



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 23 | Number 3

Article 6

4-1-1945

Practice and Procedure -- Evidence to be Considered on Motion to Nonsuit -- North Carolina Rule

Cecil J. Hill

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Cecil J. Hill, *Practice and Procedure -- Evidence to be Considered on Motion to Nonsuit -- North Carolina Rule*, 23 N.C. L. REV. 243 (1945).
Available at: <http://scholarship.law.unc.edu/nclr/vol23/iss3/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

The
**North Carolina
 Law Review**

VOLUME 23

APRIL, 1945

NUMBER 3

STUDENT BOARD OF EDITORS

CECIL J. HILL, *Editor-in-Chief*
 JAMES G. HUDSON, JR., *Associate Editor*
 CHARLES F. COIRA, JR., *Associate Editor*
 IDRIENNE E. LEVY
 ROBERT I. LIPTON

BAR EDITOR

EDWARD L. CANNON

FACULTY ADVISORS

M. S. BRECKENRIDGE	FREDERICK B. MCCALL
ALBERT COATES	BENJAMIN F. SMALL
ROBERT H. WETTACH	

Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout the Notes and Comments section of this REVIEW by an asterisk placed after the footnote number.

Publication of signed contributions from any source does not signify adoption of the views expressed by the LAW REVIEW or its editors collectively.

NOTES AND COMMENTS**Practice and Procedure—Evidence to be Considered on Motion to Nonsuit—North Carolina Rule***

What evidence is to be considered by the trial court on motion of nonsuit? The North Carolina Supreme Court in the recent case of *Atkins v. White Transportation Company*¹ has attempted to collect and clarify the rules pertaining to this important question.

In the principal case plaintiff's driver was operating a loaded truck at a speed approximating 25 miles per hour over a street 25 to 30 feet wide within 20 feet of defendant's bus ahead. As defendant's bus began to stop plaintiff's driver applied his brakes, but he was so near the

* The author wishes to thank Mr. Francis E. Winslow of the Rocky Mount, North Carolina, Bar, for his assistance in the preparation of this Note.

¹224 N. C. 638, 32 S. E. (2d) 208 (1944) (4-3 decision).

bus and traveling at such a rate of speed he could not stop the truck or turn so as to avoid collision. Plaintiff alleged negligence in the operation of the bus; the defendant denied negligence, pleading contributory negligence on the part of the truck driver. On motion of nonsuit made at the conclusion of all the evidence, it was held on appeal that such motion should have been granted. The plaintiff's driver was operating the truck so near the bus and at such a rate of speed that he created a hazard such as was his duty to avoid.

Cases in North Carolina are legion involving the question of evidence to be considered on motion of nonsuit. There is some apparent conflict of authority, but not a real one, on this issue. A careful analysis of the cases reveals that practically all the cases fall within well-defined limits under the statute.²

The Hinsdale Act³ as amended expressly provides for motion of nonsuit at two points in the trial:

(1) At the conclusion of the plaintiff's evidence; or

(2) If the motion of nonsuit at the end of the plaintiff's evidence is overruled, the defendant may (a) either except and, upon adverse verdict and judgment, appeal immediately, or (b) waive the exception and introduce his evidence; then again move to dismiss after all the evidence is in. If this motion is refused, he may except; and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal. When the defendant chooses to offer evidence after the court's refusal to grant a motion of nonsuit at the close of plaintiff's evidence, only the exception taken at the conclusion of all the evidence can be considered on appeal.⁴ Furthermore, the motion actually must be made at the conclusion of defendant's evidence, else he cannot complain.⁵ Where such motion is made, it is discretionary with the trial judge, before passing on it, to allow the plaintiff to introduce additional evidence.⁶

The trial court may grant a nonsuit on its own motion at the end of the defendant's evidence where the evidence would justify a directed verdict, since both a directed verdict and motion as of nonsuit have the same legal effect.⁷ And in such case the court must consider the evidence as a whole without passing on its weight or probative force.⁸

² N. C. GEN. STAT. §1-183.

³ *Ibid.*

⁴ Choate Rental Co. v. Justice, 211 N. C. 54, 188 S. E. 609 (1936); Harrison v. N. C. Ry. Co., 194 N. C. 656, 140 S. E. 598 (1927); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

⁵ Choate Rental Co. v. Justice, 211 N. C. 54, 188 S. E. 609 (1936).

⁶ Featherston v. Wilson, 123 N. C. 623, 31 S. E. 843 (1898); *accord*, Pearson v. Simon, 207 N. C. 351, 177 S. E. 124 (1934) (Here the rights of the defendants under this section were not affected by the action of the court.).

⁷ Ferrell v. Metropolitan Life Ins. Co., 208 N. C. 420, 181 S. E. 327 (1934).

⁸ Lamb v. Perry, 169 N. C. 436, 86 S. E. 179 (1915).

But the judge cannot reserve his ruling on motion of nonsuit until after rendition of a verdict by the jury, then set aside the verdict for insufficiency of evidence *as a matter of law* and grant the motion of nonsuit made at the close of all the evidence.^{9*} However, he can set the verdict aside as a matter within his discretion.¹⁰

Where the defendant has pleaded a counterclaim and moves at the conclusion of plaintiff's suit for a judgment of nonsuit, the defendant thereby submits to a voluntary nonsuit on his counterclaim.¹¹ But where the answer pleads counterclaim, the plaintiff may not take a voluntary nonsuit over the defendant's objection.¹² In a case where the defendant sets up a counterclaim arising out of a contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over exception by the plaintiff in order to enter a motion as of nonsuit.¹³

In the *Atkins* case,¹⁴ *supra*, Mr. Justice Barnhill and Chief Justice Stacy in concurring opinions, seem to lay down five principal rules for determining the evidence to be considered on motion of nonsuit under the Hinsdale Act. The statute provides that the motion is to be decided upon consideration of *all the testimony*, but the following rules tend to clarify the meaning of the Act:

1. *Generally speaking, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom.*¹⁵ A few of the older cases permit only the plaintiff's evidence to be considered on motion of nonsuit,¹⁶ but the court has long since aban-

^{9*} *Jones v. Dixie Fire Ins. Co.*, 210 N. C. 559, 187 S. E. 769 (1936); *Batson v. City Laundry Co.*, 202 N. C. 560, 163 S. E. 600 (1932); same case, 205 N. C. 93, 170 S. E. 136 (1933); same case, 206 N. C. 371, 174 S. E. 90 (1934); same case, 209 N. C. 223, 183 S. E. 413 (1936); *accord*, *Riley v. Stone*, 169 N. C. 421, 86 S. E. 348 (1915) (Same rule applies where judge believes the verdict contrary to the evidence.); *Wilson Cotton Mills v. Randleman*, 115 N. C. 475, 20 S. E. 770 (1894) (An exception that there is no evidence on an issue can only be taken before the verdict.). See Winslow, *Transfer of Rule-Making Power from Legislative to Judicial Department, A Responsibility of the Bar* (1942) 21 N. C. L. Rev. 16.

¹⁰ *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31 (1931); *State v. Kiger*, 115 N. C. 746, 20 S. E. 456 (1894).

It is interesting to note that the federal rule is *contra*. See FEDERAL RULE 50(b).

¹¹ *Bourne v. Sou. Ry. Co.*, 224 N. C. 444, 31 S. E. (2d) 382 (1944).

¹² *Aetna Ins. Co. v. Griffin*, 200 N. C. 251, 156 S. E. 515 (1931); *Yellowday v. Perkinson*, 167 N. C. 147, 83 S. E. 341 (1914).

¹³ *McGee v. Frohman*, 207 N. C. 475, 177 S. E. 327 (1934).

¹⁴ Note 1, *supra*.

¹⁵ *Plumidies v. Smith*, 222 N. C. 326, 22 S. E. (2d) 713 (1942); *Queen City Coach Co. v. Lee et al.*, 218 N. C. 320, 11 S. E. (2d) 341 (1940); *Barnes v. Town of Wilson*, 217 N. C. 190, 7 S. E. (2d) 359 (1940); *Coltrain v. Atl. Coast Line Ry. Co.*, 216 N. C. 263, 4 S. E. (2d) 853 (1930) (This is true whether the evidence is offered by the plaintiff or elicited from the defendant's witnesses.); *White v. N. C. Ry. Co.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939).

¹⁶ See, for example, *Allen v. Gardner*, 182 N. C. 425, 428, 109 S. E. 260, 262 (1921); *Brown v. N. C. Ry. Co.*, 172 N. C. 604, 607, 90 S. E. 783, 785 (1916); *McAtee v. Branning Mfg. Co.*, 166 N. C. 448, 455, 82 S. E. 857, 865 (1914).

done this theory. Today, where the evidence of the plaintiff and defendant is *conflicting*, the court disregards the evidence of the defendant and uses such expressions as ". . . only the evidence which is favorable to the plaintiff may be considered";¹⁷ or ". . . the often repeated rule that the evidence which makes for the plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff";¹⁸ or ". . . the plaintiff's evidence (on counterclaim) is disregarded, as the jury believed the evidence of the defendants."¹⁹ On defendant's motion of nonsuit at the close of all the evidence, all of the plaintiff's evidence must be taken as true,²⁰ and if there is any substantial evidence, more than a scintilla, to support the plaintiff's allegations, then the case must be submitted to the jury.²¹ The court must consider the evidence as a whole without passing on its weight or probative force,²² and the mere fact that there are contradictory statements made by the plaintiff's witnesses is not sufficient grounds for sustaining a motion for nonsuit, provided there is any favorable evidence for the plaintiff.^{23*}

2. *The evidence of the defendant may be considered when it is favorable to the plaintiff.* Although the statute requires a consideration of the whole evidence, only that part of the defendant's evidence which is favorable to the plaintiff can be taken into consideration on motion of nonsuit, since otherwise the trial court would necessarily pass upon the evidence, the credibility of which rests solely with the jury. In passing on the motion of nonsuit, the trial court's power is limited to ascertaining whether there is any evidence at all which has any probative value in any or all of the facts and circumstances offered in the guise of proof.²⁴

3. *When not in conflict with plaintiff's evidence, the defendant's evidence may be used to explain or make clear the evidence offered by*

¹⁷ Calhoun v. Nantahala Power and Light Co., 216 N. C. 256, 260, 4 S. E. (2d) 858, 861 (1939).

¹⁸ Bechtler v. Bracken, 218 N. C. 515, 521, 11 S. E. (2d) 721, 724 (1940).

¹⁹ Queen City Coach Co. v. Lee, 218 N. C. 320, 324, 11 S. E. (2d) 341, 343 (1940).

²⁰ Williams v. May, 173 N. C. 78, 91 S. E. 604 (1917).

²¹ Calhoun v. Nantahala Power and Light Co., 216 N. C. 256, 4 S. E. (2d) 858 (1939).

²² Lamb v. Perry, 169 N. C. 436, 86 S. E. 179 (1915).

^{23*} Gunn v. Blue Bird Taxi Co., 212 N. C. 540, 193 S. E. 747 (1937); Matthews v. Cheatham *et al.*, 210 N. C. 592, 188 S. E. 87 (1936); Dozier v. Wood, 218 N. C. 414, 181 S. E. 336 (1935); Barnett v. Smith, 171 N. C. 535, 88 S. E. 770 (1916). The reason for this rule is that the jury must pass upon the evidence, and the judge is without power to take it away. Dickerson v. Reynolds, 205 N. C. 770, 172 S. E. 402 (1934).

²⁴ Wall v. Bain, 222 N. C. 375, 378, 23 S. E. (2d) 330, 331 (1942). See Davidson v. Western Union Telegraph Co., 207 N. C. 790, 792, 178 S. E. 603, 604 (1935). Also see Tarrant v. Pepsi Cola Bottling Co., 221 N. C. 390, 20 S. E. (2d) 565 (1942) and Means v. Carolina Central Ry. Co., 126 N. C. 424, 35 S. E. 813 (1900), which Chief Justice Stacy cites to support the above rule.

the plaintiff. This rule applies even though the evidence necessarily is not favorable to the plaintiff, provided, however, the evidence nowise conflicts with the plaintiff's.²⁵

4. *The evidence of the defendant may be considered when, taken in connection with plaintiff's evidence, it makes manifest natural or physical circumstances which bar recovery.*²⁶ Under this rule, though there is some conflict of testimony, still if the facts and circumstances clearly show that the cause of the accident was due to plaintiff's negligence, the court can order a nonsuit.^{27*}

Originally in North Carolina there was considerable doubt under the statute whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on motion to nonsuit,²⁸ but it is now well settled that such may be done when the contributory negligence of the plaintiff is established either by the plaintiff or by the defendant.²⁹

5. *The defendant's evidence may be considered when, taken in con-*

²⁵ Gregory v. Travellers Ins. Co., 223 N. C. 124, 25 S. E. (2d) 398 (1943); Godwin v. Atl. Coast Line Ry. Co., 220 N. C. 281, 17 S. E. (2d) 137 (1941); Haynes Funeral Home v. Dixie Fire Ins. Co., 216 N. C. 562, 5 S. E. (2d) 820 (1939); Sellars *et al.* v. First Nat. Bank of Henderson, 214 N. C. 300, 199 S. E. 266 (1938); Harrison v. N. C. Ry. Co., 194 N. C. 656, 140 S. E. 598 (1927); State v. Fulcher, 184 N. C. 633, 113 S. E. 769 (1922).

²⁶ Austin v. Overton, 222 N. C. 89, 21 S. E. (2d) 887 (1942); Powers v. Sternberg, 213 N. C. 41, 195 S. E. 88 (1938).

^{27*} In Austin v. Overton, 222 N. C. 89, 21 S. E. (2d) 887 (1942) defendant, whose car had no tail light, slowed his car from 45 miles per hour to about 25 and turned left, whereupon plaintiff's car, which was trailing closely behind, struck defendant's car. The accident occurred on a straight highway 30 feet wide. There was a conflict in the testimony as to whether or not defendant's car came to a complete stop and whether or not defendant had said that it was his fault. The court held that the plaintiff had proved himself out of court by showing that his negligent act of trailing the car so closely contributed to the injury received.

In Powers v. Sternberg & Co., 213 N. C. 41, 195 S. E. 88 (1938) plaintiff was riding with a friend, who was driving on icy roads. They approached a wrecked automobile. Evidence of the estimated speed of approach conflicted—between 25 and 60 miles per hour. There was conflicting testimony also as to whether or not defendant flagged the driver of the car in which plaintiff was riding. Nevertheless, the car in which plaintiff was riding skidded 25 or 30 feet and struck defendant's parked truck with such an impact that the plaintiff's car was knocked five to ten feet. The court held that the force with which the driver of plaintiff's car struck the defendant's parked car established the negligence of the driver of the car in which plaintiff was riding as the proximate cause of the accident. The driver admitted that he could have stopped but for the ice and he knew the condition of the road.

Mr. Chief Justice Stacy applied this rule to the principal case.

²⁸ Powell v. Sou. Ry. Co., 125 N. C. 370, 34 S. E. 530 (1899); Whitley v. Sou. Ry. Co., 122 N. C. 987, 29 S. E. 783 (1898) (Note in these cases cited the motion was made at the conclusion of the plaintiff's evidence.)

²⁹ Godwin v. Atl. Coast Line Ry. Co., 220 N. C. 281, 17 S. E. (2d) 137 (1941); Hayes v. Western Union Telegraph Co. *et al.*, 211 N. C. 192, 189 S. E. 499 (1937); Hinshaw v. Pepper, 210 N. C. 573, 187 S. E. 786 (1936); Lincoln v. Atl. Coast Line Ry. Co., 207 N. C. 787, 178 S. E. 601 (1935); Baker v. Atl. Coast Line Ry. Co., 205 N. C. 329, 171 S. E. 342 (1933); Thompson v. Purcell Const. Co., 160 N. C. 390, 76 S. E. 266 (1912); Neal v. Carolina Central Ry. Co., 126 N. C. 634, 35 S. E. 117 (1900).

nection with plaintiff's evidence, it puts an end to the suit as a matter of law. Note that the rule states "in connection with plaintiff's evidence." These words imply that such evidence of defendant must not conflict with that of plaintiff, but rather explain it.³⁰

It appears that these rules may be condensed into two major premises: (1) Where the evidence of the plaintiff and defendant is in conflict, on motion of nonsuit by the defendant the court shall disregard the evidence of the defendant and consider only that evidence of the plaintiff which is favorable to his cause of action. (2) Where the defendant's evidence shows affirmative facts and circumstances which do not conflict with the plaintiff's evidence, but merely serve to explain and clarify and complete the picture as drawn by plaintiff's evidence, the court takes into consideration all the evidence favorable to the plaintiff, and also the independent facts and circumstances proven by the defendant, which are uncontradicted by the plaintiff.

There is no essential conflict between the two lines of cases today. While the court has used expressions such as ". . . the reviewing court cannot consider the evidence of the defendant, whether contradicted or uncontradicted, except in such respect as it may tend to support plaintiff's case," they were used in cases in which they were unnecessary to a decision and were, therefore, obiter dicta.^{30a} Where there is no evidence on the part of defendant of independent facts and circumstances unchallenged by the plaintiff, the defendant's evidence is disregarded; and there is no occasion to explain that if there had been such evidence, it would have been considered. Neither line of cases attempts to overrule the other line, and both together develop a sound rule. Neither line of cases, if considered as overruling the other, would express the intent of the legislature as set forth in the Hinsdale Act as amended.

Under the constitution of this state, the rule-making power for courts inferior to the Supreme Court is vested, initially at least, in the General Assembly,³¹ and its statutes are binding on the courts. The Supreme Court has expressed the intent of the legislature in many cases. In *Parlier v. Sou. Ry. Co.*, the first case to be decided after the 1901 amendment to the Hinsdale Act, Chief Justice Furches said: "But at the close of all the evidence, he (defendant) might renew his motion to dismiss, and this motion stood upon a consideration of the whole evidence introduced by the plaintiff and the defendant."³² The late Judge Adams in *Butler v. Holt-Williamson Manufacturing Co.* said that

³⁰ *Crawford v. Crawford*, 214 N. C. 614, 200 S. E. 421 (1939); *Hare v. Weil*, 213 N. C. 484, 196 S. E. 869 (1938).

^{30a} *Mitchell v. Saunders*, 219 N. C. 178, 181, 13 S. E. (2d) 242, 244 (1941).

³¹ See N. C. GEN. STAT. §§7-20, 7-21.

³² 129 N. C. 262, 263, 39 S. E. 961, 962 (1901).

upon defendant's exception to denial of both motions to dismiss: "... the evidence introduced at the trial must be accepted as true and construed in the light most favorable to the plaintiff."³³ Chief Justice Stacy in *Davidson v. Telegraph Co.* said: "The defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on demurrer or motion of nonsuit."³⁴ And in *Lynn v. Pinehurst Silk Mills* Justice Clarkson wrote: "An exception to a motion to dismiss in a civil action, taken after the close of plaintiff's evidence, and renewed by the defendant after the introduction of its own evidence, does not confine the appeal to plaintiff's evidence alone."³⁵

By express terms of the statute as construed by the Supreme Court, the unchallenged evidence of the defendant, serving to explain and clarify and fill out the facts of the case, must be considered on such a motion. When each decision is analyzed on the basis of its facts, there are no *modern* decisions of our court to the contrary. If so, it must have been an inadvertence.

The rule is also in accord with reason and logic. Where the burden of proof is on a defendant to prove an affirmative defense and his evidence is unchallenged by the plaintiff, and he moves for a peremptory instruction on the ground that only one inference can be drawn, and that in his favor, the court considers his evidence—all of which is uncontradicted by the plaintiff.³⁶ Since this is true, it would be highly illogical to hold that where the burden is upon the plaintiff, rather than the defendant, no part of the defendant's evidence may be considered on a motion of nonsuit or to direct a verdict when such evidence is not contradicted or impeached.

The effect of defendant's evidence on motion to nonsuit can be considered for purposes other than to strengthen the plaintiff's case. If it could not, there could never be a nonsuit at the close of all the evidence in a court which is intellectually honest. If a plaintiff's case is strong enough to overrule the first motion, it could never be weakened, but only strengthened, by defendant's evidence. Unless the purpose of the statute was to permit the defendant to break down plaintiff's case, if he can do so by evidence unchallenged and unimpeached, which explains away the inferences which the court first decided made a *prima facie* case, then what was its purpose? Before the statute when a defendant demurred to the plaintiff's evidence and the demurrer was overruled, he had the election to keep his exception, put on evidence and go to the jury. He could not do both. It has been said that the statute

³³ 182 N. C. 547, 550, 109 S. E. 559, 560 (1921).

³⁴ 207 N. C. 790, 792, 178 S. E. 563, 564 (1921).

³⁵ 208 N. C. 7, 11, 179 S. E. 11, 13 (1935).

³⁶ *Warren v. Pilot Life Ins. Co.*, 217 N. C. 705, 9 S. E. (2d) 479 (1940); *McIntosh*, NORTH CAROLINA PRACTICE AND PROCEDURE §574 (1929).

changed the rule so that a defendant can now put on his evidence and still preserve his exception to denial of nonsuit,^{37*} but this is no longer true. The first exception is waived. It is only the second exception which is preserved.³⁸ And under the Hinsdale Act, as amended or in its previous form, the first motion is determined on plaintiff's evidence; but the second on "all the evidence." If it were the first exception only which was preserved, the legislature would have said so. It expressly provided otherwise. So there must have been some other purpose for the legislation. And if it be asserted that the purpose was merely to allow a defendant an *exception on appeal*, weaker than the first one, as the price for permitting him to develop his case, no second motion could or would ever be allowed in the trial court. Yet the statute provides that the trial court shall rule on the second motion on "all the evidence," and it is constantly being done. If the purpose was merely to *reserve* its decision on the *first* motion until the whole of the evidence was in, the legislature could easily have so provided. Instead, it said the first motion and exception should be "waived" by putting on evidence. The court cannot reserve its decision. There seems to be no logical excuse for evading the enforcement of the terms of the Act, that the defendant may "again move to dismiss" (a new motion), and that it shall be determined upon "all the evidence," "accepted as true and construed in the light most favorable to the plaintiff,"³⁹ including the independent facts and circumstances proven by defendant, unchallenged and unimpeached, which serve to "explain or make clear that which has been offered by the plaintiff."⁴⁰

But what must the court do about facts of common knowledge which come to it by the route of judicial notice? If such judicial knowledge is favorable to the plaintiff, there is no difficulty. But it may be very unfavorable to him. In such case the court has always taken it into consideration on any motion to nonsuit. This is a point which probes the reasonableness and consistency of the rule.⁴¹

That a court should give judgment on the whole truth, rather than a half-truth which may be no better than a falsehood, is implicit in the very concept of the word "court." That term implies the essence of justice, fair-dealing, mental integrity. For a court to give judgment

^{37*} Means v. Carolina Central R. R. Co., 126 N. C. 424, 35 S. E. 813 (1900). This case was decided on the Act of 1897, as amended by the Act of 1899, which provided that the defendant might "renew his motion." But the Act was amended again in 1901, and for the phrase "renew his motion" was substituted the phrase "again move to dismiss." The Supreme Court has never averted to this change of language, nor discussed the purpose of the legislature in making it.

³⁸ Harrison v. N. C. R. R. Co., 194 N. C. 656, 140 S. E. 598 (1927).

³⁹ Holt-Williamson Mfg. Co., 182 N. C. 547, 550, 109 S. E. 559, 560 (1921).

⁴⁰ Harrison v. N. C. R. R. Co., 194 N. C. 656, 660, 140 S. E. 598 (1927).

⁴¹ See Jennings v. Standard Oil Co. of N. J., 206 N. C. 261, 263, 173 N. C. 582, 583 (1934).

on a false picture, when the truth is before it, though from the lips of one witness rather than from another, is to depart from that concept. Our court has never done so.

Hence, it appears that the decision in the *Atkins* case is correct. Furthermore, the Bar should welcome the distinctions laid down therein as guides for the consideration of this all-important problem.

CECIL J. HILL.

Negligence—Rescue—Aid to Victim After Accident as Rescue*

The plaintiff alleged that he was at home in bed and heard his ambulance passing on its way to deliver a patient to the hospital. Subsequently a loud crash was heard and the siren stopped blowing. Plaintiff, realizing that his ambulance had collided with something at a nearby intersection, got up and rushed to the scene of the accident, where he found that it had been struck by a gasoline truck due to the negligence of defendant in parking its truck so as to obstruct the view of the intersection. It was bitter cold; and several persons, either wounded or dead, were lying on the ground. The peril of the wounded being obvious, the plaintiff determined to dispatch them to the hospital; and, in his attempt to aid in lifting them into another ambulance, he overexerted himself causing the injury complained of. Upon demurrer it was held that the petition set forth a cause of action for damages resulting from the injuries received in the attempted rescue, the court stating that if defendant injured a person by negligence someone might reasonably be expected to come to his aid, and that it was of no moment by what circumstances the rescuer appeared on the scene.¹ The dissenting judge strongly argued that the injury to the plaintiff was too remote to be predicated on the alleged negligence of defendant in parking its truck in this illegal manner.²

It is generally held that when a person is exposed to imminent peril of life or limb, through the negligent act of another, the latter will be liable in damages for the injuries sustained by a third party in a reasonable effort to rescue the one so imperiled,³ the rescuer not being

* The scope of this note is limited to those cases in which a human being is imperiled, purposely excluding those cases dealing with the jeopardizing of property.

¹ *Blanchard v. Reliable Transfer Co.*, — Ga. App. —, 32 S. E. (2d) 420 (1944).

² *See id.* at —, 32 S. E. (2d) at 423 (dissenting opinion).

³ *Cote v. Palmer et al.*, 127 Conn. 321, 16 A. (2d) 595 (1940); *Taylor Coal Co. v. Porter's Adm'r.*, 164 Ky. 523, 175 S. W. 1014 (1915); *Hatch v. Globe Laundry Co.*, 137 Me. 379, 171 Atl. 387 (1934); *Dixon v. N. Y., N. H. & H. R. Co.*, 207 Mass. 126, 92 N. E. 1030 (1910); *Eckert v. Long Island Ry. Co.*, 43 N. Y. 502, 3 Am. Rep. 72 (1871); *Norris v. Atl. Coast Line Ry. Co.*, 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N.S.) 1069 (1910) (This case is seemingly the sole authority