $409.00 and double indemnity of $818.00 should he die by accidental means. After the son's death, the defendant's agent went to the plaintiff's house, told her "I have got here with your

14. 238 S. C. 438 at 450, 120 S. E. 2d 509 at 515 (1961): "(1) Where it arises from a preexisting definite fiduciary relation between the parties; (2) Where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) Where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties."

15. 3 POMEROY EQUITY JURISPRUDENCE § 902, 907 (5th ed. 1941).

16. See O'Conner v. Brotherhood of R. R. Trainmen, 217 S. C. 442 at 448, 60 S. E. 2d 884 at 886 (1950) where the Court states: "There was no relation of trust and confidence between him (plaintiff) and the soliciting agent."

17. See Holly Hill Lumber Co. v. McCoy, 201 S. C. 427 at 437, 23 S. E. 2d 372 at 376 (1942).

18. 238 S. C. 199, 119 S. E. 2d 685 (1961).

check at last", placed the check face down on a table with his hat over it and the release on the table face up, told her, "Now, this is showing that you are getting your check", and, after the plaintiff signed a "Claimant's Receipt and Release", gave her a check for $409.00. The plaintiff recovered a verdict of $409.00 actual damages and $3,000.00 punitive damages on the theory that the double indemnity portion of the policy was effective and that the defendant's agent had defrauded her in the signing of the release.

The Supreme Court reversed the award of punitive damages but affirmed the award of actual damages. As to the latter point, the policy provision excepting accidental death benefits if death resulted from injuries sustained while intoxicated was construed as requiring proof of a causal connection between the insured's intoxication and his injury or death, which proof was lacking. On the former point, the Court found no fraud, there being no false representation on the agent's part, since his statement ("Now this is showing that you are getting your check.") was true.

The difficulty with the case is technical: if the cause of action was one in tort to recover damages for fraud and deceit, as counsel evidently considered it and as the Court accordingly designated it, since there was no fraud on the defendant's part, no damages at all should have been awarded, neither actual no punitive. I suggest that the cause of action should really be considered to have been one for breach of contract accompanied by a fraudulent act. This analysis fits the facts and the result of the case much better than the tort fraud and deceit theory, for the result in this case was exactly the same as in many of the so-called "fraudulent breach of contract" cases: recovery of punitive damages is denied because no fraud is proven, but recovery of actual damages is allowed because the contract has been breached. Procuring a release by fraud is a fraudulent act accompanying the breach of a contract which will justify recovery of punitive damages in an action on the contract to recover actual damages for its breach.[19] One may say that this distinction between the tort action of fraud and deceit and the quasi-contract, quasi-tort action for breach of contract accompanied by a fraudulent act is far too technical, and smacks too much of the old strict

19. See Summerall, *Punitive Damages for Breach of Contract in South Carolina*, 10 S.C.L.Q. 444 at page 468 (1958).

common law procedure under which the pleader was thrown out of court for misnaming his cause of action. However, the distinction is firmly embedded in the law and it should therefore be observed in the interest of logical and clear thought and orderly procedure.[20] The decision is undoubtedly sound, but it would likely make for clearer analysis had the plaintiff's cause of action been characterized as one for breach of contract accompanied by a fradulent act rather than as one in tort for fraud and deceit.

Liability for Keeping Domestic Animals

In two cases the Supreme Court had occasion to consider the novel question of the liability of the owner of an animal which kicked and injured a third person. Recovery was allowed in one case and denied in the other, illustrating the truth of the saying that the facts make the law.

In the first of these cases[21] in an excellent and thorough opinion by acting Justice Griffith the Court discussed the liability of an owner of a kicking horse. The defendant, familiar with his horse and knowing its dangerous propensity, summoned his colored neighbor, the plaintiff, to the scene where he was currying his horse which the plaintiff had never before seen. While the plaintiff was standing near the horse's right front shoulder, the horse turned or "flounged" sideways and kicked the plaintiff, knocking him down, and then jumped the lot fence and ran away. The Court affirmed the award of $7,500.00 actual damages, basing the horse owner's liability on two conclusions: 1) That the horse was dangerous or vicious and that he was aware of it; and 2) that he was negligent in calling the plaintiff to the place of danger without giving any warning. The Court further held that the plaintiff was not guilty of contributory negligence as a matter of law since he was located at the horse's side and not at its heels at the time it kicked him, and that there was no basis for application of the assumption of risk doctrine to the case.

The opinion contains an excellent statement and discussion of the law relating to the liability of an animal owner for injuries it causes to third persons. As the old dog bite

20. Three cases illustrating the difference are: Branham v. Wilson Motor Co., 188 S. C. 1, 198 S. E. 417 (1938); Smyth v. Fleischmann, 214 S. C. 263, 52 S. E. 2d 199 (1949); and Wright v. Harris, 228 S. C. 144, 89 S. E. 2d 97 (1955).

21. Mungo v. Bennett, 238 S. C. 79, 119 S. E. 2d 522 (1961).

case[22] denied a dog its one bite, this case denies a horse even a single kick.

In the second of the two cases[23] the Court considered the liability of the owner of a cow which kicked its milker. There the plaintiff was a dairy herdsman with fifteen years' experience who had been in the defendant's employ for three years and who had raised Lula, the cow in question, and had worked with her for two years. After giving him a warning kick, Lula hauled off and kicked the plaintiff as he was trying to attach a milking apparatus to her. The trial judge ordered judgment for the defendant notwithstanding the jury's verdict of $4,000.00 actual damages and the Supreme Court affirmed. In this employee versus employer situation the Court applied the assumption of risk doctrine: The plaintiff's "injuries resulted from an ordinary risk of his employment, of which he had knowledge, and which he had therefore assumed."[24] The Court found no basis for applying the doctrine's exception "where, there being basis for honest difference of opinion as to the manner in which he might more safely perform his work, the servant surrenders his judgment of unsafety in reliance upon his master's superior judgment."[25]

Right-To-Work Law

In *Kimbrell v. Jolog Sportswear, Inc.*,[26] the plaintiffs, non-union employees, brought a class action to recover actual and punitive damages for their employer's tortious withholding of wages due them, alleging that their employer had paid wages due them over to the International Ladies Garment Workers' Union without their consent, and joining both the employer and the union as defendants. The action was based upon the provisions of the so-called "Right-to-Work Law" which make the alleged conduct criminal,[27] and which give the affected employee the right to recover actual and punitive damages for such tort.[28] The defendant demurred to the complaint upon the grounds that the state court lacked juris-

22. M'Caskell v. Elliot, 5 Strob. 196 (S. C. 1850).
23. Hatchell v. Field, 238 S. C. 398, 120 S. E. 2d 401 (1961).
24. 238 S. C. 398 at 400, 120 S. E. 2d 401 at 402 (1961).
25. *Id.*
26. 239 S. C. 415, 123 S. E. 2d 524 (1962).
27. CODE OF LAWS OF SOUTH CAROLINA § 40-46.2 and § 40-46.10 (1952 as amended).
28. CODE OF LAWS OF SOUTH CAROLINA § 40-46.8 (1952), which also allows the recovery of attorneys' fees as an element of damage.

diction, relying upon the federal pre-emption doctrine, contending that the issues involved were exclusively within the jurisdiction of the Federal National Labor Relations Board. The trial court sustained the demurrer, but the Supreme Court reversed, holding that the Court of Common Pleas did have jurisdiction of the controversy, basing its opinion upon the principle that state jurisdiction over matters of industrial relations have not been pre-empted where the consequences of the conduct involved are "of compelling State interest,"[29] and finding that the payment of wages to employees is such a matter of compelling State interest. To support the latter point, the Court relied upon the State unemployment compensation statute[30] which contains a declaration of State public policy and upon the 1938 statute making it a criminal offense for an employer having the financial ability to wilfully and fraudulently fail or refuse to pay wages due an employee after written demand therefor,[31] as well as upon the provisions of the Right-to-Work Law.

The only point in the opinion that should perhaps be criticized is very technical and pedantic: in its opinion the Court twice mentioned the plaintiff's contention that their cause of action for wrongful withholding of wages amounted to "a common law tort action."[32] There seems to have been no such cause of action *in tort* under the common law; the only common law remedy for such wrong lay in contract. The wrong was made tortious by the statute which authorized the recovery of actual and punitive damages for violations of the Right-to-Work Law, thereby treating it as a tort. Thus, the wrong is a statutory tort, not a common law tort. Probably the Court meant by its statement to emphasize the point that the conduct complained of is tortious under the State law and is a situation in which State law has a traditional and vital interest and provides a full and complete remedy.

Nuisance

Bowlin v. George,[33] is an application of the law of nuisance to a novel factual situation. The complaint alleged that the

29. 239 S. C. 415 at 420, 124 S. E. 2d 524 at 526 (1962).
30. CODE OF LAWS OF SOUTH CAROLINA § 46-36 (1952).
31. CODE OF LAWS OF SOUTH CAROLINA § 40-126 (1952).
32. 239 S. C. 415 at 419, 123 S. E. 2d 524 at 526, also at pages 421 and 527, respectively.
33. 239 S. C. 429, 123 S. E. 2d 528 (1962).

plaintiff's enjoyment of his property and his health and welfare had been impaired and his property caused to depreciate in value by the defendant's maintenance of an automobile junk yard, wherein mosquitoes breed in the hundreds of wrecked and decaying automobile hulks and parts. The Supreme Court had no difficulty in holding that the complaint stated a cause of action to recover damages for a private nuisance, pointing out the distinctions between nuisances *per se* and *per accidens* and between private and public nuisances.

Landlord's Duty to Business Guests

Three of this year's cases involve a landlord's duty to an invitee, a business guest, injured on the premises.

In *King v. J. C. Penney Co.*[34] the Court reversed a verdict for a plaintiff who was allegedly injured on the defendant's escalator when it jerked twice, throwing her down as she reached for her little daughter. The Court once again rejected the doctrine of res ipsa loquitur, stating that to recover damages, the plaintiff must prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the defendant's actionable negligence. The Court refused to apply to the owner of escalators the high degree of care imposed upon common carriers, but applied the usual standard of ordinary and reasonable care, which had previously been established as the standard of care required in the operation of elevators.[35] The Court found no actionable negligence on the defendant's part and entered judgment in its favor.

The owner of a shopping center was held liable in *Bruno v. Pendleton Realty Co., Inc.*[36] for failure to maintain the sidewalk on its premises in a reasonably safe condition, resulting in injuries to a prospective customer of one of the shopping center's stores. In this apparently first case in our Supreme Court involving the liability of an owner of a shopping center who leases stores to various merchants and retains possession and control of the parking area and sidewalks, the Court imposed upon them the same standard of care required of merchants generally, that is, they owe the customer the duty of exercising ordinary care to keep those

34. 238 S. C. 336, 120 S. E. 2d 229 (1961).
35. Medlock v. McAlister, 120 S. C. 65, 112 S. E. 436 (1922).
36. 240 S. C. 46, 124 S. E. 2d 580 (1962).

parts of the premises ordinarily used by the customers in transacting business in a reasonably safe condition. The plaintiff fell when stepping from a sidewalk to a walkway of the same color concrete material but 4 or 5 inches lower than the sidewalk. A heavy growth of grass which had existed for over a month overlapped the sidewalk to such an extent that its curb was concealed, thus creating a deceptive situation in that the sidewalk and walkway appeared to be on the same level. The Court affirmed the verdict for the plaintiff, pointing out that to maintain a step-down or step-up on the premises does not in and of itself constitute negligence but that it may, depending upon its situation and appearance. The Court held that the defendant's negligence and the plaintiff's contributory negligence were both properly jury questions.

In *Darter v. Greenville Community Hotel Corp.*,[37] the plaintiff, a sixty-five year old woman suffering with arthritis, was severely scalded and burned in the Poinsett Hotel as she sat in the bathtub and turned the hot water faucet on. The court of appeals affirmed the findings of the federal district Judge sitting without jury that the defendant was not negligent and that the plaintiff was guilty of contributory negligence. It is somewhat surprising that no South Carolina case has defined the degree of care which an innkeeper owes to his guests; the Federal Court had previously ruled[38] that in absence of South Carolina authority, the usual standard of reasonable care applies, rather than a higher degree of care which would make the innkeeper an insurer of his guests' safety. Another interesting point in the opinion is the Court's reference to the rule that a person suffering from the effects of a physical disability owes to himself a commensurately greater degree of care.

Automobile Negligence Cases

The cases involving negligence in the operation of automobiles are difficult to discuss in any particular order. In some Surveys of Torts they have been arranged according to legal principles and in others according to factual situations. My organization is a combination of the two methods and will discuss first two cases in which contributory negligence was

37. 301 F. 2d 70 (4th Cir., 1962).
38. Bowling v. Lewis, 261 F. 2d 311, 69 A.L.R. 2d 1100 (4th Cir., 1958).

held to bar recovery, then two cases on the doctrine of proximate cause and last two cases of intersection collisions.

Contributory Negligence Barring Recovery

The verdict awarding actual and punitive damages in *Brown v. Atlantic Coast Line R.R. Co.*[39] was reversed and judgment entered for defendant. The plaintiff in his automobile was injured in a night collision with the defendant's standing flatcar which blocked a Sumter Street and was so dark that it blended with that of the street. Contrary to the plaintiff's testimony that the flatcar was not loaded, testimony for the defendant was that the flatcar was clearly visible for several hundred feet for it was loaded with two John Deere combines painted green with yellow wheels. The Court held the plaintiff guilty of gross contributory negligence as a matter of law, for if conditions were such that he could not see a dark object until within a few feet of it, he should not have driven at a speed of 30 miles per hour, and, on the other hand, if the night were clear and the street light made the flatcar visible for 150 or 200 feet, the plaintiff should have seen it in time to avoid the collision. The Court found no deceptive situation here which has given rise to liability in other similar cases. The opinion relies heavily on the *Jones* case[40] which was decided a month before the *Brown* case and which is discussed in last year's Survey of Torts.

In a wrongful death action brought under the guest passenger statute by the decedent's administratrix against the driver of the automobile,[41] the Supreme Court affirmed the directed verdict in the defendant's favor, holding that although the defendant was guilty of recklessness, the decedent was guilty of contributory recklessness barring the recovery. As stated by the Court:

> We think that the lower Court was correct in holding, under the foregoing facts, that plaintiff's intestate was guilty of contributory recklessness in voluntarily riding in the automobile driven by the defendant, when he knew that the defendant was so intoxicated as to incapacitate him from driving in a reasonable and prudent manner.[42]

39. 238 S. C. 191, 119 S. E. 2d 729 (1961).
40. Jones v. Southern Ry. Co., 238 S. C. 27, 118 S. E. 2d 880 (1961).
41. Ardis v. Griffin, 239 S. C. 529, 123 S. E. 2d 876 (1962).
42. 239 S. C. 529 at 532, 123 S. E. 2d 876 at 878 (1962).

Proximate Cause

Matthews v. Porter[43] was an application of the general principles of negligence and proximate cause to the case of two successive collisions, so as to hold the original tortfeasor liable for injuries sustained in the second collision. The defendant's automobile was involved in a collision with one Singletary, as a result of which the defendant's automobile blocked the eastbound lane of traffic. The plaintiff arrived upon the scene of the collision and offered a physician her assistance in administering aid to the injured parties; as the plaintiff was standing by the physician by the side of the defendant's car, the automobile of one McKnight struck another car, skidded sideways down the highway and crushed the plaintiff between his car and the defendant's. On appeal from a jury verdict in the plaintiff's favor, the defendant offered in reality two contentions: 1) the defendant was not negligent in the first collision with Singletary; 2) even if he was, such negligence was cut off or insulated by the intervening negligence of McKnight which solely and proximately caused the plaintiff's injuries, and which could not have been foreseen by the defendant in the exercise of reasonable care and which was not a natural and probable consequence of his original negligence. On the first point, the Court held that the jury could properly have found, under the conflicting testimony, that the defendant drove to the left of the road, causing the first collision with Singletary. On the second point, the Court discussed the principles for foreseeability and proximate cause and stated that: "to exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or casual connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury."[44] The Court then went into a discussion of the facts relative to the allegations of the plaintiff's complaint that the defendant was negligent in permitting his automobile to block the highway to such an extent that other vehicles could not pass and in failing to warn approaching vehicles that the highway was so blocked and impassable. Clearly, the highway was blocked, and the evidence made a jury issue as to

43. 239 S. C. 620, 124 S. E. 2d 321 (1962).
44. 239 S. C. 620 at 628, 124 S. E. 2d 321 at 325 (1962).

whether the requisite warning was give. The Court relied upon authorities from other jurisdictions to the effect that the mere lapse of time up to an hour between the first and second collisions was not sufficient to insulate the defendant's original negligence, and that the fact that a law enforcement officer had arrived at the scene and had taken control is one circumstance to be considered in determining whether the defendant was negligent in failing to give warning, but that it could not be said as a matter of law to have cut off the effect of the prior negligence, since the duty to give warning, like other legal duties, cannot be shifted to another so as to exonerate one from the consequences of its non-performance. Therefore, the Court held that all of the issues presented were jury questions and that the lower court properly denied the defendant's various motions.

Perhaps this case does not go so far in extending the principles of proximate cause as it may seem to go upon first reading. An entirely different case would have been presented to the Court if the only negligence of the defendant had been that of driving to the left side of the road which caused the first collision. Had the defendant then done everything he could have reasonably done after the initial collision to give warning that the highway was blocked, the result may well have been different. In other words, the negligence of the defendant which persisted and which continued throughout the whole situation was his failure to give warning. Absent that negligence, the intervening negligence of McKnight might have been held as a matter of law to have constituted a superseding cause, thus insulating the defendant's initial negligence in driving across the center line.

Another proximate cause case was presented to the Fourth Circuit Court of Appeals in *Burleson v. Canada.*[45] The plaintiff was a passenger in an automobile which ran into the rear of a tractor-trailer driven by McCrae, which was loaded with lumber, broken down and stalled on the highway. Suit for negligence was brought against McCrae for leaving the truck in the highway in the path of vehicular traffic and against the Canadas, operators of a lumber company, for overloading the truck to such an extent that it became disabled on the road. Although judgment was rendered against McCrae, the plaintiff appealed from the summary judgment

45. 297 F. 2d 588 (4th Cir., 1961).

dismissing the Canadas as parties defendant. The Court held that under the rule of the *Locklear*[46] and *Ayers*[47] cases, even if the Canadas were negligent in overloading the truck, they could not reasonably have foreseen that McCrae would abandon it without sufficient warning to passengers on the highway. The Court further stated that the Canadas were entitled to presume that McCrae would comply with the statute prohibiting stopping on a highway when it is practicable to stop the vehicle off the highway.

Intersection Collisions

In *Jumper v. Goodwin*,[48] the plaintiff was passing the defendant's truck when its driver, attempting to turn into an unmarked, unpaved county road leading into the highway, suddenly and without warning turned left into the path of the plaintiff's car. On appeal from the jury's verdict in the plaintiff's favor, the defendant contended that as a matter of law the plaintiff was guilty of contributory negligence or contributory willfulness so as to bar her recovery against the defendant. This contention was based upon the plaintiff's clear violation of the statute[49] which prohibits the driving of a vehicle to the left side of the roadway when approaching within 100 feet of or traversing any intersection.

The Court affirmed the verdict on two theories: 1) although the plaintiff was guilty of negligence *per se* in violating the statute, whether such was the proximate cause of the collision is a jury question and the jury may well have found that it was not a proximate cause of the injury, in view of the other delicts on the defendant's part; 2) although the plaintiff was guilty of negligence *per se*, it was only simple negligence and the jury might properly have found that the defendant's conduct amounted to recklessness or wilfulness. The court referred to the fact that there was evidence of only the one delict on the plaintiff's part, while there was evidence of three delicts on the defendant's part, namely that the defendant turned his vehicle from a direct course and moved left upon the roadway without taking any care or precau-

46. Locklear v. Southeastern Stages, Inc., 193 S. C. 309, 8 S. E. 2d 321 (1940).
47. Ayers v. Atlantic Greyhound Corp., 208 S. C. 267, 37 S. E. 2d 757 (1946).
48. 239 S. C. 508, 123 S. E. 2d 857 (1962).
49. CODE OF LAWS OF SOUTH CAROLINA § 46-388 (1952).

tion whatsoever to see that such movement could be made with reasonable safety, in violation of statute;[50] that he failed to give a signal indicating his intended left turn, in violation of statute;[51] and that he failed to keep a proper lookout for approaching traffic.

The defendant argued that since the jury found only actual damages, it therefore found only simple negligence on his part and not recklessness or wilfulness. However, the Court dismissed this argument on the grounds that the trial judge's charge left the awarding of punitive damages to the jury's discretion, to which the defendant did not object.

The defendant relied strongly upon *Sewell v. Hyder*,[52] in which the plaintiff was held barred by contributory wrongdoing from recovery as a matter of law in a factually similar case. However, the Court had no difficulty in distinguishing the *Sewell* case on the grounds that the collision there took place at a city street intersection whereas here the collision took place on an open country road where a driver is not so often reminded of the presence of intersections as he is on city streets.

McClure v. Price[53] arose from an intersection collision seven miles North of Charleston.

The plaintiffs were in an Oldsmobile proceeding west on Dorchester Avenue toward its intersection with U. S. Highway No. 52-A, also known as Meeting Street Road. The traffic signal device was not operating facing the Dorchester Road traffic, but was operating as to the highway traffic. Mr. McClure applied brakes and almost stopped at the intersection, proceeded slowly and cautiously into the intersection and then put on brakes in an attempt to avoid colliding with the defendant's tractor-trailer loaded with bananas which came "roaring out of no place" around a curve to its right with the green light in its favor. In the tremendous impact which ensued, Mr. McClure was killed and Mrs. McClure was injured seriously. Verdicts of $20,000.00 were returned in each of the two cases.

The Court rejected the defendant's contention that Mr. McClure was guilty of contributory negligence as a matter of law, and held that at most such was a jury issue. The Court

50. CODE OF LAWS OF SOUTH CAROLINA § 46-405 (1952).
51. CODE OF LAWS OF SOUTH CAROLINA § 46-407 (1952).
52. 229 S. C. 480, 93 S. E. 2d 637 (1956).
53. 300 F. 2d 538 (4th Cir., 1962).

further held that the District Court properly ruled that there was no evidence of common enterprise so as to impute any negligence of Mr. McClure to his wife, since there was no relationship of principal and agent existing between them.

Wrongful Death and Miscellaneous

Ellison v. Simmons[54] holds that no cause of action for damage to person or property lies against a decedent's personal representative in his capacity as representative of the statutory beneficiaries of the cause of action for wrongful death. Hence, such cause of action cannot be asserted by way of counterclaim in a wrongful death action; evidence that such an action is pending in another suit against the personal representative is inadmissible in the wrongful death action, and it is no error for the trial judge to refuse to charge the jury that the defendant could not interpose a counterclaim in the wrongful death action.

Mann v. Bowman Transportation, Inc.,[55] a wrongful death action, raises two interesting points of law, along with the issues usual to negligence actions. The plaintiff's decedent had been killed while a passenger in an automobile which was struck from the rear at night by the defendant's truck while stopped on the highway without functioning signal lights just over the crest of a hill, waiting for an oncoming car to pass so it could negotiate a left turn onto a country road. On the routine negligence issues, the Court of Appeals held that the trial judge did not err in withdrawing from the jury's consideration the question of contributory negligence on the decedent's part, there being at the most only slight evidence that the driver was under the influence of intoxicants or fatigued and no evidence that the decedent knew of the driver's condition, there being no evidence that the dead passenger knew that the rear signal lights on the automobile did not function, and there being no grounds for a finding that the decedent, a passenger in the back seat, saw or should have seen the lights of the truck approaching from the rear.

On one of the interesting points, the federal court had occasion to construe the code section[56] which prohibits stopping, standing or parking on the main-traveled part of a

54. 238 S. C. 364, 120 S. E. 2d 209 (1961).
55. 300 F. 2d 505 (4th Cir., 1962).
56. CODE OF LAWS OF SOUTH CAROLINA § 46-481 (1952).

highway (except when a car is disabled) when it is practical to stop on the shoulder of the highway. As part of its defense of sole negligence on the part of the driver of the automobile, the defendant contended that the statute applies to the situation where a car is stopped on a highway temporarily, preparatory to executing a left turn. Our Supreme Court has not yet ruled upon the statute's applicability to such a factual situation. The trial judge interpreted the statute to mean that a driver could lawfully stop in his traffic lane of a highway long enough for the lane of oncoming traffic to clear to allow him to make a left turn. The appellate court found this construction reasonable, since a driver preparing to make a left turn cannot practicably move completely off the highway to the right to wait for all traffic to clear.

The other point involved the proper distribution of the $55,000.00 award between the decedent's two parents, his mother whom he was helping to support, and his father, long divorced from the mother, who had very seldom seen him. The defendant contended that the father's $27,500.00 portion of the award was excessive as a matter of law since there was no evidence of damage or loss on the father's part. There is an ambiguity in the section of our wrongful death statute[57] relating to the distribution of damages: one portion provides in effect that the jury *may* determine damages proportionate to the injury sustained by the beneficiaries respectively; the next sentence states that the recovery *shall be divided* according to the Statute of Descent and Distribution. The Court held, in effect, that if the latter mandatory division prevails, then the father and mother obviously must share equally in the recovery, and if the former discretionary division prevails, the result in the lower court was correct because the defendant neither requested that an appropriate jury instruction be given nor objected to the failure to give it. The Court refused to say that, as a matter of law, the father experienced no grief, no sorrow, no wounded feelings, no mental shock and suffering, or that he would not lose future companionship as a result of his son's death.

In *Gaskins v. Ryder Truck Lines, Inc.*[58] the plaintiff was seriously injured in a collision between his automobile

57. CODE OF LAWS OF SOUTH CAROLINA § 10-1954 (1952).
58. 299 F. 2d 236 (4th Cir., 1962).

and the defendant's tractor trailer. The evidence conflicted as to the truck's position in the road, but the federal judge sitting without jury found that it was on the wrong side of the road. The plaintiff's car admittedly skidded, and the defendant contended that such skidding was the cause of its vehicle's improper position, the plaintiff contending that his automobile stayed in its proper lane. The Court of Appeals in a crisply worded opinion held that the conflicts of evidence were properly resolved in the plaintiff's favor, that the sudden emergency doctrine was of no avail to the defendant, and that the plaintiff's skidding in and of itself did not prove contributory negligence in absence of proof of antecedent negligence responsible for the skidding.