4-1-1924

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EDITORIAL NOTES

THE SUMMER LAW SCHOOL—The Summer Term of the Law School will open on Thursday, June 12, and will close on Friday, August 15. The examination of applicants for license will be held by the Supreme Court on Monday, August 18. There are no special educational requirements for admission to the Summer Law School, except that students should show sufficient educational and practical training to be able to carry on the work successfully. The courses are given by subjects rather than by text-books, so that students may use any books on the different subjects that they may have. There will be two recitation periods a day, of one hour and a half each. The subjects will be taught by lectures, quizzes, and the reading of cited authorities, and a written examination will be given upon the completion of each subject.

The work will be conducted by Professors McIntosh and Winston, of the regular Law Faculty, and by Judge W. P. Stacy, of the State Supreme Court, and by Judge H. G. Connor, of the Federal District Court. The order in which the subjects will be taken up is as follows:
EvIDENcE OF DEFENDANT'S CHARACTER IN A CRIMINAL CASE—Whether evidence of a defendant's character may be admitted as the basis of an inference as to his guilt or innocence of a particular charge, has given rise to a variety of views. The general statement that the rules as to the admissibility of evidence are the same in criminal and in civil cases, does not seem to hold good in this case.

In civil cases it is generally held that character evidence is not admissible unless the character is put directly in issue by the nature of the case, and this does not mean that the fact in question may affect the character, but that character is a material element in the case, as in an action for damages for slander or libel.\(^1\) Where the defendant was sued for damages for seduction, he offered evidence of his character as "a modest and retiring man," and therefore he was probably not guilty of the act alleged, but the court held that the character was not in issue and that such evidence was not admissible.\(^2\) In a caveat to a will, it was alleged that the propounder had secured the execution of the will by threats of violence. The propounder offered evidence that he was a man of "easy, quiet disposition," and not likely to exhibit the conduct alleged, but this was also excluded.\(^3\) So, where the plaintiff offered evidence to show the bad character of the defendant in a case involving fraud, it was excluded.\(^4\)

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\(^1\) Morris v. Stewart (1890) 105 N. C. 455, 10 S. E. 912, 18 A. S. R. 917.

\(^2\) McRae v. Lilly (1840) 23 N. C. 118.

\(^3\) Bottoms v. Kent (1855) 48 N. C. 154.

\(^4\) Marcom v. Adams (1898) 122 N. C. 222, 29 S. E. 333; Lumber Co. v. Atkinson (1913) 162 N. C. 298, 75 S. E. 212.
assigned for the exclusion are, that it has very slight probative value, that it would lead to confusion of issues, and that it would tend to create undue prejudice for or against the person whose character is in question.

In criminal cases a different rule has been applied. This difference is sometimes explained upon the theory that the criminal charge itself puts the defendant's character in issue; but this is not satisfactory, since if the character is in issue by virtue of the criminal charge, such evidence should be admitted to sustain as well as to rebut the charge. It could not be well sustained upon the basis that at common law the defendant was not allowed to testify, because he was equally excluded in a civil action. It was probably made an exception on account of the peculiar condition of the defendant under a criminal charge, in order that he might have the benefit of all the circumstances most favorable to him.

It seems to have been first recognized in capital cases in favorem vitae, and was later extended to include all criminal cases. There was also recognized a limitation that such evidence could be considered only when the other evidence left the case in doubt, but that it could not be considered when the evidence was direct and positive. This limitation is discussed in some of the early cases, but it has not been adopted in North Carolina, and it is held that character evidence is always admissible for the defendant, however strong the evidence may be against him. This is to be considered as substantive evidence from which an inference may be made that the defendant is not guilty of the crime.

It is also generally held that the state cannot introduce evidence of the bad character of the defendant until he opens the way and puts his character in issue by offering evidence of good character. Whether such evidence of bad character can be considered as substantive evidence from which to infer the defendant’s guilt, or only for the purpose of rebutting the evidence of good character, is not clearly stated. The older rule seems to be that it is only to rebut the evidence of good character; but in a recent case the Court says, “Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof, and may be considered by the jury as such.” The cases cited for this statement, however, were those in which the defendant had become a witness in his own behalf and had also introduced evidence of his good character.

When the law was changed so as to allow the defendant to testify in his own behalf, another element was to be considered, his credibility as a witness. The defendant has the privilege of becoming a witness in his own behalf, but his failure to do so does not interfere with his right to offer evidence of his good

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*State v. Laxton* (1877) 76 N. C. 216.
*State v. Hice* (1895) 117 N. C. 782, 23 S. E. 357; *State v. Traylor* (1897) 121 N. C. 674, 28 S. E. 493.
*In re McKay* (1922) 193 N. C. 226, 228, 111 S. E. 5.
character, as he could do before. If he becomes a witness, he is subject to impeachment by evidence of bad character, as in the case of other witnesses, but such evidence can be considered only for the purpose of impeachment. In Traylor's case, the defendant became a witness but did not offer evidence of his good character. The state offered evidence of bad character, and the court charged that it could be considered both as impeaching the witness and as substantive evidence to infer guilt. On appeal this was held to be error.

When the defendant becomes a witness and introduces evidence of his good character, this can be considered both in support of his credibility and as substantive evidence in determining his innocence. If the state then introduces evidence of his bad character, this can be considered both as impeaching and as substantive evidence of guilt. This seems to be the only case in which it is clearly stated that this evidence of bad character can be used to prove guilt. In Atwood's case the defendant became a witness, and on cross-examination he was impeached by certain questions affecting his character. The state then introduced evidence of bad character, as was proper for the purpose of impeachment. The defendant then offered evidence of his good character to rebut the evidence of bad character. Upon this evidence, the counsel for the state argued to the jury: "That the character of the defendant shows that he is a person who would commit just such a crime;" and the court charged the jury that the character evidence could be considered both as substantive evidence to determine the defendant's guilt or innocence, and also as affecting his credibility. On appeal the defendant contended that error was committed both in the argument and in the charge. The Supreme Court sustained the ruling of the lower court, because it did not appear that the defendant had asked the court to restrict the application of the evidence as contended for, and because the defendant could not restrict the evidence to his character as a witness and thereby avoid his character as a defendant being before the jury. In this case there was evidence as to good and bad character, though presented in a somewhat irregular manner, and the defendant was a witness, so that the rule stated above might be held to apply. If the defendant had not introduced evidence of good character, the state's evidence as to bad character would have been limited to impeachment, as above stated. But the Court says further: "When the defendant goes upon the stand to prove his innocence, or rather to disprove the inference to be drawn from the evidence against him, it would seem that logically and necessarily he puts his character 'in all capacities,' whether as a witness or a defendant, in issue before the jury, and it becomes a fact or circumstance which they will necessarily consider in passing upon their verdict. The distinction sought to be drawn in S. v. Traylor would therefore seem to be an over-refinement in practice."

11 State v. Eder (1881) 85 N. C. 585; State v. Spurling (1886) 118 N. C. 1250, 24 S. E. 533; State v. Cloninger (1908) 149 N. C. 567, 63 S. E. 154; In re McKay (1922) 163 N. C. 226, 228, 111 S. E. 5.

12 (1897) 121 N. C. 674, 28 S. E. 493.


14 State v. Cloninger (1908) 149 N. C. 567, 63 S. E. 154; State v. Wents (1918) 176 N. C. 745, 95 S. E. 420.

15 (1918) 176 N. C. 704, 97 S. E. 12.
If this statement, which does not seem to be necessary to the conclusion reached by the Court in the case, should be accepted as controlling, then it changes the practice as laid down in former cases. When the defendant becomes a witness in his own behalf, he is not only subject to impeachment by evidence of bad character, but such evidence may also be considered as a circumstance to infer his guilt. Whether the jury will make this distinction in all cases under the former rule may be doubted, but the rule of evidence must be properly stated to them by the court. This case has not been subsequently cited for this proposition, and two recent cases, which state the general practice in such cases, seem to recognize the rule as it was formerly applied.

From the cases cited above, the rules to be applied would seem to be as follows:

1. The defendant may in all cases give evidence of his good character without becoming a witness himself. And this is to be considered as substantive evidence in favor of his innocence.

2. The state cannot introduce evidence of his bad character until the defendant opens the way by giving evidence of good character. In this case evidence of bad character is generally considered as being in rebuttal of the evidence of good character.

3. When the defendant becomes a witness, he may still introduce evidence of good character, both to support his credibility and as substantive evidence to infer his innocence.

4. When the defendant becomes a witness, the state may introduce evidence of bad character to impeach his credibility but not to infer his guilt, unless this rule is changed by the decision in Atwoods' case.

5. When the defendant becomes a witness and introduces evidence of good character, the state may introduce evidence of bad character, both to impeach his credibility and as substantive evidence to infer his guilt.

A. C. M.

Revival of Former Will After Revocation—Although cited usually upon the general question of revocation, a good case illustrating briefly the subject under consideration in its more limited aspect is Powell v. Powell. A will is made in 1862; another in 1864, revoking the first. In 1865 the second will is destroyed by the testator with the idea of setting up anew the first will of 1862. It was decided that the will of 1864 was not revoked, because of the doctrine of dependent relative revocation. When the second will of 1864 was destroyed it was upon the idea that the first was revived. Otherwise it would not have been destroyed. Therefore under the circumstances we have the necessary act of destruction, but not the animus revocandi, and there must be both the act and

\[\text{In re McKay (1922) 183 N. C. 226, 228, 111 S. E. 5;} \quad \text{State v. Moore (1923) 185 N. C. 637, 116 S. E. 161.}\]

\[\text{1 (1866) L. R. 1. P. D. 209;} \quad \text{Cost. Cas. Wills, 317.}\]
intent to revoke a will. It is to be noted that the decision proceeds entirely upon the assumption that the effort to revive the first will by destroying the second was unsuccessful. This assumption was undoubtedly correct when this case was decided in England in 1866 because of the statutory provision to that effect in the Wills Act, but without such a legislative enactment there are a number of views of this limited aspect of the general question of revocation which it is the object of this paper to discuss.

It is important to keep clearly in mind the three stages in the transaction: (1) a testamentary disposition, (2) a revocation of it, (3) a revocation of the revocation. There is nothing worthy of note so far as the first stage is concerned. It is the usual case of a will. But when we come to the second we should remember that in general a will may be revoked by another instrument or by some physical act of destruction. If the latter method is followed it is clear that the revocation is effective at once and the only way then to die testate is to start over and make a new testamentary disposition with the necessary statutory requisites. If the former method is followed, is the first instrument similarly revoked at once or is the revocation postponed until the death of the testator? The latter, of course, if in making this second revoking will he is making an instrument which is to have no effect until his death; but not if it is effective from the time it is made. In this connection the latter view is indicated by a number of statutes providing that the will may be revoked by a subsequent will or "other writing." But both have to be executed and attested like a will, the only difference being presumably that the "other writing" does nothing but revoke the previous will and therefore, does so at once.

The question is simply whether the revocation of the revoking instrument brings to life the one originally revoked. Under the English Statute and some others, it does not. The Common Law rule was just the opposite. In the Ecclesiastical courts it depended on intention. In some jurisdictions it depended upon whether in the second instrument there was an express clause of revocation, or revocation was to be implied from inconsistent provisions. This should make no difference provided the first will is ipso facto revoked. Again the questions of intention and statutory provisions have played a large part in the varying conclusions arrived at. Before considering these in detail it may be helpful to note the analogy of the repeal of a repealing statute, and to suggest that the same solution is the proper one in both cases.

It will be recalled that the common law rule was that the repeal of a repealing statute revived the original statute which had been repealed. The argument is ingenious. What is the object in repealing the second if not to restore the first? But is this necessarily true? The execution of a murderer does not bring to life the deceased whom he murdered. The truth is that in repealing a repealing

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2 Wills Act (1837) 7 Wm. IV and I Vict. c. 26 sec. XXII; Cost. Cas. Wills, 338.
3 In re Love (1923) 186 N. C. 714.
4 29 Chas. II c. 3. sec. 6; C. S. sec. 4133. See note 17.
statute or revoking a revoking will you may or may not intend to restore the former condition of affairs. The intention is the difficult part and that is the only objection to the view of the Ecclesiastical Courts. A person surely has the right to die testate or intestate and whether he has done so depends on his intention and compliance with the statutory law of wills. If he intended only to hold his first will in a state of suspense by the second instrument then it is logical to say that the destruction of the second with intent to revoke it should operate as a revival of the first. But intention is always a difficult question of fact where the person whose intent is sought does not make it clear. The court, or jury rather, is left to guess at a question on which there is very little light. So the Legislature may help by simply providing that to revive a will the testator must re-execute it. In North Carolina this has been done as to repealing statutes, but there is in this state no provision like that in the Wills Act requiring re-execution. The review of the following cases is intended to show that such an enactment is a wise one and tends to avoid confusion and difference of opinion. A study of the cases in the United States makes the following classification advisable.

I. The Common Law rule that a will is ambulatory and therefore there is a revival by destruction of second will.

This rule reviving the former will was well established and is entirely logical if the view is accepted that a will is ambulatory and has no effect until the death of the maker. For the purposes of this discussion the rule requires no further consideration except to notice that it was well established in England until changed by Parliament and that it exerted an influence on a number of American cases.

II. The rule of the Ecclesiastical Courts that the intention of the testator controls.

This allows the matter to be settled by the testator's intention which is the fairest way, for whether he shall die testate or intestate is for him to say. This accounts for the influence of this rule in this country. It would be satisfactory except for the difficulty heretofore pointed out that in the majority of cases this intention is not clear. Then, too, besides the intention there is the question of statutory requirements. Intention alone is not sufficient.

III. The present English statutory rule that there must be a re-execution.
This is clear and simple and does away with confusion. The objection may be made that it sometimes works a hardship. This is true, however, of all statutory requisites in connection with the execution and revocation of wills where one acts in ignorance of them.\textsuperscript{13}

IV. The rule in the United States.

(1) The effect of an express clause of revocation or inconsistent provisions in second will.

The first will may have been revoked by a physical act or by an express clause of revocation or by inconsistent provisions. In the first instance the will is revoked at once \textit{ipso facto}, and the question under discussion cannot arise. In the other two it is a question as to whether this is so or not. Some cases take the view that an express clause of revocation shows an immediate revocation, but not otherwise. The mistake here is that it is altogether possible for the testator to intend an immediate revocation although he does not expressly say so. In \textit{Cheever v. North},\textsuperscript{14} the Court while admitting that there is an irreconcilable conflict feels that since the later will had no express clause of revocation the subsequent destruction of the latter would revive the former. \textit{Pickens v. Davis}\textsuperscript{15} is cited but it is to be noted that this case follows the Ecclesiastical Courts and holds that it is a question of intention and that the reason the destruction of the second will in this case does not revive the first is because there is no evidence that such was the testator's intention.

In \textit{Stetson v. Stetson},\textsuperscript{16} the view is presented that the destruction of the later will operated as a revival of the former although the latter will contained a revocatory clause. It is pointed out that cases like \textit{Cheever v. North}, supra, are based on statutes unlike that in Illinois which allow a revocation by will or "other writing."

(2) That a will is effective only from the death of testator, but this is not applicable to "another writing."

This provision as to another writing is taken from the Statute of Frauds.\textsuperscript{17} The argument is that "another writing" must be effective immediately but a will only upon the testator's death. This is based upon the idea that the statute makes a will "speak" from the death of the testator. But the statute does not say that in all respects the will "speaks" from the death of the testator. It says\textsuperscript{18} that the will shall be construed \textit{with reference to the real and personal estate comprised therein} as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." His intention as to revocation may still very well be that it is to take effect at once in this case just as well as if he had executed "another writing." In \textit{Stetson v. Stetson},

\begin{itemize}
  \item \textsuperscript{13} (1895) 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499.
  \item \textsuperscript{14} (1883) 134 Mass. 252, 45 Am. Rep. 322.
  \item \textsuperscript{15} (1903) 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258.
  \item \textsuperscript{16} See 29 A. and E. p. 289, n. 2; C. S. sec. 4133.
  \item \textsuperscript{17} 7 Wm. IV and I Vict. c. 26, sec. XXIV, Cost. Cas. Wills, 338; re-enacted substantially in C. S sec. 4165.
  \item \textsuperscript{18} Note 16.
\end{itemize}
supra, the court bases its conclusion partly on the absence of the words "another writing" from the Illinois statute, but in North Carolina and elsewhere where they do appear, the same conclusion has been reached. "As wills are ambulatory and have no operation until the death of the testator it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in any wise affect the validity of the will previously executed. Both are inactive during the life of the testator and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact that the second contained a clause of revocation can alter the case, because that clause is just as inactive and inoperative as the rest of it and so continues up to the time that the whole is cancelled. This principle is settled in the common-law courts in England in regard to devises. But in the Ecclesiastical Courts in regard to wills of personalty the principle is modified to some extent and the validity of the first will is made to depend upon the question of intention which however, may be established by parol evidence of declarations and other circumstances tending to show an intention to restore the first will."¹

(3) The will is revived.

This common law view is followed in a minority of American Jurisdictions. The reasoning is given in Stetson v. Stetson and Marsh v. Marsh, supra.²

(4) It depends on intention.

This is the majority and growing rule in the United States where there is no statute. It is sensible and logical but difficult to determine in a number of cases.³

(5) Statutory provisions.

These incline against revival unless there is a re-execution, following the wise policy of the English Wills Act and doing away with much confusion. It may not be logical but it is clear to require the testator to do such things as will plainly show his intention. The wording of the Indiana Statute⁴ that the "revocation of the second will shall not revive the first unless it shall appear by the terms of such revocation to have been his intention to revive it, or unless after such revocation he shall duly republish the previous will" ought to effect a fair reconciliation of conflicting views.

Conclusion.

In general there is no statutory provision and the usual rule is that there is no revival presumed unless the intention is shown. A minority holds that on account of the ambulatory nature of the will the revocation is delayed and such intention is therefore presumed. The matter is made clear by the Wills Act requiring a re-execution and should be by legislation elsewhere.

P. H. W.

² Notes 16 and 20. The cases are collected in 28 A. L. R. 912.
³ In addition to the cases already cited, note 37 L. R. A. 577; 38 L. R. A. 439; 28 R. C. L. p. 195.
⁴ See Kern v. Kern (1900) 154 Ind. 29, 55 N. E. 1004. The other statutes from California, Missouri and New York will be found in 28 A. L. R. at p. 921 and 922.
TORT LIABILITY OF THE OWNER OF AN AUTOMOBILE—"The introduction in recent years of automobiles as a means of conveyance upon public highways, and the steady increase in the use of these modern and relatively dangerous vehicles, has led to the rapid accumulation of judicial decisions concerning their operation. The principles enunciated in these cases are to a large extent merely special applications of common law rules, devised long before such a means of conveyance was thought of." It is the purpose of this article to present some of these principles as gleaned from the decisions of the Supreme Court of North Carolina, the writer especially having in mind the tort liability of the owner of an automobile for its negligent operation resulting proximately in an injury.

First, let us determine, in general, what degree of care is required of owners or other operators of automobiles. The general principles applicable to the use of all vehicles upon public highways or streets apply to automobiles and may be summarized in the statement that the driver must use that degree of care and caution which an ordinarily careful and prudent person would exercise under the same circumstances. The duty and care which an operator of an automobile is bound to exercise is commensurate with the risk of injury to other vehicles and pedestrians on the road. Tudor v. Bowen, one of the leading cases in North Carolina, holds that "the possession of a powerful or dangerous vehicle imposes upon the chauffeur the duty of employing a degree of care commensurate with the risk of danger to others engendered by the use of such a machine on a public thoroughfare."

All operators of motor vehicles, in addition to exercising reasonable care and caution for the safety of others who have the right to use the highways, must do whatever the statute law of the jurisdiction requires whenever the conditions therein referred to arise; and a failure to comply with regulations imposed by law or ordinance may, in itself, constitute negligence and render the operator liable for consequential damages in event that any person thereby sustains personal injuries. For instance, failure to turn to the right when meeting another on the highway renders one guilty of negligence and liable for damages if it is the proximate cause of injury to another. Nevertheless, if the driver of an automobile complies with all the requirements of a statute regulating the operation of motor vehicles, he may yet be liable for the failure to exercise ordinary care to avoid injury to another traveler on the highway. Maximum speed at which one may run within a city or on public highways does not purport to establish a rate of speed which will be lawful under all circumstances; nor should it be

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1 2 R. C. L. 1165.
3 See note 3, supra.
6 2 R. C. L. 1184.
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such "as to endanger life or limb of any person." Legally proper speed may be excessive speed under some circumstances.\(^8\) One may violate the law by driving carelessly or recklessly without exceeding the speed limits.\(^9\)

Becoming a little more specific with regard to the duty of the operator of an automobile toward other occupants of public streets and highways, we find it to be well settled that it is the duty of an autoist to stop his machine or do whatever is reasonably required to relieve persons of peril when he sees a horse is becoming frightened by his machine.\(^10\) The right of the driver of a horse and that of the driver of a motor vehicle to use the highway are equal, and each is equally restricted in the exercise of his rights by the corresponding rights of the other.\(^11\) What duty does the driver of an automobile owe to a pedestrian? The drivers of automobiles or other vehicles must share the streets with pedestrians,\(^12\) and each person on the highway must so exercise his right to use it as not to injure others,\(^13\) and must exercise such caution as an ordinarily prudent person would exercise under like circumstances.\(^14\)

It is, of course, obvious that a breach of these duties owed by an automobile owner or operator to pedestrians and the drivers of other vehicles,—such a breach resulting proximately in an injury,—will give rise to a civil action for damages by the injured party.\(^15\)

When we come to consider, however, the owner's liability to his guest, whom he has invited to take a ride with him and whom the car owner has injured through his negligence, or what liability he incurs when he injures his wife or his child, the question of relationships as affecting liability enters in and we are confronted with a slightly more difficult problem.

Assuming that the car owner himself was driving at the time the accident occurred, let us consider first his liability to his guest injured proximately through the driver's negligence. The driver of an automobile owes a duty to his invited guest to exercise ordinary care not to increase the danger ordinarily incident to driving; and if he fails to exercise such duty, he is liable for the injury proximately resulting.\(^16\) Although there are but few cases in North Carolina in which the guest has actually sued the owner of the car for damages, the recent case of \textit{Tyree v. Tudor}\(^17\) very clearly shows that such an action may be maintained and a recovery had against the owner or driver of the car. A minor being responsible for his torts, the son in that case could have been held liable for causing the death of his guest by his negligent driving. An interesting side

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\(^{8}\) \textit{State v. Roundtree}, (1921) 181 N. C. 535, 106 S. E. 669; C. S. sec. 2618.

\(^{9}\) \textit{State v. Mills} (1921) 181 N. C. 530, 106 S. E. 677. For the statute law regulating the use of motor vehicles in North Carolina see C. S. secs. 2598-2621.

\(^{10}\) Tudor \textit{v. Bowen} (1910) 152 N. C. 441, 67 S. E. 1015.

\(^{11}\) 2 R. C. L. 1183.

\(^{12}\) 8 L. R. A. (N. S.) 345.

\(^{13}\) 13 Ann. Cas. 464, note.

\(^{14}\) 42 L. R. A. (N. S.) 1178 and note; 2 R. C. L. 1186.


\(^{17}\) (1922) 183 N. C. 340, 111 S. E. 714.
issue is raised, in this discussion of the car owner's responsibility to his guest, in determining whether or not the driver's negligence may be imputed to the guest so as to become the guest's contributory negligence and bar him from recovery either from the owner of the car or from a third party through whose negligence the guest was injured. It is held by the greater weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver, the relation of host and guest alone being insufficient. This is undoubtedly the view prevailing in this state.\textsuperscript{18} To impute a driver's negligence to another occupant of his carriage the relation must be shown to be something more than that of host and guest and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation.\textsuperscript{19} But where the driver and occupant of an automobile are engaged in a joint enterprise, the occupant is chargeable with the negligence of the driver.\textsuperscript{19} Also, a person riding in an automobile owned by another and actually assisting in operating it at the time of a collision is liable for injuries caused by its negligent operation.\textsuperscript{20}

The question as to the degree of care the guest should exercise with regard to his own safety has not arisen very often in this state. \textit{Pusey v. R. R.}\textsuperscript{21} holds that the failure of a passenger (guest) to remonstrate with the chauffeur for fast driving or a failure to decline to go with him if the driver was drinking was not contributory negligence on the part of the guest. Justice Stacy in his dissenting opinion in \textit{Tyree v. Tudor},\textsuperscript{22} discusses the degree of care that the guest should exercise for his own safety so as not to be guilty of contributory negligence. For his general authority he cites 20 R. C. L., p. 165 which states the law as follows: “One riding in a car driven by another, though a mere guest and having no control over the person driving the car may be guilty of such negligence as to preclude a recovery for a personal injury resulting from the negligent operation of the car, \textit{e.g.}, if the driver, from intoxication, is in a condition which renders him incapable of operating the car with proper diligence and skill, and this fact is known or palpably apparent to one entering the car, entering or remaining in it, may be held negligence on the part of the guest; and likewise a guest may be held negligent who consents to stay in an automobile when the driver attempts to run it after dark without light on an unfamiliar road.” Without digressing further from our main topic, it seems that it would at least be reasonable for us to say that the guest owes a duty to use reasonable care for his own safety.\textsuperscript{23}


\textsuperscript{19}\textit{Pusey v. R. R.} (1921) 181 N. C. 137, 106 S. E. 452.

\textsuperscript{20}See note 19 \textit{supra}.

\textsuperscript{21}\textit{Williams v. Blue} (1917) 173 N. C. 452, 92 S. E. 270.

\textsuperscript{22}(1921) 181 N. C. 137, 106 S. E. 452.

\textsuperscript{23}See note 17 \textit{supra}.

What is the liability of an automobile owner to his wife for injuries negligently inflicted by him upon her? In the recent case of Roberts v. Roberts, it was held that the defendant driving an automobile with his wife and children is liable in tort for his negligent act which causes his wife a personal injury in the wife's action against him, the common law fiction of a merger of the identity of the wife with that of her husband and that a recovery may not be had in view of their relationship having been changed by our statutes, C. S. 408, 454, and 2606. Although aside from the subject, it might be interesting to note that this case goes beyond the case of Crowell v. Crowell which held that the wife could sue and recover from her husband for his wilful tort resulting in her injury. This case holds that in order for the wife to recover damages for a tort committed by her husband causing her a personal injury, the test of his liability is whether he has committed the breach of a legal duty he owed her without distinction as to whether the breach was a wilful or negligent act.

The question as to whether a minor child may recover damages from his father for an injury caused by the father's negligent operation of the family automobile has been answered in the negative by a recent North Carolina case. In Small v. Morrison it was held to be against the policy of the law in furtherance of domestic peace and happiness to permit an unemancipated minor child, living at the home of her father as a member of his family, to maintain an action against him for his tort for a personal injury she has received alleged to have been caused by his negligence in running an automobile in which she was riding at the time; the welfare of the child being looked after by the courts and by statute especially enacted for the purpose in certain instances, but without a statute permitting a recovery of this character, as in the case of a wife against her husband. The decision in this case clearly shows that the relationship of parent and child is the predominant and determining factor in precluding a recovery by a child from its parent, while the foregoing case which allows the wife to recover from her husband shows a breaking down of the husband and wife relationship which formerly precluded a wife from recovering in a tort action from her husband, the court recognizing the statutory freedom given the wife from the shackles of the wife's common law incapacity to sue because of the fictional merger of her identity with that of her husband.

Having determined to some extent the owner's liability to others while he himself was driving the automobile, it is logical that we investigate his responsibility for the acts of others in driving his machine or the machine of which he has charge. This investigation will involve, of course, the law of a master's responsibility for the acts of his servant; also to some extent the law of principal and agent.

\[* (1923) 185 N. C. 566, 118 S. E. 9.  
\[* (1920) 180 N. C. 516, 105 S. E. 206, 208.  
\[* (1923) 185 N. C. 577, 118 S. E. 12.  

In the first place, it is generally recognized that an automobile is not inherently a dangerous machine, and the rules requiring extraordinary care of dangerous instrumentalities do not apply to such means of conveyance. Therefore the owner is not responsible for injuries which may be sustained by strangers from its careless and wrongful use while in the possession of another who is using it without his consent, merely by virtue of the fact that he is the owner. Although the owner of an automobile is not liable for personal injuries caused by it, merely because of his ownership, yet it is well to note in this connection that ownership of an automobile is not essential to charge one with responsibility for its operation. One in charge of the operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is liable for injury sustained by third persons by reason of its negligent operation, as the person actually operating the vehicle will be deemed his servant irrespective of whether he employed him or not.

Further, in determining the automobile owner’s responsibility for the driver’s acts, we have but to apply to the particular facts in each case the established rules as to the responsibility of a master for the acts of his servant. "The general test of the master’s liability is whether there was authority, expressed or implied, for doing the act in question. If it is done within the course of, and within the scope of, his employment, the master will be responsible for the act." In other words, the driver of an automobile, employed by the owner, is the servant and agent of the latter, and his acts in operating an automobile within the lines of his employment are the acts of the servant for which his employer is responsible. By way of further and more specific illustration of the principle, we find that the owners of a jitney bus are liable for an injury caused by the driver acting within the scope of his authority and when he is about his principal’s business. An employer, lending his automobile to his butler, a competent driver to be used by the latter in his own personal affairs, is not responsible for the servant’s negligent driving. The owner is not liable for injury caused by his machine in the hands of another without his consent.

Are the children, as such, of an automobile owner his servants or his agents within the meaning of the rules making the master responsible for the acts of his servants or the principal for the torts of his agents? The answer to this question has given the courts considerable trouble and has led to a diversity of opinion in

29 Williams v. Blue (1917) 173 N. C. 452, 92 S. E. 270.
30 Williams v. Blue, supra; 28 Cyc., p. 40.
33 Jordan v. Interurban Motor Lines (1921) 182 N. C. 559, 109 S. E. 566.
34 Reich v. Cone (1920) 180 N. C. 267, 104 S. E. 530.
the decisions bearing upon it handed down by the courts of the various states. For the purposes of this article we shall endeavor to indicate only the holdings of the Supreme Court of North Carolina on the subject.

The recent case of Robertson v. Aldridge—the facts of which will be stated later—contains a rather complete summary of the law on the subject as laid down by the Supreme Court. An analysis of that case discloses the following principles: (1) The parent is not responsible for the negligence of his minor son in causing injury to another in driving his father's automobile solely by reason of the relationship, for such liability must rest upon some principle of agency or employment, and no recovery can be had against the parent when it is shown that at the time of the injury the car was being operated by the son for his own convenience contrary to the parent's orders or without his consent, express or implied.87 (2) Where the father owns an automobile for the pleasure and convenience of his family, a minor son living with him and using the car with the parent's consent, express or implied, at the time of an injury negligently inflicted by him on another, will be regarded as representing the parent in such use, and the parent may be held liable in damages for his son's actionable negligence under the principle of respondeat superior.88 (3) While the driving of an automobile is not regarded as inherently dangerous, the owner, parent or otherwise, cannot avoid liability for the actionable negligence of one to whom he entrusts his car, knowing or having reason to believe he is incompetent, reckless, or irresponsible to an extent that makes a negligent injury probable, though the doctrine of respondeat superior is not presented. The principle here laid down is to the effect that the parent's negligence in allowing his reckless and incompetent son to drive the car would be the proximate cause of the plaintiff's injury and would therefore render the defendant parent liable on the basis of his own negligence.89

The case of Robertson v. Aldridge,40 which we have just been analyzing, places responsibility on the parent on the basis of the third principle above stated. In this case there was evidence that the father knowing that his minor son was reckless and irresponsible, directed him to take out the family car to be washed. Without the father's knowledge the son went to ride for his own pleasure and negligently injured another. Held, a question for the jury to determine whether the father, in entrusting the son with the car for this limited purpose, under such circumstances, was guilty of a negligent act, the proximate cause of the plaintiff's injury; and a motion to dismiss as of non-suit was erroneously granted.

For the sake of clearness we may state our conclusions, derived from the above analysis, as follows:

40 See note 36 supra.
I. The parent is not responsible on mere relationship basis.

II. The parent may be responsible:

1. If the child is acting as his agent in the course of his employment or within the scope of his authority.
2. On the respondeat superior doctrine, where the child drives the car even for his own pleasure; (a) if it be shown that the father owns the car for the pleasure and convenience of his family, and the child drives with the father's consent, the child is regarded as representing the parent in such use. Emphasis placed on the parent's consent to child's use of the family car. (b) Where the father owns an automobile for the use of his family and evidence shows that the car was openly and habitually used by his minor son for the son's own purposes it is sufficient for a finding by the jury that the son was operating the car by the authority of the parent, and to hold the parent liable for an injury caused to another by the son's actionable negligence while driving the car on his own account.41
3. Where the father's negligence in permitting his reckless son to drive may be traced as the proximate cause of the plaintiff's injury.

III. In order for the parent not to be responsible, it must be shown:

1. That there was no agency or employment.
2. That at the time of the injury the car was being operated by the child for his own pleasure and convenience contrary to his parent's orders, or without his consent, express or implied.

By way of observation, it would seem that in these modern days when nearly every family owns a car which is operated for the pleasure and convenience of the family by members of the family—with generally the consent, express or implied, of the father—if an injury occurs through the negligent driving of the children, the parent will have very little ground on which to stand to escape liability for his children's torts. Does this not tend to show that, after all, the relationship per se of parent and child plays an important part in ascertaining the parent's liability for the child's negligent driving of the family automobile?

To show to what extent the principle has been carried in this state we shall discuss, briefly, in conclusion, the most recent case decided by the Supreme Court, —Wallace v. Squires.42 This was a suit brought to recover damages for injuries to the plaintiff in a collision caused by the negligent driving of the defendant's car by his minor son. The court held that even though it were shown that the son had been expressly forbidden to drive the car without the father's permission and consent, the fact that there was further evidence tending to show that the minor was habitually driving the car for the family or for his own pleasure or business would entitle the jury to infer that he was driving with the implied consent of his father; that the knowledge whether on a certain occasion the son had inflicted the injury while using the car for his own purposes being peculiarly within the knowledge of the father, who is the defendant in an action to recover

41 [Annotations not provided]
damages for such injuries, the burden of proof is on the father to show a want of authority or permission on the part of his son to drive the car at the time and place in question in order to exculpate the defendant father from liability. In this case there was found to be error in the judge's charge to the jury, and the plaintiff's appeal from a judgment in favor of the defendant was sustained. The Court distinguishes this case from the Nissen Case, cited frequently supra, because there the car was taken by the minor son clandestinely and against the positive prohibition of the father.

Justice Stacy in his dissenting (in part) opinion thinks that the placing of the burden of proof on the defendant father was going too far and that Hoke, J. in Robertson v. Aldridge\(^4\) correctly stated the law when he said, "When it is made to appear that a car owned by a parent for family use is openly and habitually used by a minor child, a member of the family, such conditions will constitute evidence permitting the reasonable inference that the car is being operated by the authority of the parent and for the purpose for which it was obtained."

If the inference is correct, it would appear from further statements in his opinion that Justice Stacy's objection lies in the fact that from the Court's holding that the burden of proof was on the defendant parent "to show want of authority or permission on the part of his son at the time and place in question in order to exculpate the defendant from liability" would tend to raise a presumption of agency flowing solely from the family relationship. He states that "the liability of a father for the torts of his minor child, in general, rests only upon the rule of respondeat superior when the fact of agency is proved and no presumption of agency arises from the family relationship." It would appear that Judge Stacy fears that the court in Wallace v. Squires is coming perilously close to an indirect abrogation—at least—of the doctrine that the mere relationship of parent and child does not per se charge the parent with responsibility for the torts of his minor child. The inference thus drawn from Judge Stacy's opinion seems to be in line with the writer's observation on concluding the analysis of the case of Robertson v. Aldridge.\(^4\)

In view of the many injuries and fatalities that are occurring from the negligent operation of automobiles and in view of the enormous increase in the ownership of them, it would seem that the legislature must soon take a hand in determining, definitely, responsibility for their negligent operation. Would a statute declaring an automobile to be an inherently dangerous instrumentality and requiring questions of liability to be determined in that light be a solution of the problem of determining the tort liability of the owner of an automobile?

F. B. Mc.

\(^4\) (1923) 185 N. C. 292, 116 S. E. 742.

\(^4\) See note 43 supra.